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# Commentary on the Conflict of Laws. By Russell J. Weintraub.


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# BOOK REVIEW

COMMENTARY ON THE CONFLICT OF LAWS. By Russell J. Weintraub, Mineola, New York: The Foundation Press, Inc. 1971. xviii + 494 pages. $13.50.

ROBERT L. FELIX*

In this welcome new single volume treatise Professor Weintraub tries to convey to the lawyer, the judge and the law student a clearer understanding of "the most significant problems encountered in the American conflict of laws."[1] A major concern of the book is to explain the methodology of state-interest analysis in language that those who are not conflicts professors can work with. Needless to say, conflicts professors will be grateful for the clarity of exposition of the many problems of the subject and, probably, for the solutions proposed.

Although detailed attention is given to both the traditional territorial approach and to state-interest analysis, Professor Weintraub is clearly an advocate of the latter and a skilled exponent of his version of it. Thus, he proffers solutions to conflicts problems which are exemplary of his own system of analysis in addition to those exposed by a reasoned account of existing authorities. In composing this work Professor Weintraub has borrowed freely from his own previously published writings. His useful earlier work in law journals has been updated and elaborated to make the book a current whole. There is, as well, a considerable amount of entirely new material. The integration achieved is generally successful. The more acceptably discursive and relaxed style of law journal publication has been preferred to the sometimes rigid format of formal treatises. On this score, students especially will be pleased that "Commentary" means a lively and facile discussion of the subject.

A striking feature of the book is the absence of a separate section or chapter on "Judgments." The author treats material relating to "Judgments" in the context of other issues to which it is relevant. This will come as a surprise to those who cling to

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1. P. vii.

the traditional wisdom that the conflict of laws, like Caesar's Gaul, is divided into three parts: Jurisdiction, Judgments and Choice-of-Law. In spite of this conventional separation of the subject it is apparent that the functioning division has been of choice-of-law on the one hand and jurisdiction and judgments on the other. In American conflict of laws, the recognition of an out-of-state judgment is almost exclusively determined by reference to constitutionally acceptable bases of jurisdiction in the rendering state. It has, moreover, been argued that the decision to assume jurisdiction may properly be influenced by choice-of-law considerations.[2] Choice-of-law considerations have also been seen as properly pertinent to the decision to recognize a foreign judgment.[3]

With apparent economy the subject of American conflict of laws is divided simply into ten chapter headings. With the exception of the third chapter—The "Pervasive Problems" of the Conflict of Laws—the effect of such an organization is, from a superficial perspective, not very striking. Upon closer examination, of course, innovation is obvious enough.

As per custom there is an introductory chapter which gives a description of the subject matter and a sketch of the modern theories. It is far too short to be anything more than a brief outline of the latter and in the mind of the student may leave the impression that the work of courts—the primary source of authority—has not contributed very much to the intellectual stuff of the subject. It is certainly no fault of the author that there are excellent treatments of the several "theories" of the conflict of laws in other currently used works. They are hard acts to follow, but there is room for moderate historical survey of judicial approaches as influenced by academic commentary and analysis. The author chooses to provide this elsewhere in the context of analysis in later chapters.

Although Professor Weintraub has reworked the traditional subject matter in the second chapter on Domicile, a separate chapter on Domicile would seem to perpetutate the large attention given to this index term, or "contact word" as the author calls it,

2. *See* Traynor, *Is This Conflict Really Necessary?*, 37 Tex. L. Rev. 657 (1959).

3. *Cf.* von Mehren and Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1636-55 (1968).

which was devoted to it in the first Restatement.[4] This devotion is repeated in the Restatement, Second,[5] and in certain casebooks.[6] Following an exposition of traditional doctrine, Professor Weintraub undertakes an analysis of several casebook favorites to demonstrate that domicile does not always indicate the state with the predominate interest in the issue at hand. Students will be especially grateful for the close state-interest analysis given the cases. Says the author: "Recognizing that the meaning of 'domicile' changes with the context is not sufficient to make it a useful tool for conflicts analysis."[7] The point is well made. Now, if the uses of domicile are limited, and if the proper search is for the place of most-settled connection and the subsequent determination of whether that state is "interested," why not group the uses of domicile around the several issues rather than the other way around? In other words, treat domicile the way judgments is treated and give it no separate chapter. Notwithstanding the author's critical analysis, the necessarily panoramic view of traditional doctrine forces the reader to anticipate materials later on and may be confusing to some.

From the viewpoint of a law teacher the most pleasing parts of the book are the chapter on the "Pervasive Problems" and the chapters on choice-of-law in Torts, Contracts and Property. The chapter on "Pervasive Problems" is a successful treatment of the effect upon preliminary questions—characterization, renvoi, the "public-policy" exception, and notice and proof of foreign law—of the change from a territorial to a functional method of choice-of-law. The methods are crisply distinguished.

> A territorially-oriented choice-of-law rule is one that points to a geographical location as the source of the applicable law before any inquiry is made into the content of that law. . . .
>
> On the other hand, a 'functional analysis of choice-of-law problems' describes a process that first focuses on the apparently conflicting domestic rules of two or more jurisdictions having contacts with the parties and with the transaction. The next step is to inquire into the policies underlying each state's rules, and ask whether one or the other state's policies would be meaningfully advanced by application of its domestic law in light of each state's

4. RESTATEMENT OF CONFLICT OF LAWS (1934).

5. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

6. *See, e.g.,* E. SCOLES & R. WEINTRAUB, CASES AND MATERIALS ON CONFLICT OF LAWS (1967).

7. P. 36 (bold face in original).

> contacts with the parties or with the transaction. It is one of the premises of functional choice-of-law analysis that at this point many conflicts problems will be resolved. Only one state will appear to have any 'interest' in having its law applied. . . . The apparent conflict of laws is a 'false' conflict.[8]

Apart from those who, like Professor Ehrenzweig think that "state-interest" or functional analysis are chimerical terms and that the analysis is awry from the start,[9] the main battlefield of modern conflicts is expressed in the next sentence. "If, on the other hand, there are two or more states whose policies will be advanced by applying their laws, there is a 'real conflict.' "[10] The chapters on Torts, Contracts and Property offer most of Professor Weintraub's solutions to "real conflicts." As to the preliminary problems, the author would distinguish between pigeonholing categorization of problems in course-catalogue fashion, which can be dispensed with, and the interpretation of even functional choice-of-law rules, which cannot be avoided. Like Professor Cavers,[11] the author expects that new and more rational rules will emerge from the use of the new method. "Very shortly, as a number of decisions in a given state applying the new methodology are handed down, there will emerge new 'rules' in the only sound way for rules to evolve from a case system of law—as summaries of patterns of rational and just decisions."[12] Here Professor Weintraub reminds us of the common law tradition of the development of rules through the pattern of rationalized solutions to groups of similar problems. Sceptics may wonder.

The selection of an organizational scheme for a book on conflicts must remain difficult while the subject is in a state of flux. The scholar has his own "pervasive problem" of unspinning the seamless web into a sequence of page and print. The difficulty of moving from a complex multifaceted dimension to one of comparatively simpler analytical dimension is posed by the question: where to put the chapter on jurisdiction? Unlike judgments, this material cannot be assimilated throughout the book. Professor Weintraub puts it hard upon the engaging exposition of state-

8. P. 39.

9. Most recently, *see* Ehrenzweig, *Conflict, Crisis and Confusion in Pennsylvania*, 9 DUQUESNE L. REV. 459 (1971).

10. P. 39.

11. *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965).

12. P. 45.

interest analysis as applied to the pervasive "threshold" or methodological problems. Just when we are ready to launch into choice of law with all its jurisprudential delicacies, the author serves up a potion of sterner stuff. The chapter on Jurisdiction to Adjudicate extends just over a hundred pages, nearly a quarter of the book. It is for the most part a comprehensive rendition of existing law, thorough and reliable, but understandably not very innovative. The state long-arm statutes have already occupied most of the field available to state courts. It may also be observed that *Hanson v. Denckla*[13] and the Federal Interpleader Act[14] have either chilled or made unnecessary the developments which may have been promised by Justice Traynor's notable opinion in *Atkinson*.[15] Further, the major analytical treatment of the subject by Professors von Mehren and Trautman commands the field.[16] Even so, the short section on the relationship between jurisdiction to adjudicate and choice of law is insightful and challenging. The author implies that the concept of the transitory cause of action as such is a bar to the functional integration of jurisdiction and choice of law. As he points out felicitously, "continued use of transient presence in the state . . . is the chief bundling board that separates jurisdiction and choice of law."[17] Particularly useful is the account of the problem and partial solution of "judicial direct action" in *Seider v. Roth*[18] which the author calls "the reductio ad absurdum of quasi in rem jurisdiction."[19]

The fifth chapter on Marriage, Divorce and Custody may seem out of place because it is often set toward the end of such works on the theory that the subject matter is unique or, with less than complete consistency, with the view to illustrate salient features of the general subject matter. Since the particular material shows a mixture of jurisdiction, recognition, and even choice-of-law, the decision to place it just before the next three chapters on Torts, Contracts and Property seems well conceived.

13. 357 U.S. 235 (1958).
14. 28 U.S.C. § 1335 (1948).
15. Atkinson v. Superior Ct., 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied*, 357 U.S. 569 (1958).
16. von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966).
17. P. 69 (footnotes omitted).
18. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).
19. P. 147.

There are reasons why the chapters dealing with choice-of-law are the most interesting. Generally viewed, there is more going on in choice of law than in jurisdiction and judgments. The *Sniadach*[20] case is and will be the subject of much commentary not because it promises to alter doctrines regarding garnishment as a variety of quasi in rem jurisdiction, but because it alters the relationship between debtor and creditor. It is a major event in the law of Creditor-Debtor Relations and so-called Poverty Law. The *Ezrine*[21] case will raise more ripples in the conflicts pool, but general dissatisfaction with the cognovit note and its ultimate abandonment should moot the interest stirred by the case. More specifically, Professor Weintraub's larger contribution to the subject is in choice of law. It is not surprising that he tells us at the outset that the focus of his commentary "will be on . . . 'choice-of-law' problems and, more particularly, on United States interstate choice-of-law problems—one of the most perplexing aspects of our federalism."[22] "On the interstate level, these problems reach to the taproots of our federalism."[23]

The chapter on Torts presents a two-step method for resolving torts conflicts problems. First, spurious conflicts must be identified and eliminated. This is the heart of the policy-oriented or state-interest method for choice of law. Jurists who share this approach begin to part company at the second stage the task of which is to provide a rational basis for resolving true conflicts. In his opposition to "weighing" as a technique of interest-analysis, Professor Weintraub reveals the intellectual inheritance of Brainerd Currie.[24]

> Seeking a rational solution to a true conflict does not involve weighing the interest of the two jurisdictions. To describe state policies as being weighed in order to determine which interest is greater is to speak in the loosest of metaphors. Such a weighing process is too subjective to be satisfactory for resolving a conflicts problem, except, perhaps, a problem that presents either a spurious conflict or a conflict so close to being spurious that any objec-

20. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
21. Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 919, 250 N.E.2d 474, 303 N.Y.S.2d 382 (1969).
22. P. 1.
23. P. 3.
24. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

> tive observer would agree that one state's interests clearly predominate.[25]

(This comes very close to saying that "weighing" is only tolerable when it is unnecessary.) Moving on, the author argues that attention may be given to "the preferred national solution to an interstate conflicts problem."[26] Emphasizing the general trend toward resolution in favor of policies of risk distribution in modern tort law, the author presents a synthesis of choice influencing considerations in the form of a choice-of-law "rule":

> An actor is liable for his conduct if he is liable under the law of any state whose interests would be advanced significantly by imposing liability unless imposition of liability would unfairly surprise the actor.[27]

Like it or not, case law is rapidly changing here and one who does not know his interest analysis can not be considered informed on the subject. We are reminded that in less than ten years, "[t]he District of Columbia and at least 21 states have rejected the place-of-wrong rule in some context, usually in a court decision revealing general acceptance of the premises of state-interest analysis."[28] Professor Weintraub gives us an excellent survey and analysis of the swiftly moving case law; the characterization game and other old tricks, the transitional opinions and the emerging problems attending the rejection of the old territorial approach and the confusion in working out and applying the new method are admirably presented. Many will find this to be the best part of the book. Special attention is given to products liability where the growing acceptance of state-interest analysis in deciding both tort and contract conflicts problems is influenced by the nearly universal adoption of the Uniform Commercial Code. Professor Weintraub might have added that the Code and its rival section 402A of the Restatement, Second, Torts may even compete for dominance within a single jurisdiction. Multi-state torts and workmen's compensation are briefly considered, the latter perhaps too briefly, although more is found in the chapter on Constitutional Limitations on Choice of Law. Professor Wein-

25. P. 203.
26. *Id.*
27. P. 209 (bold face in original).
28. P. 234 (footnotes omitted).

traub asserts that workmen's compensation cases are "dangerously misleading bases upon which to build general conclusions about choice-of-law proplems."[29] The reasons in support of this view would throw much light on the choice-of-law process in general and particularly upon the way similar schemes of the future—such as no-fault insurance systems—will operate in a choice-of-law context.

Professor Weintraub begins the chapter on Contracts with a forthright declaration. "It is common for American Conflicts scholars to refer to contracts as the most complex and confused area of choice-of-law problems."[30] This chapter seems less extensive in its treatment of authority than the one on Torts. Students of the subject will find themselves more on their own with the individual cases. Nevertheless, the confusing diversity of rules is concisely presented. The starting point is the important distinction between problems relating to the validity of a contract and those relating to the construction of a contract. The author ably steers us through a number of existing choice-of-law approaches to determine the validity of a contract. His own solution emphasizes "a rebuttable presumption that the validating law will be applied and [that] the courts and lawyers should be directed to specific, objectively determinable factors that will strengthen or rebut this presumption in particular cases."[31] Problems of construction vary according to whether the contract has a choice-of-law clause, a device which it is argued should control only matters of construction.

The chapter on Property provides another excellent historical and analytical treatment, beginning with the utility of the situs rule in real property conflicts. The author finds that the situs qua situs will rarely have a substantial interest in refusing to recognize a non-situs land decree. Clearly he favors "the great national interest in recognition of sister-state judgments" to "false constitutional dogmas concerning jurisdiction of the subject matter . . . ."[32] Happily the situs rule has not been as dominant in the case of "movables." The discussion distinguishes between donative transactions, where, in recent years, judicial

29. P. 262 (footnotes omitted).
30. P. 263 (footnotes omitted).
31. P. 295.
32. P. 338.

treatment has tended toward functional analysis and commercial transactions where confusion is threatened by "the poorly drafted and regressive choice-of-law provisions of Article 9 of the Uniform Commerical Code."[33] The exposition of conflicts problems involving debtor and the secured creditor and third parties is the high spot of the chapter.

The last two chapters give attention to constitutional limitations on choice-of-law and choice-of-law in the federal courts. That these chapters should come at the end indicates that American conflict of laws is a common law subject. Notwithstanding that a written constitution might, through interpretation, have been an instrument for close policing, the sources of conflicts doctrines are largely the decisions of the state courts speaking without the felt compulsion of the United States Constitution. Whether this conception of the subject squares with the practices of state-interest analysis remains to be seen. It may well be that state courts are effectively unrestricted in choice-of-law; that, upon the interpreted invitation of *International Shoe Co. v. Washington*[34] they have gone as far as long-arm statutes will reach; that the full faith and credit clause is, accordingly, a matter of routine. But state-interest analysis as a method of choice-of-law (and necessarily as a method for jurisdiction and recognition) is a dynamic theory purporting to measure the territorial and personal reach of the law of the forum and of other states. Attention to the sources of the authority of one state to set the measure of reach of the laws of another state reveals that interest analysis is a function of federalism rather than of private international law. State-interest analysis emerges as a choice-of-law theory having its source not so much expressly in constitutional law as such, but implicitly in the social, political and economic realities of our federalism.

The key to the relationship between the constitution and the emerging state-interest doctrines of the conflicts of laws is the status of state choice-of-law rules in diversity cases. In choice-of-law, the constitutional limitations to date have been the broad concepts of equal protection and due process and to a lesser and somewhat vague extent the full faith and credit clause. The generality of these clauses sets outer limits to state choice-of-law

33. *Id.*
34. 326 U.S. 310 (1945).

practices. *Klaxon*[35] stands in the way of more detailed development of constitutional choice-of-law solutions. In the fine concluding chapter on Choice-of-Law in the Federal Courts, Professor Weintraub offers his own moderate solution to the *Klaxon* issue. At present no major surgery is needed. *Erie*[36] stands. So does *Klaxon,* though slightly impoverished and a little shaky. Professor Weintraub would disregard *Klaxon* in cases where jurisdiction in personam over a party is available in a federal court and not available in a state court in the state where the federal court is sitting. Thus, federal courts would be free to fashion independent choice-of-law rules in "cases under the Federal Interpleader Act; cases in which a party utilizes federal process beyond the boundaries of the forum state under Rule 4 (f) of the Federal Rules of Civil Procedure; actions transferred on motion of the defendant under Section 1404 (a) of the Judicial Code when a state court in the transferor state would have dismissed on the basis of *forum non conveniens;* decision of non-federal claims under the doctrine of pendant jurisdiction."[37] From the other side there might be an expansion of constitutional limitations on a state's choice-of-law. "Ironically," says the author, "*Klaxon* itself might be the first to fall under such a modest expansion . . . ."[38] The effect is that of a squeeze play and one is reminded of the story of the magician and the captain's parrot who found themselves in a lifeboat after their ship had been torpedoed. "I give up," said the parrot, "what have you done with the ship?"

This overlong review has set out the organization of the book and sketched out its contents. When measured against fair criteria the work must get high marks; it is a comprehensive and timely account. Thorough documentation, including extensive citation to the now completed Restatement, Second, makes the book valuable as a reference tool. The author's own analysis and proposed solutions take their place with the best scholarship in this field. There is innovation without distortion, improvement without disorientation from existing authority. All is presented in a pleasing style and with refreshing clarity.

35. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).
36. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
37. P. 462.
38. P. 463.