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Book Review

CONFLICT OF LAWS, PART ONE: JURISDICTION AND JUDGMENTS.

By Albert A. Ehrenzweig. St. Paul: West Publishing Co., 1959. Pp. XXXIV, 367. \$6.00.

This is the first part (*Jurisdiction and Judgments*) of a two-part *Treatise on the Conflict of Laws* by Professor Albert A. Ehrenzweig. Part One will eventually be republished along with the forthcoming publication of Part Two (*Choice of Law*).

Professor Ehrenzweig needs no introduction in this country. His valuable contributions in the fields of conflict of laws,¹ insurance,² and torts³ assure him a prominent position in our legal literature. Now, his much reviewed *Treatise*⁴ is being added to the list of accomplishments.

The present volume contains a general introduction and three chapters, dealing respectively with "Local Jurisdiction," "Recognition of Foreign Judgments," and "Divorce, Annulment, and Their Incidents." In detail, the general introduction is devoted to a historical analysis of major doctrinal trends in the field of American conflicts law, an argument for separation of international and interstate conflicts, and a discussion of sources, such as international law, federal, and state law. Chapter One deals with the problem of local jurisdiction, namely the question whether a court may validly under its law and the Federal Con-

1. See, e.g., *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953); *American Conflicts Law in Historical Perspective: Should the Restatement be "Continued"?*, 103 U. PA. L. REV. 133 (1954); *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956); *Parental Immunity in the Conflict of Laws: Law and the Reason v. The Restatement*, 23 U. CHI. L. REV. 474 (1956); *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957); *The Real Estate Broker and the Conflict of Laws*, 59 COLUM. L. REV. 303 (1959).

2. "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM: A VOLUNTARY COMPENSATION PLAN (1954).

3. NEGLIGENCE WITHOUT FAULT: TRENDS TOWARD AN ENTERPRISE LIABILITY FOR INSURABLE LOSS (1951).

4. Book reviews: Rheinstein, 8 J. PUB. L. 550 (1959); Kelso, 58 MICH. L. REV. 306 (1959); Cheatham, 45 A.B.A.J. 1190 (1959); Inglis, NEW ZEALAND L.J. 169 (1959); Cavers, 47 CALIF. L. REV. 414 (1959); Hazard, 24 MO. L. REV. 406 (1959); Stern, 1 INT. AM. L. REV. 455 (1959); Callahan, 70 BROOKLYN BAR- RISTER 233 (1959); Reese, 12 J. LEGAL ED. 305 (1959); Currie, 73 HARV. L. REV. 806 (1960); Falk, 69 YALE L.J. 1311 (1960); Weintraub, 45 IOWA L. REV. 979 (1960). See also Cleary, Cowen, Laflar & Schlesinger, *Transient Jurisdiction — Remnant of Pennoyer v. Neff — A Round Table*, 9 J. PUB. L. 281 (1960).

stitution render judgment, and further whether it will do so ("Will the court take jurisdiction?"). Subjects such as procedural capacity (active and passive) of individuals, corporations, and unincorporated associations, jurisdiction in rem and in personam, and the problem of mandatory and discretionary dismissal are analyzed and discussed. Chapter Two is devoted to the theory of recognition of foreign judgments, requirements for, and mode, scope, and effect of recognition, including the doctrines of *res judicata* and collateral estoppel. The problem of "international" and "interstate" jurisdiction is discussed in the same chapter as one of the requirements for the recognition of foreign judgments. Finally, Chapter Three is devoted to problems of local jurisdiction, and recognition of foreign decrees, in proceedings for divorce, support, children's custody, and annulment of marriage.

In general, the arrangement of the subject matter follows a rather coherent and consistent scheme, departing from traditional classifications to "unorthodox" formulations, in accordance with varying degrees of emphasis placed on requirements for scientific elaboration or usefulness of the *Treatise* as a reference book for teachers, students, and practicing lawyers. Indeed, at times consistent analysis which "would necessitate much new nomenclature" had to be sacrificed "to the exigencies of practical use."⁵ (p. 73) Thus, though failing in rigid consistency, the work gained in flexibility and accessibility.

I

Ehrenzweig's *Treatise* is a milestone of our literature in the field of conflict of laws. It came at a time when traditional doctrine could no longer cope with a body of growing case law, and a body of new doctrine remained scattered in countless valuable law review contributions. It sealed a past, and may well furnish the basis for a new beginning.

The *Treatise* is pervaded by a spirit of innovation, and is replete with inspiring ideas, which, though not always fully explored or carried to meaningful conclusions, may become the subject of discussion and further elaboration. The presentation of

5. See also p. 56 (passive procedural capacity of corporations has to be treated under the heading of personal jurisdiction, an "analytically imperfect" arrangement). For a possible classification according to civilian notions which would have permitted rigid consistency, see Rheinstejn, *Book Review*, 8 J. PUB. L. 550, 554 (1959).

both Jurisdiction and Judgments in a single volume should be commended as a significant innovation. Such treatment necessarily focuses attention to the close interrelation of problems involved in both areas and stresses the need for an integrated approach to the question of satisfaction of reasonable expectations, which, indeed, is the central problem of all conflicts law. In this connection should also be commended the inclusion in the *Treatise* of such matters as procedural capacity, and the largely ignored precepts of admiralty jurisdiction.

Among Ehrenzweig's several other significant contributions which deserve attention are his continuous search for a historical explanation of present day dogma; his respect for treaty law, a source of conflicts law frequently disregarded by counsel and courts; his imposing collection of authorities and literature of both common law and civil law origin; and his uncompromising effort at reformulation of obsolete rules swallowed up by exceptions, along with his insistence for more rationalization so that unwieldy formulas could be reduced to more flexible equity and other considerations.

As a typical example of Ehrenzweig's methodology in that regard, attention may be called to his treatment of "international" and "interstate" jurisdiction, as one of the requirements for the recognition of foreign judgments. In this area, Ehrenzweig's main effort is directed at making explicit a number of inarticulate major premises pervading the cases in which recognition was granted or denied in accordance with a finding that the foreign court had or lacked "jurisdiction." That such a broad formula can hardly be of assistance in understanding the past and predicting future court action is made abundantly clear. Ehrenzweig's analysis of what actually happens is this: while compliance with the jurisdictional requirements prevailing at F-1 is indispensable to judgment recognition, the final determination as to the "international" or "interstate" jurisdiction of F-1 will be made in accordance with the law in force, and notions of fairness, prevailing at F-2. Thus, in most cases, the finding that the foreign court had or lacked jurisdiction is nothing more than a statement of a conclusion: that the judgment will or will not be enforced. On the basis of this analysis, Ehrenzweig is able to contribute a number of suggestions deserving careful consideration as the need for more rationalization in this confused area is broadly felt.

However, Ehrenzweig's reformulations are not always convincing, and, at times, one has the uneasy feeling that an *ought* is presented in terms of an *is*. This is, perhaps, the case with the much-deplored rule of "transient" jurisdiction, which, in spite of aphorisms to the contrary, seems to be still the law in the United States. One may question the usefulness of Ehrenzweig's optimism. Some courts, relieved of their obligation to follow an allegedly no longer existing rule, might feel free to reach better results; yet, the urgent need for law reform can be obscured when a persisting anomaly — instead of being stigmatized outright — is presented as merely a ghost.

II

Some reviewers, limiting perhaps their scope of inquiry to Ehrenzweig's introduction, expressed the opinion that the *Treatise* lacks a coherent theoretical framework and fails to manifest a credo.⁶ It is not the purpose of a book review to refute criticism made by others; yet, this may be inseparably connected with the effort of appraising the work under review and placing it in proper perspective.

One may be censured for what he did and what he did not do in connection with an overall effort to give a comprehensive picture (past, present, and future) of an entire branch of law, such as conflicts; but an essentially eclectic approach should be appraised for what it actually is. Other treatises in the field of conflicts may be "hopelessly out of date,"⁷ and an overall effort for the clarification of past and present state of conflicts law and doctrine, including accurate description, critical evaluation, and suggestions for future development, should be welcome. But the fact that no one seems prepared for such an undertaking, and the scepticism which has been voiced with regard to possible success, and perhaps, desirability of such a project,⁸ may be a partial answer. Ehrenzweig's courageous effort, at this stage, should necessarily be limited in scope.

Within such limitations, Ehrenzweig was able to isolate among a number of contradictory tendencies in conflicts doctrine two elements which emerged as fundamental antinomies. Quite

6. See Falk, Book Review, 69 YALE L. J. 1311, 1316 (1960); Currie, Book Review, 73 HARV. L. REV. 801, 803 (1960); Reese, Book Review, 12 J. LEGAL ED. 305, 306 (1959).

7. See Falk, Book Review, 69 YALE L.J. 1311 (1960).

8. See Currie, Book Review, 73 HARV. L. REV. 801, 809 (1960).

convincingly, present day dogma is explained as a historical evolution of "unitarian" and "pluralistic" notions, and attendant compromises thereof. There may be other reasons, too, which may account for the chaotic state of law in textbooks and case reports. Yet, the conflict of pluralistic and unitarian notions, and subsequent compromises which blurred clear vision, should be fully clarified prior to a new beginning; and this is Ehrenzweig's main concern. This may explain in part why Ehrenzweig did not undertake a detailed critique of specific doctrines, and why he refrained from inserting in his introduction doctrinal constructions of his own. If doctrine there must be, it is to be found in the eloquent treatment of issues and cases in the *Treatise* as a whole.

This brings us to a closer examination of Ehrenzweig's *credo*. Conflicts law may not rest on "comity" because this is "no-law." (p. 6) It cannot rest on public international law or any other "super-law";⁹ (p. 6) indeed, public international law is not concerned with conflicts among national legislations beyond some vague maxims pertaining mostly to flagrant abuses of national sovereignty, and, apart from treaties, does not contain specific conflicts rules. (p. 23 *et seq.*) Nor can the theory of "vested rights" furnish us with a guide, as such theory is simply an early borrowing from public international law and functions as a counterpart to obsolete notions of "legislative jurisdiction" transferred into the field of decisional law. (p. 9) The decisions of three great judges, Holmes, Hand, and Goodrich, were founded on obscure premises and resulted in compromise, and this is also the case with the *Restatement*. The so-called theories of local law did away with compromise but "left us without a guide." (p. 15) A break-down of emerging new maxims into a countless number of common law conflict of laws rules with a limited scope would achieve "too little and too much." (p. 16) Finally, isolation and examination of conflicting policies through reliance on sociological and economic factors seem to be only a partial answer. (p. 16)

Are we thus left "without a guide" by Ehrenzweig, too? If we were to rely on the introduction alone, and if it were not for

9. One cannot but agree with Ehrenzweig that expecting too much from the United States Supreme Court for the development of a consistent system of conflicts law based either on the due process or full faith clause of the Constitution is contrary to both experience and present-day reality. The last pronouncement of the Court in that regard seems to vindicate quite conclusively Ehrenzweig's admonition. See *Clay v. Sun Insurance Office, Ltd.*, 80 Sup. Ct. 1222 (1960).

countless instances of critique addressed by Ehrenzweig to specific results reached by the courts in concrete cases, the answer could be in the affirmative. But this, and the conspicuous absence of a doctrinal thesis may be taken as a doctrine in itself. Thus, we should, perhaps, proceed to appraise Ehrenzweig's work in the light of his refusal to be bound by doctrinaire and conceptualistic formulas. However, on the basis of a study of the *Treatise* as a whole, a number of propositions in the nature of a credo may be established. A central theme is deployed with masterful advocacy: doctrine, in order to be able to guide the courts and lead to law reform, should be based on accurate functional observation of existing institutions rather than provide a Procrustean bed of pre-conceived "logical" notions. The law is to be found in the actual doing of the courts, apart from lip-service to obsolete rules and confusing terminology. The courts must start from their own law, and should consider application of foreign law in accordance with policy considerations pertaining to specific issues, and always in a concrete context; generalizations and reliance on "logic" alone may be harmful.

III

Ehrenzweig insists on the need for separate treatment of international and interstate conflicts. His assumption seems to be that, though inarticulate in most of the cases, such a distinction exists *in fact*, and also *ought* to exist. This approach has aroused some scepticism, mostly as tending to encourage "provincialism" in an era calling for an internationalist rather than isolationist outlook.¹⁰ The difference of opinion thus relates to ideology and not only to method.¹¹

Distinct treatment of international and interstate conflicts does not necessarily presuppose a commitment as to the desirability of development of two distinct bodies of law. Such treatment may be regarded as a research and educational device designed to focus attention to a number of policy considerations in a concrete setting. In fact, such a method will enable us to de-

10. See Falk, Book Review, 69 YALE L.J. 1311, 1320 (1960). Cf. Rheinstein, Book Review, 8 J. PUB. L. 550, 557 (1959).

11. Apart from ideological orientation, the method of approach itself may make little difference. Indeed, we may well start by drawing a line of demarcation between international and interstate conflicts, indicating areas where concepts and rules may be identical in both situations; we may equally well proceed to analyze the conflicts situation on a common basis for both international and interstate conflicts, and then draw attention to differences.

termine whether the distinction is warranted by the law as is, and further will enable us to decide whether it ought to be.

That such a distinction exists in fact has been amply demonstrated by Ehrenzweig's analysis. That such a distinction ought to exist in connection with a number of concrete problems has been equally well demonstrated. Indeed, the United States Constitution may compel deviations in the interstate field from an internationally desirable rule. The states may enjoy partial legislative independence under the Constitution, and may be regarded for some purposes as autonomous units in the community of nations. But the states are also part of a Union whose interests should be considered paramount and should prevail in case of conflict with those of the international community. Precisely for this reason, and in spite of occasional accusations, other federal constitutions established a distinct system of interspatial conflicts in addition to a system of international conflicts.

IV

The extensive use of the comparative method by Ehrenzweig, and the frequent reference to civilian institutions and literature, should be regarded as a major contribution. Indeed, comparative study of procedural institutions has attracted little attention in this country, and pieces of information contained in the *Treatise* are very valuable.

However, reference to civilian institutions is not always accompanied by adequate explanation, and thus, meaningful comparison by the uninformed reader is frequently made impossible.¹² Further, over-generalized reference to the "civilian" approach or to "civil law systems" may not always be an accurate basis for suggesting functional equivalents. This is particularly so with regard to such broad concepts as "jurisdiction" and "competence."¹³ Ehrenzweig states, for example, that in "civil

12. See, e.g., p. 183, concerning a "deep cleavage" between civil law and common law conceptions of adoption; p. 212, "Exequatur." Cf. Currie, Book Review, 73 HARV. L. REV. 801, 807 (1960).

13. The term *competence* (in German "Zuständigkeit," in French "compétence") refers to the authority of a concrete court to render a valid judgment in a concrete case. See ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 116 (1954); MOREL, PROCÉDURE CIVILE 117 (1949); CORNU, PROCÉDURE CIVILE 131 (1958). Competence is further analyzed in terms of *subject matter* competence (in German "Sachliche Zuständigkeit," in French "compétence d'attribution, ratione materiae"), and *local competence* (in German "Ortliche Zuständigkeit," in French "compétence territoriale, ratione personae vel loci"). See ROSENBERG, *op. cit. supra*, at 117; MOREL, *op. cit. supra*, at 181, 218; CORNU, *op. cit. supra*, at 224.

law" "jurisdictional defects are procedural in character and thus curable," (p. 74) which is not necessarily so with regard to all civil law systems and all possible cases.¹⁴ Actually, this statement seems to convey an over-simplified idea of what we may term civilian conceptions of jurisdiction.

Further, Ehrenzweig's much too sketchy analysis of civilian conceptions in this area may lead to a number of misconceptions in this country. The attention of the reader is not called to the fact that Ehrenzweig actually discusses procedural problems of a *domestic* nature¹⁵ rather than the foundation of a state's (or a court's) authority to settle disputes involving international contacts. And thus, though accurate in terms of what happens in a non-conflicts situation, the discussion becomes misleading with regard to what happens in the field of (international) conflicts and in case of proceedings brought for the enforcement of foreign judgments.

An accurate analysis of civilian conceptions would necessitate distinction in clear terms between "local jurisdiction" (to use Ehrenzweig's terminology, although the term "state jurisdiction" would be preferable) and "international jurisdiction" as one of the requirements for the recognition of foreign judgments.

"Local jurisdiction" (in German "Gerichtbarkeit," in French "jurisdiction") ordinarily refers to the power or authority of a state (which in absence of international obligation is unlimited) to have disputes settled by its courts.¹⁶ In the United States, "local jurisdiction" in proceedings in personam is said to rest on the requirement of proper service of process, which has been elevated to a constitutional principle. The requirement of proper

14. In fact, civilian theory distinguishes among non-existing, void, and voidable judgments, which means that in some cases some procedural defects are incurable. Lack of proper service, and non-compliance with rules pertaining to "local competence," may be curable with regard to the validity of the judgment *within* the state, but this is not so in case of proceedings brought in another state for the enforcement of such judgment. See note 17 *infra*. Finally, lack of "subject matter" competence may be an incurable defect. See CORNU, PROCÉDURE CIVILE 442 (1958); MOREL, PROCÉDURE CIVILE 178 *et seq.* (1949). *But cf.* ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 119, 718 (1954).

15. *Cf.* p. 79 ("jurisdiction with sole regard to the domestic contacts with the case"); p. 98 ("civilian experience with [the property forum] not an altogether happy one"); p. 208 ("location of property in the forum state as just another basis of the foreign court's competency").

16. *Cf.* ROSENBERG, LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS 30 (1954); RIEZLER, INTERNATIONAL ZIVILPROZESSRECHT 198 (1949); MOREL, PROCÉDURE CIVILE 77 (1949); CUCHE, PROCÉDURE CIVILE ET COMMERCIALE 48 (1958).

service may thus affect the validity of a judgment both in the rendering state and in any other sister-state where proceedings may be brought for its enforcement. In civil law countries, "local jurisdiction" is not founded on personal service but on other considerations; and in spite of lack of personal service a judgment may be valid *within* the state. But in case of proceedings brought for the enforcement of such a judgment in another state, lack of personal service in the rendering state may exclude recognition.¹⁷

There is no uniform "civil law" approach to the problem of "local jurisdiction." Thus in Germany, such jurisdiction depends (with some exceptions) on the availability of a court having jurisdiction over the subject matter of the dispute and locally competent to hear the case.¹⁸ In France, "local jurisdiction" is grounded on the French nationality of the plaintiff or defendant.¹⁹ This means that French citizens may bring action (at a court of their domicile) against foreigners not domiciled in France, and even in the absence of a locally competent court;²⁰ and under similar circumstances, a foreigner domiciled in France may bring action against a French citizen domiciled abroad.²¹ This goes much further than our rule of transient jurisdiction and illustrates the fact that in France, and several other countries following the French system, "local jurisdiction" is not always founded on close contacts between the forum and the subject matter of the dispute.²²

Finally, with regard to judgment recognition, both in France and Germany, one of the requirements of such recognition is that the foreign state had "international jurisdiction." This jurisdiction is tested uniformly according to notions prevailing at the recognizing forum. In such cases the courts answer the hypothetical question whether under similar circumstances they would be able to hear the case.²³

17. See RIEZLER, *INTERNATIONALES ZIVILPROZESSRECHT* 535 (1949); Z.P.O. :328.1.2. See also ROSENBERG, *LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS* 702 (1954). This seems to be the rule in Germany, Austria, Italy, and France.

18. See RIEZLER, *INTERNATIONAL ZIVILPROZESSRECHT* 219 (1949); ROSENBERG, *LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS* 65 (1954).

19. See RIEZLER, *INTERNATIONALES ZIVILPROZESSRECHT* 274 (1949).

20. See FRENCH CIVIL CODE art. 14; MOREL, *PROCÉDURE CIVILE* 223 (1949); CUCHE, *PROCÉDURE CIVILE ET COMMERCIALE* 205 (1958).

21. See FRENCH CIVIL CODE art. 15.

22. Cf. EHRENZWEIG, *CONFLICT OF LAWS* (1959): "[In civil law] such rules now permit the courts to take jurisdiction with sole regard to the domestic contacts with the case."

23. See RIEZLER, *INTERNATIONALES ZIVILPROZESSRECHT* 532 (1949); ROSENBERG, *LEHRBUCH DES DEUTSCHEN ZIVILPROZESSRECHTS* 701 (1954).

V

One may disagree with Ehrenzweig's arrangement and method of presentation. A wealth of materials and ideas included in the *Treatise* may raise some scepticism as to whether or not such inclusion was justified. I refer to a number of long historical digressions, and efforts at reformulation of domestic rather than conflicts law, as in the case of arbitration agreements and rules governing collateral estoppel. In both areas, the discussion of domestic law is most enlightening, but relatively short space is devoted to the analysis of attendant conflicts problems. Perhaps this is due to the scarcity of conflicts materials, and the need for placing the domestic law on a more rational ground before suggesting solutions for conflicts problems.

Ehrenzweig's style is compact, and, at times, elliptical. The *Treatise* is replete with original ideas, illustrations, references, and cross-references to preceding and following sections in the same work. This, at times, may account for a certain degree of difficulty in following the main line of thought.

One may also disagree with some of Ehrenzweig's conclusions drawn from both statutory materials and case law.²⁴ For example, it is stated that "In personal actions arising out of maritime occurrences and transactions, federal district courts sitting in admiralty have exclusive jurisdiction when relief other than a money judgment is sought, and concurrent jurisdiction with the state courts in certain other cases." (p. 78) It seems that the admiralty jurisdiction of the federal courts in personal actions (*libels in personam*) is always concurrent with that of the state courts, and that federal admiralty courts have exclusive jurisdiction where relief in the nature of *in rem* relief is sought.²⁵ Further, the admiralty jurisdiction of federal courts (*both* exclusive and concurrent) to grant "relief other than a money judgment" is extremely limited in scope.²⁶

VI

Reservations, disagreements, and criticism apart, the *Treatise* of Professor Ehrenzweig remains a landmark in our litera-

24. Cf. Hazard, Book Review, 24 Mo. L. Rev. 406, 408 (1960); Cavers, Book Review, 47 CALIF. L. REV. 414, 416 (1960); Currie, Book Review, 73 HARV. L. REV. 801, 803-04, 807 (1960).

25. See GILMORE & BLACK, ADMIRALTY 33 (1957), and cases cited.

26. *Id.* at 37.

ture on the Conflict of Laws. The product of mature scholarship, and a protest against conceptualism, the *Treatise* marks a new beginning. As the author wanted it, the work will be valuable in the hands of teachers, students, and practicing lawyers.

The teacher will be able to start his own analysis on a number of issues raised by Ehrenzweig with regard to which the law seems self-contradictory and confused; the student will have a panoramic picture of the law surrounding embattled issues; and the practicing lawyer will find a treasure chest of ideas for better counselling in the field of conflict of laws.

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