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Treatise on the Conflict of Laws

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BOOK REVIEWS

Treatise on the Conflict of Laws. By ALBERT A. EHRENZWEIG. St. Paul: West Publishing Company, 1962. Pp. 1i, 824. $10.00.

The method of legal thought is undergoing a change. The Conceptual Jurisprudence, which was dominant around the turn of the century, is yielding place to that new method which is varyingly called jurisprudence of interests, sociological jurisprudence, jurisprudence of reason, the Grand Style, or simply, realism. The movement started simultaneously, but without conscious connection, in Germany, the United States and the Scandinavian countries. It has spread to France, where it had already received an earlier impetus through François Gény. It has now reached Italy, Spain and even England. Everywhere the method of formal rationality, as it has been called by Max Weber, is changing into a modern method of substantive rationality, one in which legal problems are solved no longer by an allegedly value-blind derivation of answers from more or less broadly defined formal concepts, but by the conscious application and evaluation of social policies and their balancing against each other.

Conceptual jurisprudence, which permeated all fields of the law, found its most consistent application in the law of conflict of laws, especially in that branch known as choice of law.[1] Whether a problem in the law of contract or tort was to be decided under the law of state X or Y was determined by broad rules, such as those requiring the application of the law of the place of contracting or the place of the wrong. These rules were widely conceived as being derived by logical necessity from postulates such as that a right vested in one state must be protected everywhere, and that the vesting of a right can be produced exclusively by the sovereign of the place of the person, the thing or the act in question. Formulae as conceptual as this vested rights-territoriality theory of Dicey

1 Choice of law is, of course, only one of the three branches commonly regarded in the United States as constituting the field of law of conflict of laws. The other two branches are the law concerning judicial jurisdiction of states, and the law concerning the effects of foreign judgments and other foreign governmental acts. These latter two branches were already treated by Ehrenzweig in a book published in 1959 and which was to be followed by a second volume devoted to choice of law. Ehrenzweig has now chosen to combine into one volume a condensed revision of the 298 pages of the older book with the new part on choice of law. As I have already reviewed that book, 8 J. PUB. L. 551 (1959), I shall limit the present review to the new part on choice of law, which now occupies pages 307-679. To present so vast and complex a field in 372 pages, and to do so in a highly original fashion, is in itself a remarkable achievement.

and Beale could also be found in continental countries. They have been abandoned there, just as in this country, even though traces linger on in a good many courts.

For a generation the efforts of the leading scholars in the field were directed to the refutation and destruction of the theoretical structure of Beale and his *Restatement.* That work was done so effectively that conflicts law finally came to be a heap of ruins. What design should guide the construction of the new building that would correspond to the new method of jurisprudence of interests? Several architects have proposed, in varying, more or less radical, formulations to renounce, at least for the moment, all efforts to find guiding principles, and to choose, in each individual case, that state's law which would yield the "better result" in terms of policies and preferences of the forum. Under another view, propounded and consecutively refined by Brainerd Currie, and more recently also adumbrated by David Cavers, conflicts law is concerned with the demarcation of the regulatory spheres of sovereign states. In the absence of a power superior to the several sovereigns concerned, each sovereign should apply its own regulations, except when another sovereign has a strong interest which, for reasons of friendliness, the forum wishes to accommodate.

Another new design is now supplied by Ehrenzweig, who, first among American rebuilders, presents both a general sketch and a detailed new structure encompassing in detail the entire field of conflicts law. This new structure is impressive, and its details are worked out with admirable care. While many will criticize, nobody can deny that Ehrenzweig has approached his immense task with a refreshing open-mindedness and a stupendous range of learning. Ehrenzweig draws on the history of the field from its continental beginnings in 12th century Italy, and he is at home in the vast modern literature of English and other languages, including Scandinavian and Slavic. American and British case law is fully covered. The reader will, indeed, find references to a large number of cases which have never been cited in any other treatise. More important, the cases are scrutinized so that one can, for the first time, distinguish between those in which the courts had to choose between two or more laws yielding different results, and those in which it made no practical difference which law would be applied. It constitutes a major discovery that a large number of cases which have so far figured as leading authorities, and are used to prove one or another of the various competing conceptualist theories, belong to the category of dictum.

Ehrenzweig does not waste time and space on a theoretical refutation of the old Beale approach. He regards it as dead. But he points out, perhaps all too often, what inadequate and uncertain consequences follow

from that approach. No time is wasted to refute either the neo-realist approach or Currie's view of conflicts law as a law deciding which of competing sovereigns shall prevail. For Ehrenzweig, conflicts law is a part of private rather than of constitutional or international law. Only by coincidence does Ehrenzweig agree with Currie that decision under the law of the forum ought to constitute the general norm even in cases presenting foreign elements. According to Ehrenzweig, foreign law ought to be resorted to only where its application is indicated by some rule which is established with unmistakable clarity by statute or firm judicial practice, or where decision under foreign law is required by some reason of strong and important policy of the forum. The existence and the scope of such policies cannot be determined by any broad theories of comprehensive application, but only by analysis of each narrow situation.[2]

As indicated, Ehrenzweig's system dictates that decision under the *lex fori* should be the normal, even though not necessarily the most frequent, law applicable to cases with foreign contacts. Naturally the reader wishes to know why this should be so. But he does not receive an adequate answer to that question. The *lex fori* rule is presented as an axiom, which Ehrenzweig attempts to show was adhered to in fact when conflicts law had not yet been confused by formalistic-conceptual reasoning. But history may be read in many ways. It might be seen as indicating the insufficiency of a strict adherence to the *lex fori* rule, as well as offering proof of the inadequacy of Ehrenzweig's ideal, where choice of law is fully replaced by choice of jurisdiction, so that no court would ever have to decide a case for which its own law would not be the "proper" one. The United States especially is far removed from this latter position. That it would be untenable is demonstrated by the English experience.[3] Indeed, for centuries English common law courts refused to decide cases requiring the ascertainment of foreign facts, especially those facts alleged to give rise, had they occurred in England, to an action in the inchoate law of contracts. Where what we would nowadays call the conclusion of a contract was alleged to have occurred

2 This method is, of course, of that same jurisprudence of interests that is making its way in all fields of the law. In conflicts law it has the special advantage of eliminating those "pseudo-problems" of renvoi, characterization, preliminary question and public policy, which, as Ehrenzweig shows, the conceptualists had to develop as correctives to which one could resort when the results of the overly general basic rules appeared too unjust.

Practitioners will be grateful to Ehrenzweig for thus freeing them from refinements which they have never understood. The elimination of these refinements constitutes a welcome simplification of conflicts law.

3 See Sack, *Conflict of Laws in the History of the English Law*, in 3 LAW: A CENTURY OF PROGRESS 342 (1937).

outside of England, it was not possible to assemble a jury from the vicinage and thus proceed in a common law court. Jurisdiction by these courts was indeed not necessary, because cases with foreign contacts were satisfactorily handled in the courts merchant, the Court of Admiralty or the Council, all of which applied a law merchant or a law of the seas with worldwide uniformity. Difficulties arose only when, in the 17th century, these courts were merged in the common law courts. The refusal of the latter to take cognizance of cases with foreign facts would have resulted in a denial of justice in all cases in which a foreign forum was not available or not easily accessible. This situation was remedied by the common law courts' refusal to allow a defendant to deny a plaintiff's allegation that such places as Honfleur, Hamburg or Calcutta were situated in England. The court could then decide the case under the English common law.

It was the very injustice of this indiscriminate application of the *lex fori* which induced Lord Mansfield and his successors to employ the technique, developed several centuries earlier on the continent, of taking a foreign law as the rule of decision, that is, the technique of choice of law. That technique asks under what circumstances a court should look to a foreign law rather than its own. That question cannot be satisfactorily answered unless we are aware of the reasons why we regard decision under the *lex fori* as unsatisfactory in certain cases. Ehrenzweig does not offer us an answer to this question.

For centuries scholars sought to answer that question by reference to the territorial nature of sovereignty. It appeared as self-evident that each sovereign had the power to regulate conduct carried on within his own territory. The question asked was to what extent, if any, the sovereign's power of regulation should be given "extra-territorial effect." Such an allocation of sovereign spheres presupposed the existence of a legal order superior to all territorial sovereigns. Unfortunately, no rules allocating sovereignty could be found in any of those legal systems which at one time or another were indeed superior, or believed to be superior, to the several territorial sovereigns, such as the Roman Law, International Law, Anglo-American Common Law, or the Constitution of the United States. A great deal of the trouble of traditional conflicts law stemmed from this futile search for rules of jurisdiction allocation in legal systems in which such rules were not contained.

It was not until recently that the futility of such a "unitary" approach was recognized on the continent. Much of the present difficulties of American conflicts law stems from the continuation of the futile search to find superior jurisdiction allocation rules in the Constitution of the United States, although it has also been recognized in this country that

conflicts law is not superior to territorial law—*i.e.*, in the American context, state law. Although this fact has been eloquently expressed by commentators and the United States Supreme Court,[4] the proper conclusions have not yet been drawn. The reason for this failure seems to lie in the ambiguity of the term "law."

Ordinarily we think of law as a complex of rules and principles regulating human conduct. We distinguish law from such other norms of human conduct as morals, religion and social convention by indicating its connection with the state. Law thus appears as that complex of norms which emanates from the state or, in a more refined form, as those norms to which compliance is enforced by the state. Law is, as John Austin defined it, the command of the sovereign, or, as we should prefer to say, the command that is enforced by the sovereign.

If we look upon law in that way it is but natural to regard as possible the existence of conflicts of laws and to look for rules by which such conflicts are adjusted. But this definition of the rules of law as rules of human conduct, that is, as rules addressed by the sovereign to individuals, is not the only one possible. We can just as well say that the rules of law are commands to certain officers of the state, telling them under what circumstances they ought to go into action against individuals by seizing their property, depriving them of life or liberty, or subjecting them to other detriments. In our society, where sheriffs, prison wardens, policemen and other enforcement officers are not to act against anyone without being ordered or authorized to do so by a court, we could then say that the law is that complex of rules which tells the judges under what circumstances they ought to order or authorize enforcement officers to act. Addressees of the law are, in this view, the judges rather than the individuals. The rules of law are what they are called in the Federal Judiciary Act of 1789, section 34, "rules of decision" rather than "rules of conduct."[5]

Certainly the two definitions do not mutually contradict each other. Knowing that under certain circumstances officials will be authorized to act against us, we are inclined to arrange our conduct so as to avoid that unpleasant consequence or, vice versa, so as to make sure that the consequences will take place against another if he should fail to conduct himself as we wish him to. The rules which appear to be primarily addressed to the judges as rules of decision thus appear to be indirectly addressed to the individuals as rules of conduct. Ordinarily it makes no

4 Klaxon Co. v. Stentor Electric Co., 313 U.S. 487 (1940); Griffin v. McCoach, 313 U.S. 498 (1940).

5 Now 28 U.S.C. § 1652 (1958).

difference whether we look upon the law one way or the other. But it does make a difference when we are concerned with choice of law.

If we look upon law as a set of rules of conduct, we are necessarily driven to the search for rules limiting the conflicting commands of different sovereigns. In the absence of a super-sovereign, such rules do not exist. But if we look upon law as rules of judicial decision, the need for such a search loses all meaning. There is no compulsion to accommodate the conflicting demands, and each court is free to give full cognizance to the most important conflict of laws concern—the parties' expectations.

Each court's rules of decision are, of course, those of its own sovereign. An Illinois court is expected to decide under Illinois law, and a French court under French law. We can supplement this statement by observing that on July 11, 1964, an Illinois court is to decide under the Illinois law as it stands on July 11, 1964.

But let us assume that on July 11, 1964, Illinois law would provide, what in fact it does not, that a contract of sale shall not be valid unless it be made under seal, that a contract was made on July 11, 1960, that at that time a sale did not require a seal, and that, on July 11, 1964, the defendant in the Illinois court pleads the new law which went into effect on January 1, 1963. We shall all regard it as self-evident that the Illinois court will not apply the new statute. This is so because when they acted in 1960, the parties were looking to the law as it stood then. If the court in 1964 decided their case by the decisional rule of 1964 rather than by that of 1960, the parties would be taken by surprise. The promisee's expectation, that in case of non-performance the court would authorize the sheriff to go into action against the promisor, would be disappointed. Transactions made by the promisee on the basis of that expectation may be upset. If such disappointment of expectations were frequent, our credit economy would be seriously disturbed. Even in non-economic matters, such as marriage, decisions under a retroactive law would appear to us to be "unjust." Non-retroactivity of new rules of substantive private law has thus become the generally accepted principle in all modern legal systems.

Choice-of-law has exactly the same policy ground: avoidance of the injustice that would result if a controversy were decided under a law unfamiliar to the parties. Adjustment of one's behavior to norms of possible judicial decision is not difficult for a person who lives, acts and owns property in only one jurisdiction. It can be troublesome for one whose activities range beyond the territorial limits of one judicial hierarchy. The situation will be serious if the several sets of rules are incompatible or contradictory. At the present state of world organization these difficulties and troubles cannot be eliminated. But all countries of

modern civilization have adopted policies designed to alleviate and mitigate them. Each country or state has developed a special set of norms of decision for this purpose and it is exactly these sets of special norms of decision which constitute what has come to be known as the "law of conflict of laws" or "private international law." These norms are as much a part of each state's own law as all the state's other norms of decision; they are, if we use a convenient short-hand name, part of the *lex fori*. The reason each country or state has found it appropriate to develop such special norms of conflicts law as part of its own law is simply the desire to facilitate individual life where courts of different jurisdictions follow different, or potentially different, norms of decision. The establishment of a minimum measure of predictability in a society of credit, investment and individual planning has been a principal motive for the policies which states or countries pursue when they develop norms of conflicts law.

Since the decisional norms of conflicts law are as much state law as all other norms of decision, differences from state to state will be inevitable. Law framers may hold different views as to what constitutes that minimum of predictability for the sake of which the decision norms of conflicts law should be designed. Views may differ as to which person's desire for prediction deserves preference in situations in which several persons of diverging expectations participate. Frequently, norms of decision are primarily intended to determine behavior, and only incidentally to protect individual parties' expectations. Also, conflicts rules may be consciously shaped so as to facilitate a harmonious co-existence of states pursuing potentially different policies of behavior. Conceivably an occasional conflicts rule may be shaped to help another state effectuate a policy of its own or to avoid the possible unfriendliness that might result by helping individuals evade the norms of behavior laid down by another state. The policies pursued in the shaping of conflicts rules may thus be manifold, but the primary policy, indeed the very *raison d'être* of conflicts law, is the policy of mitigating for individuals the inconveniences and problems that can arise through the actual or potential conflict of differing states' norms of judicial decision. The most important need for every framer of rules of conflicts law, be he a legislator, a judge, or a scholar, is never to lose sight of this fact. He will do so if he allows himself to be influenced by the idea that conflicts law should define the spheres where different states may regulate conduct. When a political unit superior to those whose legislative jurisdictions are to be demarcated exists, such a task may fall to conflicts law. But an attempt by the states to build a system of conflicts law on the demarcation of state spheres of legislative jurisdiction is doomed to failure, for no state

is bound to abide by efforts of any other state. Such unreality will lead to the defeatist attitude of a Brainerd Currie, with its predominance of *lex fori* and disregard of the need to help individuals adjust themselves to diverging norms of decision.

It is to Ehrenzweig's credit that he is taking the local law theory seriously, and that he draws from it all those conclusions which require the shedding of notions which make no sense outside a system of supra-state allocation of legislative jurisdiction. Contracts, torts or other human situations are no longer "governed" by any particular law. Gone are vested rights, territoriality and its counter-part extraterritoriality of law; gone are the "pseudo-problems" of renvoi, characterization, etc. Conflicts law has been divested of its mystery; it is treated like any other branch of state law by which certain policies are sought to be achieved. But Ehrenzweig does not state the policies with full clarity because he fails to break cleanly with the approach which views norms of law as norms of behavior rather than norms of decision.

Another of Ehrenzweig's merits is that he discards lump sum thinking and scrutinizes particular situations. That not everybody will agree with all the results is natural. My own doubts shall be stated here with respect to two major issues: Ehrenzweig's advocacy of the rule of validation as to contracts and marriages, and his preference for the *lex fori* in the field of torts.

The rule of validation means that among several laws conceivably proper to determine the validity of a contract or a marriage, preference should generally be given to the law validating the contract or marriage. In attempting to evaluate this position one must remember that in the field of contracts Ehrenzweig expressly exempts the entire group of contracts of adhesion from the rule of validation, that is, those contracts in which free bargaining is practically absent. For these contracts Ehrenzweig emphasizes the need of protecting the "adherent" against the abuse of predominant power.[6] Ehrenzweig justifies the rule of validation in two ways. Analysis of the case law is said to prove that the rule has actually been applied by the courts, even though this fact has been hidden behind the varying formalistic formulae of traditional conflicts law. This practice is said to have its basis in the courts' universal eagerness to apply the law chosen by the parties, an eagerness which Ehrenzweig also believes to discover behind the opinions themselves. If the autonomy of the parties is to be honored, the rule of validation is said to follow with necessity, because contracting parties naturally wish their contract to be valid.

Assuming that Ehrenzweig's reading of the cases is correct, the rule of

[6] P. 454.

validation would of course be one of those firmly established rules of conflicts law that would have to be followed in the future irrespective of the value of the underlying policy. Perhaps Ehrenzweig's advocacy of the rule derives only from this desire to maintain existing tradition—indeed a meritorious concern. But he also appears to regard the rule of validation as the expression of desirable policy. Here, I must voice my doubt.

Adhesion contracts do not monopolize unfairness in contract law. Rules on formality or consideration not only defeat serious and unobjectionable bargains, but also can be used to avoid the enforcement of unfair bargains. American courts, lacking a developed doctrine of economic duress, have been particularly deft in their resort to such "formalistic" devices.[7] If an unfair deal has contacts with more than one state and can be defeated under the law of one of them, why should a general rule of validity induce the court to enforce it?

The rule of validity in the field of marriage appears even less desirable. Ehrenzweig properly connects it with that *favor matrimonii* which has so long permeated our law of marriage. The tendency of courts to decide in favor of validity of a contested marriage whenever possible had three causes: the sacramental nature of marriage, the desire to prevent the bastardization of children, and the desire to prevent sexual relations from retroactively being stamped as sinful. Today, retroactive bastardization of children can be almost universally prevented by statutes bestowing legitimacy on children of invalid marriages. Also, prevention of retroactive sin and protection of the sacramental character of marriage are religious considerations having no place in secular law. They have not even been carried out consistently in Canon Law, where, as in secular laws in which a divorce can be obtained not at all or only with great difficulty, annulment and declaration of nullity of marriage have traditionally been used as substitutes. Shall the escape hatch from an unhappy marriage be closed whenever a marriage having contacts with more than one law is valid under one and invalid or voidable under another? Why should conflicts law drive courts into a position in which they would have to be more Popish than the Pope?

Resort to the *favor matrimonii* may indeed be justified to correct injustice in cases where, for instance, the invalidity of marriage is raised as a defense to a suit for support, or in a dispute between a decedent's relatives and a person claiming to be the surviving spouse or the legitimate issue. But as a general rule it hardly fits into a time when people expect judicial relief from an unhappy marriage even in the teeth of a rigid divorce law. Ehrenzweig himself states that in cases of successive

[7] See VON HIPPEL, DIE KONTROLLE DER VERTRAGSFREIHEIT NACH ANGLO-AMERIKANISCHEM RECHT (1963).

marriages the *favor matrimonii* usually is, and ought to be, applied in favor of the last marriage. This attitude is certainly justified when the last marriage is attacked as bigamous by a third party. But should it also apply whenever a spouse to that marriage seeks to escape from it, for a reason which appears to be "good" even though it may not be recognized in the forum's official law of divorce? Ehrenzweig's treatment of marriage justifies his concern, manifest elsewhere in his work, lest overly broad general rules break down when scrutinized in particular situations.

In the field of torts, Ehrenzweig differentiates between two great groups: intentional torts and accidental torts. Ehrenzweig sees no reason to except the latter from his general rule of the *lex fori*. He recognizes that this rule contains an invitation for plaintiffs to shop for the forum with the most favorable law. The corrective, he hopes, will be found in the doctrine of *forum non conveniens*. It is hard to share this hope in a country where cooperation between aggressive lawyers, "generous" juries and a friendly bench has been by no means rare. Ehrenzweig recognizes that a rule of the *lex fori* unrestricted by new rules on proper forum subjects manufacturers and transport enterprises of nationwide activity to the law of that state whose law is the most favorable to accident victims, and that, consequently, premiums of liability insurance of such enterprises will be set in accordance with that law. He seems to be ready to accept that result, which, of course, means higher prices for consumers and customers. But does it not seem rather more desirable to increase the predictability by which manufacturers and transportation enterprises could estimate their potential liability, by regular resort to the law of one place?

While in the field of torts the wide scope given by Ehrenzweig to the *lex fori* rule should be subjected to renewed consideration, it is arguable that in contracts the scope of the *lex fori* might be expanded. As stated above, a general rule of validity is of doubtful desirability. However, Ehrenzweig is correct in establishing a basic rule giving recognition to the parties' own choice of law. Ehrenzweig convincingly shows that there is no reason why the parties' choice should be limited to the laws of those jurisdictions with which the contract has factual contacts. Ehrenzweig, however, seems to accept the rule of party autonomy simply because he regards it as the rule followed universally, or almost universally, by courts all over the world. To myself, the rule of party autonomy illustrates the very reason for the existence of a conflicts law. The rule of party autonomy is required just because decision under the *lex fori* would catch the parties by surprise when they had implicitly or expressly agreed upon resolution of possible controversies under some other law. To solve the problem of unexpressed intent, scholars and judges must

elaborate in detail the situations in which parties can be assumed to have contemplated a certain law. However, if the facts indicate that parties contracted with each other without having before their minds any particular law, no expectations will be disappointed if the dispute is decided under the forum's rules of law, with which the court is, of course, most familiar. Cases are conceivable, of course, in which the *lex fori* might be too alien to be applied to the contract without surprises. Analysis of these situations is one of the many tasks ahead for a conflicts law built, in the manner of Ehrenzweig, not upon untenable formalistic theories, but upon a systematic evaluation of the real interests at stake in particular litigation.

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Unionism and Relative Wages in the United States: An Empirical Inquiry. By H. G. LEWIS. Chicago: The University of Chicago Press, 1963, Pp. xvii, 308. $7.50.

How have labor unions affected the pattern of wage rates in the American economy? Professor Lewis's book, *Unionism and Relative Wages in the United States* (hereafter *Unionism*) is a response to that query. *Unionism* is a weighty, scholarly, and meticulous work. But, like most virtuous things, it is dull. Professor Lewis never concocts stylized facts, nor does he choose to speculate on implications of his findings for broader reaches of economic theory. This is, of course, a perfectly legitimate, indeed, a commendable choice. But the upshot is that while a judicious, statistically-trained reader will profit greatly from the book, a reader ignorant of statistics will not. Surely, professional economists will both praise *Unionism* and much benefit from Professor Lewis's highly skilled processing of mountains of data; he attempted and successfully discharged an extraordinarily intricate and backbreaking task.

I.

Before I can conscientiously set forth the book's findings to readers of the *Law Review* who are untrained in statistics, I must offer more song and dance. The problem that Professor Lewis faced is that he cannot conduct a controlled experiment: he must attempt to infer effects of unionism from indirect evidence. By way of simple analogy, consider an hypothesis that rats thrive better on an all banana diet. An ordinary experimenter will randomly allocate a pack of rats between an experi-