Ehrenzweig's Proper Law and Proper Forum

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INTRODUCTION

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Professor Rodolfo De Nova and I have agreed in conversation that conflict of laws is a field, not of laws, but of men. European conflicts law has been so dominated by theoreticians and treatise-writers that its very history can be written in terms of their competing approaches to choice of law.¹ The history of American conflicts law lends itself to a similar treatment: after Livermore, a civil law lawyer from Louisiana, had written the first American book on the subject,² American conflicts law became subject in turn to the internationalism of Story³ and the territorialism of Beale.⁴ The ascendency of the first Restatement and its demise under the attacks of Cook,⁵ Lorenzen⁶ and Nussbaum⁷ has been often recognized and need...
not be retold here. The tale does not end, however, with the destruction of the *Restatement*: Cook himself, having helped to clear the garden, anticipated the growth of "useful vegetables." The modern history of American conflicts law has been and is being written by scholars (Cavers, Currie, Cheatham, Ehrenzweig, Hancock, Leflar, Reese, Rheinstein, Yntema, to name only a few) and scholar-judges (such as Stone, Hand, Traynor) as they go about their job of working out sensible approaches to specific problems. And, although the rivalry has probably never been more intense, nor the outcome more unclear, no one seriously doubts that the writers are still very much in charge.

Like the history of conflicts law itself, the recent history of the Association of American Law School's Round Table on Conflict of Laws can be written in terms of individual achievements: in 1958, at Chicago, the panel discussed Brainerd Currie's newly-formulated approach; in 1960, the

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8 COOK, supra note 6, at Preface.
10 SELECTED ESSAYS ON THE CONFLICT OF LAWS (1964).
12 CONFLICT OF LAWS (1962); CONFLICTS IN A NUTSHELL (1965).
14 CONFLICT OF LAWS (1959).
15 E.g., Conflict of Law and the Restatement Second, 28 LAW & CONTEMP. PROB. 679 (1963); Reese and Cheatham, Choice of the Applicable Law, 52 COLUM. L. REV. 959 (1952).
17 E.g., Basic Issues in Conflicts Law, 12 AM.J.COM.P.L. 474 (1963); Recent Literature on the Conflict of Laws: The United States and Canada, 10 AM.J.COM.P.L. 473 (1961); The Hornbook Method and the Conflict of Laws, 37 YALE L.J. 468 (1928).
19 E.g., Irving Trust Co. v. Maryland Cas. Co., 83 F.2d 168 (2d Cir. 1936); Scheer v. Rockne Motors, 68 F.2d 942, 944 (2d Cir. 1934); see Cavers, The Two "Local Law" Theories, 63 HARV. L. REV. 822 (1950).
Round Table reacted to the *Restatement Second*’s contract proposals\(^{21}\) (Willis Reese, Chief Reporter); in 1962, the discussion centered on Chief Justice Traynor’s contributions to the field; and now, the appearance of Albert Ehrenzweig’s *Conflict of Laws* is honored.

Much has happened in the field of conflict of laws since the Round Table last met in 1962: The volume of law review articles and comments devoted to this subject continues to grow; important judicial opinions seem to appear in every advance sheet; and there is even an increase in the number of texts and casebooks dealing with conflicts problems. A welcome development is the tendency of Law Reviews to provide a forum for debate among persons working in the field so that the views of each can be compared on a common topic. Thus, the *Columbia Law Review*\(^{22}\) contributed to the understanding of choice of law problems in torts cases by gathering comments from Professors Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese on *Babcock v. Jackson*.\(^{23}\) At a time when some courts show a disturbing tendency to lump together all critical work in this area as “the new approach,”\(^ {24}\) an opportunity to separate one view from another is doubly helpful. The past two years have seen other important symposiums on conflict of laws: the special issue of *Law and Contemporary Problems* devoted to “New Trends in the Conflict of Laws”\(^ {25}\) included contributions from Professors Baade, Cavers, Currie, De Nova, Ehrenzweig, Leflar, Nadelmann, Neuhaus, Reese and Wengler. And, under the chairmanship of Professor Kadish at Ann Arbor, Professor Cavers chose to devote the 1964 Cooley Lectures to conflict of laws; Professors Currie, Reese, and Rheinstein were invited as commentators. Finally, this symposium on “Ehrenzweig’s Proper Law and Proper Forum” will be published by the *Oklahoma Law Review*.

The recent decisions indicate that judges have not lagged behind the professors in their response to the new freedom in conflict of laws. Professor Leflar’s paper on “Ehrenzweig and the Courts” will discuss many of the recent cases in detail and need not be anticipated here. It should be pointed out, however, in appreciation of the efforts of the American judiciary to remain current in a complex field, that once the scholars heeded Chief Justice Traynor’s appeal to “[labor] in advance to break ground for

\(^{21}\) That same year, Professor Nadelmann discussed “The Influence of Mr. Justice Story on the American Law of Conflicts” as part of the Legal History Round Table.


new paths” in the “wilderness” of conflict of laws, the judges have not hesitated to place their steps firmly upon the new byways. Indeed, some have added to the common store of knowledge by their careful and discerning opinions.

The number and quality of books that have appeared in this field since 1962 is truly impressive. Not only did Ehrenzweig’s *Conflict of Laws* (1962) appear during that period, but the profession also received, in 1963, Currie’s *Selected Essays on the Conflict of Laws*, (which received the First Triennial Coif Award) and Stumberg’s Third Edition of the *Principles of Conflict of Laws*; in 1964, Cheatham, Griswold, Reese, and Rosenberg’s Fifth Edition of the *Cases and Materials on Conflict of Laws*, and the *Restatement Second’s Draft on Torts*. In 1965 (to take advantage of the lag between the holding of the Round Table and the publication of its proceedings), Von Mehren and Trautman published their *Law of Multistate Problems* and Ehrenzweig brought forth his newest book, *Conflicts in a Nutshell*.

It goes without saying that Ehrenzweig’s *Conflict of Laws*, rich in challenging ideas and reformulations of the case law, appearing at the height of the current period of rapidly-developing theory, not only will contribute greatly to the present understanding of conflicts law but also will exert a major influence on its future development. Even if one should ever attempt to review a colleague’s work, which I doubt, this is not the place to review the treatise. Even a colleague may be permitted to say, however, that Ehrenzweig’s work is an outstanding contribution to the field. The treatise reflects Albert’s “first life” as a continental scholar as well as his rebirth as an American common-law lawyer. His varied experience as a lawyer, judge, and professor lends unusual depth to his insights. Rarely does one man combine both major legal systems and all three levels of the profession. The very sophistication of his approach to conflicts means that the book cannot be quickly digested; but for those who persevere, it becomes a storehouse of information, an aid to research, and a stimulus to the imagination.

The Round Table Committee that planned this symposium did not select the topics for the panelists. We thought, rightly as it turns out, that their opinions varied sufficiently to provide a built-in safeguard against

28 The committee members were Professors Eugene F. Scoles, University of Illinois, Athanasios Nicolaee Yannopoulos, Louisiana State University, John R. McDonough, Jr., Stanford University, and R. Dale Vlet, The University of Oklahoma.
repetition. Thus, Currie has fulfilled his promise\textsuperscript{29} to re-read all the cases Ehrenzweig cites in support of his “rule of validation” theory as it applies to the Statute of Frauds; Leflar discusses the courts’ acceptance of Ehrenzweig’s general approach; Rheinstein analyzes the rationale set forth in the treatise for the primacy of the \textit{lex fori} as a starting point in conflict of laws;\textsuperscript{30} and Cavers investigates some of Ehrenzweig’s conflict-of-laws generalizations. Ehrenzweig was given an opportunity for rebuttal; his paper was necessarily prepared in advance of the Round Table and subsequently revised for publication after seeing the manuscripts of the contributors. He has, wisely I think, refrained from specific replies to the suggestions of the commentators (he could not resist a footnote directed to Currie\textsuperscript{31}) and has, instead, “restated” and refined some of his own views.

My years as Ehrenzweig’s colleague in conflict of laws have been and promise to remain highly stimulating. The differences of opinion between us, based on my work with Brainerd Currie, have only added to our mutual interest; and, as the following incident hopefully indicates, to the interest of our students as well. During my first year on the Boalt faculty, Albert, open-minded as always, invited me to lecture to his section of the conflicts class on Currie’s approach to conflict of laws. One of his students, sensing the dramatic possibilities of the situation, billed my lecture on the student bulletin board as “Aunt Herma’s recipe for Ehrenzweig Currie.” Despite the student’s confidence, I have not perfected that recipe; but if it could ever be served, one might discover Cook’s “useful vegetables” in the dish.


\textsuperscript{31} See Ehrenzweig's article, note 39 \textit{infra}.