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Book Reviews

THE CONFLICT OF LAWS: A COMPARATIVE STUDY (Volume One, Introduction and Family Law), by Ernst Rabel.¹ Michigan Legal Studies, The University of Michigan Press, Ann Arbor; Callaghan & Company, Chicago. 1945. Pp. lvi, 745. \$12.50.

This book should mark the opening of a new era in the conflict of laws. Rabel substitutes *factual or social situations* for *legal relations* as the subject of conflicts rules.² In so doing he makes possible the uniform achievement of just or desirable results through uniform conflicts rules.

There can be no doubt that the policy of the conflict of laws should be uniform reference of a situation, regardless of forum, to the law which most satisfies general social and economic demands. Conflicts rules, therefore, should be conclusions of policy as well as rules of reference. Yet paradoxically uniformly desirable results have been achieved more consistently in those fields, such as contracts³ and workmen's compensation, where uniformity of rule has been ignored and which therefore have been called chaotic. Obviously our conflicts rules as applied have failed to perform their function.

Chapter 2, "Structure of the Conflicts Rules," goes to the root of the difficulty. Professor Rabel observes that the operative facts term (or first part) of the conflicts rule has been interpreted as expressive of a legal relation, rather than connotive of a factual situation;⁴ further, that the reference to foreign law (or sec-

1. Research Associate, University of Michigan Law School, sometime Professor of Law, University of Berlin, and Director, Institut der Kaiser Wilhelm Gesellschaft für ausländisches und internationales Privatrecht, Berlin. Professor Rabel was brought to this country in 1939 by the American Law Institute to annotate the Restatement of Conflict of Laws, but found the present work more advisable. He has been at the University of Michigan Law School since 1941.

2. Rabel's approach was first announced by him in Germany in (1929) 3 *Zeitschrift für ausländisches und internationales Privatrecht* 752 and in *Das Problem de Qualifikation* (1931) 5 *Zeitschrift für ausländisches und internationales Privatrecht* 241, republished in Italian in (1932) 2 *Rivista Italiana di diritto internazionale privato e processuale* 97 and in French in (1933) *Revue de droit internationale privé* (Darras) 1. Rheinheim described Rabel's approach in *Comparative Law and Conflict of Laws in Germany* (1935) 2 *U. of Chi. L. Rev.* 232.

3. See Taintor, "Universality" in the Conflict of Laws on Contracts (1939) 1 *LOUISIANA LAW REVIEW* 695.

4. For example, Restatement of the Conflict of Laws (1934) § 7 (a): "in all cases where as a preliminary to determining the choice of law it is nec-

ond part of the conflicts rule) has been understood as one to a portion of the foreign law pertaining to a legal relation (institution, concept, device) therein, rather than to the foreign law as a whole. Legal relations may have different meanings in different legal systems. One jurisdiction may adjust a social situation by a different legal device than another would use. As a result, the reference from *legal relation* to *law governing a legal relation* often is not an equation.⁵ The way to avoid this inequality of situation referred and law referred to, Rabel suggests, is to consider the conflicts rule as a reference of a factual or social situation to a system of law in its entirety. The conflicts rule is then what it ought to be, a reference to a system of law in accordance with previously determined policy for the type of situation; and the foreign law selected is applied just as it would be by a court sitting in the foreign jurisdiction.⁶

Under this approach the problems of primary and secondary characterization disappear, for the legal definition of issues is unnecessary. The major consideration in the conflict of laws

essary to determine the quality and character of legal ideas, these are determined by the forum according to its law."

The method begs the question, for a set of facts cannot be considered a legal relation except by reference to a system of law, a reference which is the function of the conflicts rule.

5. The same problem is presented in the application of some federal laws in the several states. Desired uniformity of income and estate tax burdens, for example, was thwarted because of the different meanings given "income," "decendent's estate," and "property" in separate and community property states. See, as to income taxes, *Bender v. Pfaff*, 282 U.S. 127, 51 S.Ct. 64, 75 L.Ed. 252 (1930). This situation has been corrected substantially as to estate taxes. Near uniformity of tax burden has been achieved there by amending the act to provide different legal bases of taxation for separate and community property states. The present basis of estate taxation is one which does not correspond to the legal definition of "estate," "succession," or "property" in any state, but which includes about the same economic power transferred from a decedent to others. The factual or social situation—transfer of economic power—is used in place of legal concepts having different content in local laws. See *Fernandez v. Wiener*, 66 S.Ct. 178; 90 L.Ed. 147 (U.S. 1945). The analogy between the federal law—state law situation and the conflicts rule—local law situation is obvious. If any one agency were charged with the development of conflicts rules and was as interested in substantially uniform and just results as is the treasury department, the results might be astounding.

6. "The needs are simply and efficiently fulfilled by the application of the foreign law as it stands and . . . 'in its totality.' If the first part of the conflicts rule, the description of the matter referred to the applicable law, is correctly formulated, i.e., not burdened by internationally impractical concepts, it contains in itself all that is necessary for its purpose. All else belongs to the selected system. In other words, the question which state's law governs the case, is answered by the choice of law; there is no reason why reference should not be made to this law as a whole instead of to parts prematurely chosen. (Whether some public policy of the forum is involved is entirely separate and independent.) More precisely, the court has to decide the question exactly as a court sitting in the foreign state would do, if such court had jurisdiction and had to apply its own domestic law." P. 66.

becomes that of determining the policies to be given effect by conflicts rules, or of discovering the criteria for drafting conflicts rules for various situations. This Professor Rabel discusses in Chapter 3, "Development of Conflicts Law." The criteria, he believes, are *uniform choice of law regardless of forum*, without excluding sufficient flexibility for changing conditions, and a *just result*. The latter may always be incapable of complete definition, but he gives some guides: Care must be taken to insure that justice not be identified with local policy; the interests of public and individuals, of commerce and parties in good faith, must be balanced against each other and the need for certainty; and there must be objective standards to avoid decisions in accordance with the judge's own sense of justice.

After discussing in the introduction the proper use of conflicts rules and the criteria for choosing them, Professor Rabel proceeds with his major task, the examination of the conflicts rules of almost every country of the civilized world to determine their similarities or dissimilarities and to discover whether they are performing their proper function. His purpose is to prepare the way for the reform of the conflict of laws, of course, but he warns against "premature legislation and half-hearted treaty making" and suggests "a patient and concerted world-wide discussion determined to relieve the present chaos."⁷ He recommends, however, that immediate attention be given such study,⁸ and begins it with a consideration of the conflicts laws applied to marriage, divorce and annulment, parental relations, and of course, the personal law concepts used as contact points for these situations. He tells us he has regarded his foremost task to be "the collection and grouping of the significant rules, theories, critical views, and proposals, and the cases animated by them," but that it is his "duty not entirely to conceal his impressions regarding the desirable path that the evolution [of the conflict of laws] may take." "Theoretical conclusions of a more general scope," he continues, "as well as specified proposals for elaborating the rules may be expected, when comparative research in this singular and disturbed field has become broader and bolder."⁹

Rabel's approach to the conflict of laws should carry because of its intrinsic validity. The author states he hopes "the survey

7. P. xxii.

8. "I am convinced that large results must not be deferred to a remote future. The legal profession has great power and deserves great confidence. If it decided to consider conflicts law as a matter of general interest and gave it its unbiased attention, much might be obtained that now seems Utopian. I am particularly hopeful of the lawyers in the United States." P. xxii.

9. Pp. xxii, xxiii.

itself will almost automatically arouse the wish for certain reforms."¹⁰ His second and third chapters alone should do this and it is to be hoped that eventually the Restatement will be restated. But much preparatory work needs to be done in the discovery of the methods in which various systems of law handle similar social situations before adequate, satisfactory conflicts rules can be devised. This means intense comparative law study which should result in not only improved conflicts law, but increased perspective in law, greater appreciation of it as a means of social control, and better understanding of other ways of living. Rabel has begun the effort in the field of family relations. It is understood that his second volume will consider corporations, contracts and torts. He has pointed the way to a sound conflict of laws.

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STUDYING LAW. Selections from the writings of Albert J. Beveridge—John Maxcy Zane—Munroe Smith—Roscoe Pound—Arthur L. Goodhart—Eugene Wambaugh—John H. Wigmore—Charles B. Stephens. Edited by Arthur T. Vanderbilt. Washington Square Publishing Corporation, New York City, 1945. Pp. viii, 753. \$4.75.

In this compilation, Dean Vanderbilt has attempted to present a comprehensive array of materials selected with the primary purpose of stimulating the law student, present and prospective, "to a realization of his opportunities and his responsibilities as a lawyer and as a citizen." The technique used is largely one of selection from the "old masters." The compiler states that his book is especially designed for the young man in the service of his country who may be contemplating the study of law. The class of students for whom the work is intended have already entered law schools in goodly number so the compilation's appearance is timely. There can be little doubt that a broader perspective of the nature and purposes of law, its history, the human influences which have been brought to bear in its moulding, the interests which law protects, the techniques of the law, the requirements of a sounder prelegal preparation and an insight into the problems of professional opportunities and placement can be considerably aided from careful study of materials in this compilation. This is reading of the type which law schools expect of law students. But selections from only

10. P. xxiii.

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