1960


Brainerd Currie

Follow this and additional works at: http://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

his chapter on "Fundamental Corporate Changes," he is not similarly disturbed
by the adverse consequences which can be forced upon minority stockholders
through charter amendment or merger.

Professor Lattin's book is very comprehensive for a one volume text; it has
the advantage of speaking in terms of modern cases and citations and contains
extensive references to modern business corporation acts. It indicates some as-
pects of the impact of the Internal Revenue Code and state and federal securi-
ties laws upon corporate law and practice. The presentation is, by virtue of the
size of the book, necessarily somewhat elementary and discursive; the treat-
ment of the subject matter is not sufficiently intensive or documented to be
valuable as a reference work to the practicing lawyer. Professor Lattin's book
cannot be said to have achieved the high purposes set out in his statement of
purpose quoted at the beginning of this review. However, it is a competent intro-
ductive textbook, which covers a large mass of material in simple and under-
standable fashion.

STANLEY A. KAPLAN*

* Professor of Law, University of Chicago.

Benjamin Busch. New York: Oceana Publications, Inc. (for Parker School
of Foreign and Comparative Law), 1959. Pp. 170. $5.00.

Those who follow the recurring law review discussions of the problem of
pleading and proving foreign law will remember Messrs. Sommerich and Busch
as the authors of one of the more helpful contributions to that discussion.1 The
theory that foreign law is fact, to be pleaded and proved as such, had long im-
posed unnecessary burdens on the administration of justice. In revolt against
those burdens, modern scholars, lawyers, and legislative draftsmen had turned
to the concept of judicial notice as a solution to the problem of ascertaining
foreign law. Without denying that substantial progress had resulted from the
employment of judicial notice, Sommerich and Busch counselled moderation
and common sense. Judicial notice, after all, could not accomplish miracles.
The problem of ascertaining foreign law, and of establishing it to the satisfaction
of a court, remained a formidable one. Knowledge of foreign law cannot be
bestowed on courts by legislative fiat; and considerations of fairness still dictate
that foreign law, like other matters that may have a decisive effect on the out-
come of litigation, be determined in accordance with the traditions of the ad-
versary process. Notice is still required, and the foreign law must still be ascer-
tained in the fairest and most reliable way. Notice is best given in the pleadings,
and the fairest and most reliable way of ascertaining foreign law is by the ex-
amination of experts in open court. Hence Sommerich and Busch maintained
that, while judicial notice could be relied on to obviate some of the harshness

1 Sommerich & Busch, The Expert Witness and the Proof of Foreign Law, 38 CORN. L. Q. 125
(1953).
and needless formality of the older regime, foreign law should still be pleaded and proved.

The volume under review is an expansion of the article noted above, supplemented in such a way as to constitute a nearly complete handbook for the practitioner confronted with a case involving foreign law. In addition to reviewing the common-law requirements of pleading and proof, the presumptions, and the rise of judicial notice, the book contains detailed suggestions on proper pleading and the examination of experts. It also discusses summary judgment, discovery, and the ascertainment and application of foreign law in other countries. In general, this is a sound and helpful guidebook which may be recommended to the lawyer who finds foreign law material to his case—and that, as the authors rightly say, means almost every lawyer.

My reservations about the book are two only, and one of these may be summarily dismissed. The chapter entitled "When Foreign Law is Applied—Choice of Laws," designed in an introductory way to explain how courts come to be concerned with foreign law, is superficial in the extreme. Of course, it was not to be expected that a small book devoted to the specific problem of pleading and proving foreign law should contain any extensive treatment of conflict-of-laws principles. This brief and shallow discussion, however, will give many readers an erroneous impression as to the quality of the rest of the book and as to the qualifications of the authors. They would have been well advised to omit it and assume that the book's readers would possess an elementary understanding of conflict of laws.

The other reservation is related to the first. Although such a book as this cannot include a treatise on conflict of laws, the most fundamental problem associated with pleading and proof of foreign law relates to the consequences of failure to comply with the requirements; and these cannot be properly understood without reference to some very fundamental and controversial questions of conflict-of-laws theory. These questions are given inadequate attention. Like most others before them, the authors tend to assume without question that foreign law becomes material whenever a case has a foreign aspect such that, according to a choice-of-law rule of the forum, foreign law becomes "applicable." The foreign law thus becomes an essential ingredient of the claim or defense, and failure to plead or prove it results in disaster, unless one of the presumptions can be relied on; and, in international cases, the presumptions are of relatively little help. Accepting this point of view, the authors are content with such cases as *Cuba R. R. v. Crosby* and *Walton v. Arabian American Oil Co.*, and, indeed, have reprinted in full the opinions in both of these cases as containing "the essence of the basic law on the subject." The prominence given these cases is regrettable,

2 222 U.S. 473 (1912).
3 233 F.2d 541 (2d Cir. 1956).
4 P. 3. Also reprinted is the opinion in *Arams v. Arams*, 182 Misc. 328, 45 N.Y.S. 2d 251 (Sup. Ct. 1943), a very sensible one with respect to both judicial notice and the consequences of failure to establish foreign law. The fact that this opinion is inconsistent with the *Crosby* and *Walton* cases is not noted.
as is the neglect of cases adopting a different view of the materiality of foreign law.

_Cuba R.R. v. Crosby_ is a monumentally unjust decision. The _Walton_ decision is only slightly less so. In each an American citizen sued an American corporation for injuries sustained abroad. In each the suit was dismissed because of the plaintiff's failure to establish the foreign law. In _Crosby_ the defendant made no reference to foreign law until it filed its motion for a new trial. In _Walton_ the objection was suggested by the court at the outset. Let us agree with Sommerich and Busch that, despite judicial notice statutes, foreign law cannot be relied upon unless it is pleaded and proved, or the equivalent. The plaintiff's failure to plead and prove foreign law need not, however, result in the dismissal of his case. The alternative is that the law of the forum will be applied unless and until the defendant pleads and proves some aspect of the foreign law favorable to him. This was, and is said to be still, the law of England. It was certainly the law of New York at one time, and it is very close to being the law that was applied by Judge Walter in the authors' favorite case, _Arams v. Arams_. It is a sensible and just rule, and there is good reason to hope that the courts in New York and elsewhere will ultimately return to it. Yet the authors give it little attention, apparently assuming that _Crosby_ and _Walton_ have settled the law to the contrary. They even undertake to defend the _Walton_ case, suggesting that "a total loss would have been avoided for the disabled plaintiff by ascertaining the Islamic law through organizations dealing with Islamic culture in New York City and Washington, D.C., such as the Islamic Mission of America, Inc., for the propagation of Islam, Brooklyn, N.Y., or through the Saudi Arabian Consul, and by pleading and proving it through a person learned in the laws of the Koran" (p. 104). As one who has expended some energy in attempting to discover the relevant Saudi Arabian law from similar sources, I can testify that it is neither an easy nor a rewarding task. But the authors adhere to their rather sanguine attitude although the best that they—or any of us—have been able to come up with the way of a statement of the relevant Saudi Arabian law is a statement by Professor Joseph H. Schacht which they paraphrase thus: "The disability damages would have been computed by an intricate system of ascertaining the percentage of loss, assuming the victim to be a slave, and taking that percentage of the 'blood money' for a free man, and dividing the total in half, if the plaintiff is a Christian or a Jew" (p. 104).


6 See Currie, note 5 _supra_, at 967–70.


8 Note 4 _supra_.

9 Indeed, the authors refer to such cases as Monroe v. Douglas and Savage v. O'Neill (note 7 _supra_) without seeming to realize that they stand for a principle inconsistent with _Crosby_ and _Walton_. P. 17.
It is a sorry state of affairs when an American plaintiff is thrown out of an American court because he does not establish a foreign law that is so nearly unknowable, and that, if it is known, may provide a mere pittance calculated according to barbarous concepts. One gathers that the reason why the authors did not dwell on the injustices of Walton and Crosby is that they were concerned in this book to deal with a "practical" subject in a "practical" way (p. 1). Is it impractical, however, to suggest to American lawyers that our courts may return to the sensible and just course of applying the law of the forum when the foreign law is not made to appear? If so, it can only be because the practical sense of the American lawyer has been corrupted by the influence of an academic, imported, and highly conceptualistic theory of conflict of laws which is quite inconsistent with the common law tradition.

* Professor of Law, The University of Chicago Law School.


Mr. Greenberg begins with the question: "Can the law alter race relations?" and declares that his thesis is that "law often can change race relations, that sometimes it has been indispensable to changing them, and that it has in fact changed them, even spectacularly" (p. 2). He then provides rich documentation and illustration for the oft made observations that laws do change, that these changes are responsive to and creative of other changes in the "political, social, economic, and moral" orders (p. 370), and that since 1938 there have been vast changes in the legal institutions affecting race relations in the United States.

Mr. Greenberg has followed the general pattern established by Myrdal, Rose, and Sterner in An American Dilemma (1944). It is essentially a description of how, since 1938, state law (in the broadest sense) in the United States has moved away from substantial conformity to one of the major competing value-judgments about race relations in our society and into progressively closer conformity to the other, and a consideration of what additional legal arguments and legislative and administrative actions might further reduce the gap between this latter ideal and the norms applied by the agents of the state. In its narrowest form, the progressively dominant value-judgment is that it is wrong to discriminate against any individual solely upon the basis of race. In its broadest form, this value-premise states that it is wrong to differentiate between individuals solely upon the basis of race.

Again following An American Dilemma, Mr. Greenberg presents this narrowing gap in chapters three through ten as it affects each of several of the "main categories of social activity" (p. 31): public accommodations and services (36 pages), interstate travel (18 pages), elections (19 pages), earning a living (54