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A COMPARATIVE STUDY OF CONFLICT OF LAWS:
A REVIEW OF VOLUME ONE*

Elliott E. Cheatham†

This is a notable book. It is the first volume of a comparative study of conflict of laws, undertaken at the invitation of the American Law Institute and completed with the support of the University of Michigan Law School. The author, Dr. Rabel, is a man whose great learning has been tempered and made fruitful by a distinguished and varied career as lawyer and as judge on national and international tribunals, as director of an institute of comparative law and conflict of laws serving practical as well as scholarly aims, and as author and professor of law.

The undertaking is timely. The purpose of conflict of laws is to aid in making the international and interstate systems work well in their operation on the private affairs of men. The closer cooperation of governments now imperative and the growth of international commerce so greatly desired call for a body of conflict of laws based on an understanding of the local institutions of other countries as well as of their principles of conflict of laws. This is especially true in the United States which now can have the largest role in international commerce, but which, as Professor Yntema points out in the foreword, has developed its conflict of laws rules with an eye directed almost wholly to international or interstate problems. And in the development of local institutions to meet changed social and economic conditions, comparative study may yield suggestions and accomplish the author’s purpose “to enrich, rather than to standardize the juridical world.”† The present volume, devoted to personal and family law, has a special timeliness of its own, for within the year the Supreme Court of the United States divided sharply on the very bases of jurisdiction for divorce.‡

In the preface the author, referring to the need “for a total reconsideration of the international purposes and the undeveloped resources

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‡ See, infra, note 5.
of this branch of law," states his principal purpose to be only "the collection and grouping of the significant rules, theories, critical views, and proposals, and the cases animated by them." He has given much more. In each area Dr. Rabel provides analysis and appraisal of the major problems and solutions in family law, mirrored as they are in diverse local laws. On the resultant conflicts he gives brief statements of the American rules with copious reference to more detailed treatments. There follows an outline of other systems of conflicts in extraordinarily compact but clear form, with the inquiry ranging from Canada south to Chile and from England east to Japan. The special attention given to the highly developed systems of Western Europe permits the discussion of many problems and solutions already dealt with or discussed there, though not yet presented or even envisaged in this country. All is done with unremitting attention to the appropriate bases for decision and with the author's own restrained conclusions. The book has the charm of extraordinary learning and mature wisdom, modestly presented.

The first few chapters of the book give a compact sketch of the literature and sources of the subject, a general discussion of personal law under the different systems of domicile or nationality, and the author's views on some of the pervasive problems of conflict of laws. Here he offers his basic conviction that each case should be considered on its merits rather than hastily shoved under general rules, especially because this branch of the law is immature and needs prolonged cultivation.

Each part of the book begins with an examination of the social as well as the legal problems rather than with a statement of the rules of law.

"... in the statutist conception, the object of conflicts law is the substantive rule of law. The substitution for this of the legal relations between persons or of persons to things by Savigny constitutes the chief advance from this to the modern conception. . . . The starting point of the analysis, as should be obvious, ought not to be the legal relation. . . . At this stage, there is nothing but a factual or 'social' situation. . . . Evidently, conflicts rules must operate . . . directly on the facts of life, not on a legally predicated, abstract subject matter."*

For the author the problem of renvoi is not to be taken in the lump, but its various applications are to be given individual consideration.

* Page xxii.

* Pages 45-46.
Characterization is essentially interpretation, and whether regarded from the viewpoint of the interpretation of terms or from that of the classification of legal problems and institutions, it proceeds with attention to conflicts considerations rather than through a blind transfer of internal law conceptions.

The body of the book is devoted to family law, to marriage, its formation, effects, and dissolution, and to parental relations, legitimacy, legitimation, illegitimacy, and adoption. Only a few comments are possible.

On marriage the author expresses the belief that there is developing in the United States a distinction elsewhere fundamental between the problems of formalities and those of intrinsic validity. The partial rejection of the law of the place of celebration in conflict of laws and the increasing use of the personal law are evidenced not only by the public policy doctrine but by the numerous marriage evasion statutes. Under the effects of marriage, one perplexing problem discussed is drawing the appropriate line between the field of marital property and the field of inheritance, a matter especially important when the spouses move from a non-community property state to a community property state.

On divorce the division in the Supreme Court of the United States is now deeper than it has ever been. In the second Williams case, some of the justices denied that there was to be found in the Court's decision a domicil principle which others said had never been questioned. One consideration which induced the minority to disregard domicil as a jurisdictional factor is the migratory character of the American people, with the consequent inability of a substantial proportion to meet the old test of domicil of choice anywhere and the denial of jurisdiction over a group of the population most apt to desire divorce.

Of the first Williams case the author gives the interpretation that when the divorce forum is the domicil of the plaintiff, no additional factor such as matrimonial domicil or fault by the defendant or personal service on him is necessary to the protection of the decree under the full faith and credit clause, with the consequent overthrow of old special rules of nonrecognition of foreign divorces in North Carolina and a few other states. The second Williams case and the Esenwein

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7 He has some kind words, with which I agree, for the much maligned conception, matrimonial domicil. See page 399.
8 Note 5, supra.
case were decided too late for comment. Clearly the author would agree with the majority in the second *Williams* case, insisting as he does that divorce judgments in the United States be supported by the bona fide domicil of at least one of the parties and that inquiry by another court in domicil be not impeded. The minority judges may gain some support, however, for dealing compassionately with migrants from the practice of a few countries to use residence or dwelling place as at times an important contact when there is no domicil of choice, and from the special treatment of stateless persons in countries where nationality is the test of personal law. The rich migrant with two or three homes has received much attention, most of it from the tax collector. The poor migrant, perhaps, will now come in for more consideration from the law. The *Esenwein* case, with the important suggestion by Justice Douglas that a divorce may be good to terminate the personal relation of the spouses but not to end the husband's duty of support, is not explicitly commented on, but there is a useful discussion of alimony following a foreign divorce.

The author shows the great variety of parental relations and obligations in local law, masquerading, it may be, under the same term, and he regrets the tendency of American courts to force these varied relations into the relatively simple American concepts. He mentions without criticism the refusal of the Supreme Court to require that effect be given to foreign legitimation and foreign adoption in two cases, *Olmsted v. Olmsted* and *Hood v. McGehee*—a result which it may be hoped will be upset in interstate conflicts under the view now prevailing of the sweeping effect of the full faith and credit clause. The tabloid's delight, a trial to determine paternity, would take a different turn under a law like that of Norway or Finland which imposes an obligation to support an illegitimate child on any man who has cohabited with the mother during the critical period, the so-called payfather.

In the preface the author makes generous acknowledgment for aid in the work. Two of those who made the work feasible contribute a fine foreword. Mr. William Draper Lewis, the director of the American

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10 Pages 468, 505, 514.
11 Pages 111-112.
12 Pages 122-124.
13 *216 U.S. 386, 30 S. Ct. 292 (1910).*
14 *237 U.S. 611, 35 S. Ct. 718 (1915).*
Law Institute, after indicating the outstanding position of Dr. Rabel, stresses the comprehensive assistance the book gives on foreign law in a form readily available to men of the common law. Though directed initially to Americans, it may serve those of the civil law equally well in acquainting them with the institutions and methods of the common law.

Professor Hessel E. Yntema, the editor of Michigan Legal Studies of which this book forms a part, bore the heavy responsibility of editing the manuscript and seeing it through the press, as Dr. Rabel says, with an unprecedented sacrifice of time and labor. Professor Yntema makes a strong plea for the comparative method. The generous hopes of Story and Savigny a hundred years ago for the development of a truly international jurisprudence of conflict of laws were thwarted, he points out, by the rise of nationalism conceived first as a generous and liberalizing force, and by narrow and constricting dogmas of nationality and of territorialism. In conflict of laws comparative studies have not merely the liberalizing force which they may have in every field. They serve as well an essential informative purpose, for conflicts rules look to reciprocal recognition and understanding of the respective specific institutions of local law. "Justice both comprehends and transcends local interests." And rightly he terms Dr. Rabel's book "an exemplar of the comparative method in law."