

Studies in Modern Choice-of-Law: Torts, Insurance, Land Titles. MOFFATT HANCOCK. William S. Hein Co., Buffalo, N.Y., 1984. Pp. xviii, 446. \$45.00.

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Since the appearance of his remarkable *Torts in the Conflict of Laws*¹ in 1942, Moffatt Hancock has been a force to be reckoned with in the battleground known as the conflict of laws. The present volume performs the welcome service of gathering into one convenient package an impressive number of his later contributions in the same field.

It is no secret that the period of Moffatt Hancock's engagement has been one of enormous excitement and change in the conflict of laws, a time in which earlier expressions of heretical doubt by such pioneers as Walter Wheeler Cook² and David Cavers³ have blossomed into an all-out assault on the temple of ancient wisdom and on its holy scripture, the *Restatement* of 1934.⁴ Professor Hancock has been in the vanguard of that assault. His *Studies in Modern Choice-of-Law*⁵ is an invaluable record both of the battle itself and of his own important role in the victory. And victory it has been for Moffatt Hancock and his fellow revolutionaries: rare indeed are the legal scholars who have had the satisfaction of such widespread judicial acceptance of their unorthodox ideas. "It is one of the chief purposes of this book," writes the author, "to illustrate the working of the new methodology in practice."⁶

Professor Hancock's basic thesis is laid out in the first chapter, in which he examines three approaches to the choice-of-law problem: "the classificatory, the functional and the result-selective."⁷ The traditional, or classificatory, system assigned tort questions to

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¹ MOFFATT HANCOCK, *TORTS IN THE CONFLICT OF LAWS* (1942).

² See, e.g., WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942).

³ See, e.g., Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

⁴ RESTATEMENT OF CONFLICT OF LAWS (1934).

⁵ MOFFATT HANCOCK, *STUDIES IN MODERN CHOICE-OF-LAW: TORTS, INSURANCE, LAND TITLES* (1984) [hereinafter cited without cross-reference as HANCOCK].

⁶ *Id.* at ix.

⁷ *Id.* at 3.

the law of the place of wrong, real-property questions to the law of the situs, and the like. That approach is subjected to the criticisms that have become so familiar: the rules are "mechanistic,"⁸ "oversimplified,"⁹ "undiscriminating,"¹⁰ "uncertain";¹¹ they are sometimes so "elastic" that they "can be manipulated to produce almost any result desired"¹² and at other times "seem to create an almost insurmountable barrier to an otherwise sensible solution."¹³ Most important, they lead to an inquiry "remote from the actual problem of delimiting or reconciling domestic rules in a particular case."¹⁴ Hancock prefers the "sober, realistic"¹⁵ functional approach sometimes known as governmental-interest analysis. Under this approach—first clearly articulated by Justice Stone in a series of constitutional cases¹⁶—the initial step is, as in a purely domestic case, to determine whether, in light of its purposes, each state's rule applies to the case.¹⁷

Professor Hancock spends little time defending the functional approach; that had already been done in some detail by his good friend and my father, Brainerd Currie.¹⁸ For me the virtue of this approach has been its application, to the interstate and international context, of the principle "that laws are adopted in order to accomplish social goals and that they should be applied so as to carry out their purposes."¹⁹ When a legislature has made clear the extraterritorial scope of its legislation, the courts have no difficulty in following the legislative command to the extent consistent with constitutional limitations. The heart of the new learning is, as Professor Hancock insists, that choice-of-law decisions present, at least in the first instance, opportunities for the interpretation of competing laws. By means of this process a court may often be able to conclude that there is no real conflict of laws despite the

⁸ *Id.* at 5.

⁹ *Id.* at 15.

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² *Id.* at 15.

¹³ *Id.* (footnote omitted).

¹⁴ *Id.* at 5.

¹⁵ *Id.* at 14.

¹⁶ See, e.g., *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502-03 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935); see also BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 201-14 (1963) (discussing *Alaska Packers* and other cases).

¹⁷ HANCOCK at 3-4.

¹⁸ See BRAINERD CURRIE, *supra* note 16 (collecting earlier articles).

¹⁹ David Currie, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 595, 605 (1968), quoted in HANCOCK at 143.

connection of the dispute with more than one jurisdiction; only one law, properly construed in light of its purpose, applies by its own terms to the case.

Professor Hancock's main endeavor is to illustrate the application of this functional analysis. In so doing he begins, as did Brainerd Currie, with a decided domiciliary presumption: "[I]f one starts thinking about the policy of a domestic legal rule in the interstate context asking, 'for whose benefit was this rule enacted?', the obvious answer must be, 'primarily, at least, for the members of the enacting community: voters and taxpayers domiciled there'."²⁰ It bears emphasis at this point that such a presumption is by no means implicit in a functional approach. Critics have exhibited a tendency to equate such an analytical method with a parochial preference for local residents,²¹ but the equation is fallacious. It would be entirely consistent to argue both that the question is whether local law should be interpreted to apply to an interstate case and that such laws should generally be interpreted in accordance with traditional choice-of-law rules. The proponent of functional analysis as such should not be required to shoulder the additional burden of defending a presumption that laws are passed out of selfish preference for local people over outsiders.

As the tone of this observation suggests, I have come to find it much easier to accept the principle of functional analysis than to share the presumption that laws are designed to benefit only local people. Cynicism may suggest that parochialism is to be expected in human affairs, but the practical advantages of getting along with one's neighbors dampen the force of the conclusion that what Professor Cass Sunstein calls "naked preferences"²² for local people are to be presumed even on the assumption of self-interest. Moreover, I am increasingly troubled by the relation of article IV's privileges and immunities clause to a choice-of-law view that tends to find discrimination against citizens of other states simply because of their citizenship. On the other hand, as my father and Herma Hill Kay demonstrated in their painstaking study of the privileges and immunities question,²³ there are compelling reasons both of

²⁰ HANCOCK at xi; *cf.*, e.g., BRAINERD CURRIE, *supra* note 16, at 81-86 (discussing a rule forbidding married women's contracts).

²¹ See, e.g., Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 175 (1981).

²² See Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

²³ Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960), reprinted in BRAIN-

policy and of constitutional law for not attributing to lawmakers a desire to meddle with affairs that are not their legitimate concern. A partial answer to this perplexity was provided by Justice Curtis in a perceptive early opinion holding that Louisiana did not have to give Mississippi widows community-property interests in Louisiana land, partly on the ground that a state might reasonably deem it "proper not to interfere . . . with the relations of married persons out of that State."²⁴ This insight may be as valuable in interpreting state statutes as it is in interpreting the Constitution: it may be appropriate to limit the application of local law to local people when the sole purpose of the rule is the protection of the individual and its extension to out-of-staters would frustrate the policy of some other jurisdiction.

It should be added, moreover, that neither Professor Hancock nor Brainerd Currie was prepared to argue that *all* laws should be construed as inapplicable to outsiders. The former amply demonstrates in his chapters on land controversies that the policy of transferability reflected in recording statutes, for example, demands their application for the benefit of nonresident buyers.²⁵ The latter came increasingly to acknowledge that "the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose."²⁶ Critics of the "parochialism" of these authors should not overlook these important qualifications.

In any event, Professor Hancock's essays illustrate thoroughly, clearly, and logically his application of a functional approach to a rich variety of familiar cases and hypothetical situations. He takes us carefully through interspousal tort immunity,²⁷ guest statutes,²⁸ limitations on wrongful-death damages²⁹ and on charitable be-

ERD CURRIE, *supra* note 16, ch. 10.

²⁴ *Conner v. Elliott*, 59 U.S. (18 How.) 591, 594 (1856); see David Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-1864*, 1983 DUKE L.J. 695, 698-700 (concluding that Curtis "deserve[d] credit for having doubted that the Framers meant to require one state to trample on the legitimate interests of another").

²⁵ HANCOCK at 359.

²⁶ Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963) (approving *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961)).

²⁷ HANCOCK chs. 2-3.

²⁸ *Id.* chs. 3-4.

²⁹ *Id.* ch. 5.

quests,³⁰ and divers land disputes.³¹ It should be no surprise that Professor Hancock consistently finds a great many of the limitations I have listed to have been designed solely for the benefit of local persons.³² Whether or not one agrees with the particular results he suggests, it would be difficult not to view the exercise as a valuable demonstration of how a functional approach can operate; and it is equally clear that the arguments in support of specific conclusions are very challenging. I find especially valuable the bold chapters respecting land.³³ It is in this area that resistance to the new learning is perhaps at its height, and it is a field strangely neglected by most other commentators.

Professor Hancock finds functional analysis an excellent tool for resolving what have come to be known as "false conflict" cases, in which, upon interpretation, only one state's law is discovered actually to apply to the case.³⁴ He finds such an analysis inadequate, however, to resolve true conflicts between the laws of two states if both are construed to apply.³⁵ The essays in the present collection suggest a development in Professor Hancock's thinking on what to do in this situation. In the opening chapter, describing the three general approaches to choice-of-law problems, he is content to say that in a true conflict case "[t]he court must . . . adopt a result-selective approach (which some commentators regard with distaste) or fall back upon the law of the forum."³⁶ By the third chapter, first published in 1973, he seems willing to commit himself to choosing the more desirable law: "There is no reason why judges should always indulge the polite fiction that one state's law is just as fair and well-adjusted to modern conditions as that of another."³⁷

With respect, I believe this formulation implies the wrong question. The issue is not whether one state's law is as fair as another's, but whether it is entitled to equal legal force. When rules are embodied in statutes, the question becomes one of separation of powers. In all our states, the courts are expected to follow the constitutional commands of their legislatures, not the less because

³⁰ *Id.* ch. 9.

³¹ *Id.* chs. 10-12.

³² *See, e.g., id.* at 140 (wrongful death limitations), 287 (charitable bequests).

³³ *Id.* chs. 10-12.

³⁴ *See, e.g., id.* at 12.

³⁵ *Id.* at 14-15.

³⁶ *Id.* at 15.

³⁷ *Id.* at 78.

some other legislature may have enunciated a contrary rule.³⁸ This seems obvious when the legislation is explicit. It is no less true when the court concludes, by a process of interpretation, that a less-than-explicit local statute applies to the case: the court must follow the legislative command. If the rule is one of common law, the court is not so constrained. Yet the elder Currie's objection to the subordination of forum interests on a better-law basis in common law cases still persuades the younger: "[i]f a court is sufficiently convinced that a law of the forum is so obsolete that it should not be applied in a mixed case, the courage of its convictions should lead it to abrogate the law for domestic purposes as well."³⁹

At another point, Professor Hancock praises the increasing use of better-law analysis⁴⁰ on the ground of "greater realism in the decision of choice cases."⁴¹ Indeed one of the major contributions of the book is its thorough demonstration that the modern choice-of-law revolution has been one of judicial candor more than of outcome. Time and again Professor Hancock reminds us of cases in which judges who professed to adhere to the old *Restatement* system manipulated its manifold escape devices to avoid results that seemed absurd: alternative classification,⁴² for example, or public policy.⁴³ He reminds us as well that in using these devices the courts risk predetermining future cases that ought to be governed by different principles.⁴⁴ Honesty is a virtue, and the willingness of generations of judges to risk exposure for mendacity in order to avoid following the accepted wisdom is powerful evidence that there was something wrong with the old system. But in the last analysis, judicial nullification of valid legislative commands must stand or fall on its own merits.

The battle over the intractable problems of choice of law will go on. The activities of a mobile population are not confined by

³⁸ On this matter I follow the family line. See BRAINERD CURRIE, *supra* note 16, at 106 ("It is simply not the business of the courts to substitute their judgment for that of the legislature."). It seems no answer to point out, as Professor Hancock does, that "courts can and do put a restricted construction upon their own State's statutes in both domestic and choice of law cases." HANCOCK at 128 (footnote omitted).

³⁹ BRAINERD CURRIE, *supra* note 16, at 106 n.49.

⁴⁰ HANCOCK at 141.

⁴¹ *Id.* at 78. The realism of modern approaches is a pervasive theme of this work; Hancock also describes the functional approach as realistic, *id.* at 14.

⁴² See, e.g., *id.* at 366-67 (discussing *Miller v. Miller*, 91 N.Y. 315 (1883)).

⁴³ See, e.g., *id.* at 34-35 (discussing *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936)).

⁴⁴ See, e.g., *id.* at 33-34 (discussing the classification of interspousal immunity as a matter of domestic relations to be determined by the law of the domicile).

political boundaries, and there is no tidy solution for an untidy world. The most one can ask is that the problem be approached, as Moffatt Hancock has long approached it, with a sympathetic understanding of the competing considerations, with careful analysis of the issues, and with a keen and penetrating mind. *Studies in Modern Choice-of-Law* is a welcome record both of the modern choice-of-law revolution and of the thinking of a major participant in that campaign.