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Book Reviews

MARITAL PROPERTY IN CONFLICT OF LAWS, by Harold Marsh, Jr.*
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In its selection of a single area of choice-of-law problems in conflict of laws, this book brings to mind another recent book of a similar kind, namely, Hancock's work on Torts in the Conflict of Laws. Both studies began as part of graduate law programs—the earlier one at Michigan, the present one at Columbia. Each constitutes a very noteworthy contribution to the growing field of knowledge in conflict of laws, and it is to be hoped that further work of this sort will be encouraged for future authors. There is not only a place but also a need for such comprehensive monographs on a single topic.

To say that this book is light reading would be unfair to both the intensive scholarly work of the author and the concentrated attention of the careful reader, but it is a credit to the author that it is written in a smooth and easy style with a clear description of all his ideas and thought-processes. The work is detailed and thorough as well as stimulating; in many instances it will provoke the re-thinking of old problems and may even be responsible for the revision of old ideas.

To begin with, the author defines marital property as "any interest or aggregate of interests which arise in one spouse, with respect to things owned or acquired by the other spouse, solely by virtue of the existence of the marital relation, but excluding from it the 'bare expectancy' of inheriting upon the death intestate of the other." (p. 11) This not only supplies a working definition but also describes the limits of the problems within the scope of the book.

Preceding the discussion of actual choice-of-law problems in marital property cases, there are two preliminary studies which are both deserving of independent commendation. The first (c. II, pp. 9-67) includes (a) the historical development of the laws pertaining to marital property in both the common

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law system and the community property system (the American forms adopted in certain states in the West and Southwest), with careful description of the distinctive interests of each spouse in property acquired by the other under the various modifications of each system, together with (b) an analysis and comparison of the marital property laws in the United States. The mutually supplementary nature of marital property laws and inheritance laws—both of which should often be examined together in order to get a more complete picture of inter-spousal property relationships—is kept in mind by the author and discussed in appropriate situations.

The second preliminary study (c. III, pp. 68-125) is an analysis of the general basic choice-of-law problems in conflict of laws. The author's acknowledgment to Falconbridge (preface, p. viii) is particularly evidenced in the analytical pattern of approach through the three steps: characterization, selection, application. While directed principally to marital property matters, the treatment of this method of handling choice-of-law cases shows a keen insight and meticulous exposition. The author clarifies the process by careful identification of each idea, in breaking down the two separate elements of any rule of conflict of laws, namely, (1) the nature of the legal issue, and (2) the reference or connecting factor to be used in reaching a decision. For analytical purposes, the separation of the first element makes for a more clearly defined identification of the legal issue, as an idea, which is altogether distinct from the reference to a connecting factor. Thus, the question of whether the legal issue is one of marital property or inheritance is a separate idea from the reference to a connecting factor (e.g., situs of land, or domicile of decedent) which determines by which law the issue is to be decided. It is true that, in treating a choice-of-law problem on a broad comparative law basis, as Rabel does, it is preferable to keep the two elements together because the complete conflicts rule and its effect have to be considered as one composite whole. Nevertheless, for a clear appreciation of each distinct idea involved in the handling of a choice-of-law case, there is a useful purpose to be served in an understanding of this kind of a detailed analysis. While it is not immediately helpful to be told the generalizations that characterization "should be performed in the light of sociological jurisprudence" (p. 74) and that decisions concerning the use of *renvoi* should be made "on the basis of pertinent policy considerations," (p. 75) the individual mari-

tal property problems are dealt with more specifically in the last three chapters of the book.

Considering the author's careful analysis of the basic aspects of choice-of-law problems and the marital property statutes and cases, and in view of his prefatory objective of presenting a theoretical framework (preface, p. vii) in addition to a digest and analysis of cases, it is surprising that he purports to keep out of the vested-rights versus local-law controversy which he feels "can safely be left to the metaphysicians." (p. 69, n. 2) Nevertheless, there are occasional indications of a position which must be considered on the vested-rights side.¹

In the matter of renvoi, the author seeks to avoid the complexities of a single affirmative or negative position; he advocates an individualization of the problems and their respective solutions on the basis of policy considerations. (pp. 110-125) The logical debaters will be able to find argument against this solution, and those strictly opposed to renvoi may label it as a distracting device of legal trickery to ignore a general rule by sidestepping it completely in appropriate cases. However, it is likely to have appeal for courts in search of justification for variation in handling cases so as to achieve the individually desired results.

All writers on characterization have had difficulty in formulating a short verbal description of what is being characterized; the present author's statement that what is characterized is "a claim or defense in the light of the pertinent facts" (p. 76) may seem a little more satisfactory to some readers than other definitions, while it will raise new questions for others. Differences will also occur as to whether the characterization should be made "as part of the conflicts law of the forum" as distinguished from the standards of local law for purely internal purposes. (p. 77)

As a further refinement in the analysis of ideas and thought processes, the author suggests the existence in each major step (characterization, selection, application) of three levels of inquiry: policy or purpose, rules and principles, and specific application. (p. 71) This has a certain logical and analytical

1. E.g., "The position taken in this study is that state B should, as a general rule, recognize the interests created by state A, as between the husband and wife, and enforce these rights in a manner as closely approaching their enforcement in state A as is possible under the local forms of procedure." (p. 225)

merit and should be kept in mind for purposes of understanding, but it can hardly be spelled out in detail in every case discussed.

In dealing with the characterization of claims which might be considered as marital property problems, or possibly as succession problems, or even as matters of procedure, it is pointed out that the characterization is not an inherent metaphysical and inflexible element but that it (characterization) is simply the grouping of a claim in a specific category for a certain purpose. (p. 129) This is followed by the description that "a choice-of-law rule is basically simply a judgment (judicial or legislative), founded upon considerations of convenience and social justice, that a certain type of issue should be determined by the law of the jurisdiction with which the case has a specified type of factual connection." (p. 130)

The problems of *characterization* in actual cases are divided into seven major areas: Distribution on Death, Divorce, Rights of Creditors, Transfer of Property, Rights of Spouses inter se, Income from Property, and Acquisition of Tort Claims. (c. IV, pp. 126-179) Under each topic, numerous fact situations are examined—both in separate property and community property jurisdictions—from the point of view of characterizing the issue. This process is usually the most controverted yet decisive one in the handling of the case because there is generally much more agreement as to the appropriate rule of conflict of laws for each of the possible kinds of legal issues—for example: whether the rent from the husband's separate property in California is a matter pertaining to the immovable (and governed by the law of the situs) or whether the rent as such is income to be classified as a movable (and governed by the law of the domicile, which may be Texas). (p. 169) In addition, special institutions like the wife's "tacit mortgage" on the husband's separate property (Louisiana) present interesting problems of characterization. (p. 155)

For the cases in which the legal issue is characterized as one of marital property, the rules of *selection* most frequently refer to domicile or situs. However, here again, the connecting factor of domicile is incomplete without identification of a person (husband or wife), and specifications as to time (e.g., date of marriage, time of acquisition). In order to facilitate the presentation of the problems of selection (pp. 180-221), the materials

are grouped in four categories: property owned at marriage, property acquired in a state other than the domicile, property acquired before a change of domicile, property acquired after a change of domicile. The effects of ante-nuptial agreements are also considered. Regardless of agreement or disagreement with the views of the author, this mode of treatment attests a careful and thorough consideration of all the situations which usually arise.

In most cases, there are no serious problems of *application* (c. VI, pp. 222-250), that is, deciding the legal issue in accordance with the rule of dispositive law of the place indicated by the connecting factor in the conflicts rule. However, there are several kinds of difficulties which do occur in some form of the *renvoi* problem and in the different characterizations which may be made in the same fact situations (e.g., marital property or successions); there is also the problem of the different meanings which the same word may have in different systems (e.g., "separate" property in a common law state and in a community property state). These difficulties are sometimes unavoidable; for example, where separate property is taken into a community property state, there may or may not be a change of domicile and there may be a transformation into other property. The variety and complications of the problems involved have not deterred the author from making a careful and detailed analysis of all the situations.

If there has been any mistaken notion that marital property problems are of particular significance only in the community property states, this book should dispel the idea. At the same time, if any person may have thought that marital property problems in conflict of laws were not involved and complicated, that thought will also be corrected. It may even surprise some readers to find the numerous different meanings of the terms "separate property" and "community property" which are enumerated and described. The book makes available, for the first time, a most complete treatment of a very special area of the law; it should not be overlooked by those who have occasion to examine this field of the law, whether in the law office or the law school or the court's chambers. Although many specific laws and problems in individual states are carefully discussed, the book is of a general nature for the whole United States.

Even if there were among the states more similarity and accuracy than actually exist in the method of handling marital property problems in conflict of laws, a large number of problems would still remain because the laws themselves are so different. Whether more uniformity in legislation will be encouraged by this book is doubtful; however, by bringing these numerous and far-reaching differences into such sharp focus, this book may stimulate and encourage others to make some concentrated studies on the policies and possibilities of some measure of uniform legislation, even if only in certain parts of these related fields of law.

It would not be fair to criticize this book on the ground that it does not include a discussion of "jurisdiction" and "full faith and credit," even if to some people these may be indispensable aspects of any conflict of laws study in the United States. There still remains the difference between a relatively small monograph and comprehensively large reference text.

It would not serve enough purpose here to take issue with individual characterizations or policy considerations or recommendations. It is of more importance that this book should be recognized as containing something more than the compilation and analysis of statutes and cases and of marital property problems. One of the accomplishments of this book is the manner in which the author has combined the use of two approaches which have sometimes been considered as antagonistic and mutually exclusive. With acknowledgments to both Falconbridge and Rabel, the author demonstrates the combination of a carefully detailed analytical treatment of characterization along with the functional approach of comparative law on the basis of policy considerations. This has not previously been done in such a clearly defined treatment, and it constitutes one of his principal contributions to the current American developments in conflict of laws.

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