

## Foreword

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### I

**T**HOSE who prior to World War II knew the chief legal personalities of Europe recognized the outstanding position held by Ernst Rabel, the author of the present treatise.

Born in 1874 in Austria, as a young man he studied law in his own country, in Germany, and in France. His university career has been most distinguished; he taught Roman and modern civil law in Switzerland and Germany, the many invitations he received leading to celebrated professorates, notably at Munich and ultimately at Berlin, where he occupied an influential position. His contributions to comparative legal history have been noteworthy; he first introduced the comparative study of Egyptian papyri with the medieval documents; he is a leader in the efforts, through the modern search for interpolations, to reconstruct the original Roman private law; his services as editor of various research publications in the field of legal history are well known. These broad interests were complemented by extensive comparative work on the modern Swiss, French, and German laws, later including the Common Law as well; his contributions in the preparation of international drafts of unified law, especially that on sales of goods, are widely recognized.

In Rabel, outstanding legal scholarship has been enriched by wide and unusual practical experience. He practiced law in Vienna and served as judge in the appellate courts of Basle and Munich. Shortly after the First World War, he became a member of the German-Italian arbitral tribunal. As a judge of the Court of International Justice (World Court) at the Hague, between 1925 and 1928, he took part in German and

Polish suits. He was president of the International Association of Comparative Law and a member of the Council and Executive Committee of the Institute for Unification of private Law in Rome. He received diverse honors in Italy, Greece, Poland, Spain, and Norway.

The central interests and achievements of the author have been in the development of comparative legal research. In the course of the First World War, he recognized the danger of a narrow legal nationalism and in 1916 founded and became Director of the Institute of Comparative Law in Munich, the world's first research institute for comparative law. In 1926, being appointed Director of the Kaiser Wilhelm Institute of Foreign and International Private Law in Berlin, he was entrusted with the task of organizing and conducting a much larger enterprise. This Institute, parallel to the Institute of Foreign Public Law and the Law of Nations, directed by the late Viktor Bruns, was devoted to research as well as to the giving of practical information and advice to the Foreign Office in Germany, legislative authorities, courts, lawyers, and business firms. Under Rabel's guidance, the Institute trained a staff of experts in the various legal systems of the world, some of whom are now in this country as law teachers or members of the legal profession, and, in conjunction with the sister organization, established the most comprehensive law library in Europe. The opinions delivered by the Institute under Professor Rabel's responsibility in matters of legislation, conflict of laws, international trade and international law, numbered about a thousand. The Institute exercised a profound influence in the legal thought and methods not only of Germany but also of those numerous other countries whose scholars availed themselves of its facilities.

After the completion of the Restatement of the Law of Conflict of Laws in 1934, the American Law Institute had under consideration a plan to supplement the Restatement by a

parallel work presenting to the American public the rules, principles, and doctrines of the leading foreign countries. But, until in 1937 the Nazi insanity removed from the directorship of the world's then principal organization devoted to the study of comparative law the director whose foresight and leadership conceived and conducted it, it had seemed all but impossible to find the right man for a task requiring so wide and mature a background of learning and experience. The opportunity thus offered to bring Doctor Rabel to this country to do much to break down our isolationist legal attitudes was unique. Doctor Rabel knows the private law systems of German and Latin-American countries. He knows much of the common law of the English-speaking peoples. Furthermore, he has not only the law professor's knowledge of legal theory, but the practical knowledge of the similarities and differences in the application of the legal principles of different systems to the solution of concrete legal problems.

Accordingly, in the spring of 1939, the American Law Institute took steps to bring Dr. Rabel to the United States with the guarantee of two years' employment. He arrived in this country in September, 1939, and at once began work preparatory to the preparation of this treatise, of which the first volume is now published. In the spring of 1942, his arrangement with the Institute having been fulfilled, the Law School of the University of Michigan gave him a position, which has now enabled him to complete the first of the volumes contemplated. His work in Michigan has been done under the most fortunate surroundings, as he has had the active advice and assistance from the point of view of a leading American specialist in international law, Professor Hessel E. Yntema.

The present treatise is the confirmation of Doctor Rabel's life work. Its primary purpose is to make a comparison of the significant legal systems of conflict of laws with reference to the specific problems arising in each topic. **The first volume,**

besides containing a most interesting and comprehensive introduction dealing with the literature, theories, and sources of the subject, is devoted to a study of the problems of what may be described as family relations, such as the personal law of individuals, marriage, divorce and annulment, and parental relations. It is a field presenting a variety of interesting and difficult conflicts problems. The second volume now well under way will deal principally with Foreign Corporations, Torts, and the General Problems of Contracts. It is hoped that there may be further volumes, covering the other legal topics treated in the American Law Institute's Restatement of the Law of Conflict of Laws.

In the course of its preparation and completion, the plan of the work has undergone substantial change.

The original plan was that of a work which, in arrangement, should exactly parallel the sections of the Restatement of Conflict of Laws. This plan has turned out to be impracticable. The differences between the European and American systems are too great to allow such minute comparison, section by section. The major subdivisions, however, present sufficient analogy to those of the Restatement to draw attention to the significant distinctions and similarities. Comparison between the foreign and American law has been emphasized throughout. The book does not simply constitute a presentation of foreign law, but a painstaking and comprehensive comparison of the solutions accorded to the particular problems of family law, both here and abroad. It is this feature that gives the work its special value and attractiveness.

The author conceives that comparison of laws requires study in the legal systems compared of the solutions reached on particular practical problems rather than the review of general theories. In thus emphasizing the comparative solutions of concrete problems, he is in accord with our common law habit of thought. Consistently carried out in the present treatise,

it greatly increases the value of the work in the English-speaking countries. The method does not ignore the necessary consideration of theories but obviously gives them less significance than is usually found in most European literature.

The work offers not only comprehensive assistance to the practicing lawyer or the judge who is concerned to know the answers in other countries to a conflict of laws problem, but will also furnish the English-speaking reader with foreign law concepts of the rules of conflicts of laws and their application in a form easily comprehended by those whose legal training is largely confined to our common law and statutes. In all the topics treated, the author enables us to appreciate the "other fellow's" point of view and compare its practical results with our own. This is not an insignificant service to a people just awakening from a self-centered legal sleep to an appreciation of the fact that we must hereafter go forward in a world which is increasingly one.

WILLIAM DRAPER LEWIS, *Director*  
*The American Law Institute*

## II

IT is appropriate to add a few remarks from the viewpoint of the University of Michigan. The foregoing statement by the director of the American Law Institute outlines the distinguished career of the author of the present work and indicates the circumstances under which he was invited by the Institute to undertake a comparative survey of the existing systems of conflicts law. As therefrom appears, while the inspiration to bring to this country an internationally recognized jurist with unique qualifications for the task—an extraordinary opportunity afforded only by the malign policy that has betrayed Germany and crucified millions in this generation—is to be credited to the Institute and more particularly to the generous wisdom of the director, the studies reflected in the

present volume have been substantially accomplished at Ann Arbor, in large part with the aid of funds and further assistance provided by the University of Michigan.

This co-operation, illustrating an appropriate function, as once suggested by the writer, for a nondenominational Institute in the world of academic rivalries, deserves a word of commendation. On the part of the University, it has been motivated not only by the liberal disposition of the Faculty of Law to promote worth-while research and their long-standing interest in comparative legal studies, but more especially by the significance of the enterprise. This is no mere *tabula ex naufragio*, thus rescued from the maelstrom in which contemporary European culture is engulfed. The survey undertaken is essential at the present time for the proper development of a branch of law of special interest for interstate and international trade, arising, as Story states, "from the conflict of the laws of different nations, in their actual application to modern commerce and intercourse." More generally, it exemplifies a fundamental mode of legal investigation, which each day becomes more nearly indispensable in the modern world.

The latter consideration, the need in these times for comparative legal research, does not call for extensive comment. The present conflict, multiplying contacts among the most distant peoples and through untold suffering and sacrifice uniting them to vindicate the common values of humanity, like the Napoleonic wars and the War of 1914, again emphasizes that no one is unconditionally immune from influences operative within the effective orbit of international intercourse. In a universe progressively interrelated by the miracles of modern communication, therefore, it is neither prudent nor even longer possible for any nation to pursue a policy of self-sufficient isolation. In such a universe, the notion that the corresponding legal order is compartmentalized exclusively within political frontiers is inadequate.

For legal science, so pervasively indoctrinated these hundred years by the preconceptions of sovereignty and nationalism, this spells the necessity of comparative reorientation, of ampler realization that justice both comprehends and transcends local interests. If the price of peace and liberty is constant vigilance in an integrated world, it is expedient to know what transpires abroad as well as at home. While legal science in each country will and should continue to cultivate first its peculiar institutions and traditions, these can no longer be accepted as the horizon of legal knowledge. The practical, specialized study of indigenous techniques, legislative, judicial, and administrative, must be complemented by scientific comparison with other legal systems—to ascertain their manifold bearings on domestic interests; to prepare the reforms that may be desired from time to time to bring the municipal laws into harmony with advancing conceptions of justice and the requirements of the international community; to share in efforts to provide appropriate uniform legislation for the commerce of the world; in fine, to establish a more objective scientific basis for the consideration of legal problems. To attain these ends, indeed even to appreciate the special genius of each legal system, the comparative method, necessarily supposing intensive historical and functional investigation of particular institutions, is indicated. Without this perspective, as Ihering pointed out long ago, there is no legal science worthy of the name. Blind without history, jurisprudence without comparative understanding can scarcely rise above the level of provincial casuistry and empirical craft.

Obviously, such understanding of the existing legal systems is most immediately needed in those branches of law that are concerned with international relations. Of these, the law of conflict of laws, devoted to the principles governing assumption of jurisdiction and resort to the proper law in the solution of private disputes of an international complexion, is in a parlous state, permitted presumably by the fact that it is

almost wholly administered in the ordinary courts in the positivistic atmosphere of municipal law. For, in this subject matter concerned with determining the application of the diverse legal provisions that may be involved in any such dispute, in consonance with, or at least without violating, common standards of justice, emphasis is rampant upon territorialism and nationality, upon the dominant pretensions of *lex fori* or *ordre public*, in other words, upon ideas that obscure, limit, or frustrate the very purpose in view.

This, it is worth recalling, was not always the emphasis. More than a hundred years ago, Story founded the modern law of conflict of laws on a broad, comparative basis, that looked, despite uncertainty and diversity in the then existing doctrines, "towards the establishment of a general system of international jurisprudence, which shall elevate the policy, subserve the interests, and promote the common convenience of all nations." Fifteen years after Story penned these words, in the preface to the eighth volume of the monumental *System des heutigen Römischen Rechts*, Savigny voiced two interesting prognostications in like vein. Adverting to the variety of opinions among both writers and courts respecting conflicts of laws, he nevertheless conceived that, from the exceptional and active common concern in the problems of this field of law, there would develop a universal, existent community of legal understanding and legal life. The further suggestion that the principle of nationality, then coming into prominence, would not make itself felt in a subject, the nature of which involves the resolution of conflicts of national laws within a recognized community of the various nations, equally reflects Savigny's international point of view.

How soon and how far these anticipations were to be disappointed is writ at large in the illuminating introduction that forms Part One of the present volume.

*Aetas parentum, peior avis, tulit  
Nos nequiores, mox daturos  
Progeniem vitiosiore.*

But two years after Savigny wrote, the doctrine of nationality, which in its exaggeration has so much contributed to international disorder during the past century, was proclaimed by Mancini as the fundamental principle of the law of nations and shortly became the distinctive basis of legislation in Continental Europe. Consequently, to borrow the author's expression, the international community, as contemplated by Story and Savigny, disintegrated. Story's broad understanding of the conflicts of law doctrines current in his time eventually shrank in the United States to the dimensions of the introverted treatment of the subject by Wharton and later by Beale: in England, Westlake bridged the way to Dicey's Anglican positivism; on the Continent, Savigny and his international-minded successors were duly eclipsed by the intransigent, if despairing, nationalism of Bartin and Kahn.

Thus, by 1900, the dominant supposition was a caricature of the truism that international private law is not international but private law; absorbed in domestic legislation and precedents, the doctrine reflected the prevailing provincial dogmatisms of legal science generally. Apparently, justified recognition of the circumstance that, under existing conditions, national courts typically administer conflicts rules as a branch of municipal law, was thought to warrant indifference to their international *raison d'être*. Consequently, legal theory in this field in recent years, having lost sight of the underlying purpose to be had in view, has devoted itself with aprioristic methods to unreal issues and become something of a logical mystery. Essentially, it faces the problem of how to square in terms of national interest or tradition a circle of internationally superior needs.

In this country, the current isolationism of conflicts of law doctrine has been accentuated by certain contributing factors: first, by a quite natural preoccupation on the part of specialists in the subject with the relatively frequent internal conflicts of jurisdiction and law arising within the federal structure of the United States; and second, by the extensive influence of the theories expounded by Beale, including the belief that reference in this field to civil law authorities is not one that tends "to preserve the correctness and purity of the common law." It deserves repeating—even after almost twenty years—that this is a conceit, strange and for the United States inexpedient. Strange, since it disavows the considerable indebtedness of common law doctrines respecting conflicts of laws to the civil law; inexpedient, since a great commercial nation cannot afford to remain in ignorance, particularly in this subject matter, of the laws of foreign countries with which it trades. In consequence of these influences, despite the pioneer work of Lorenzen and more recent contributions by Kuhn, Nussbaum, and others, inadequate attention has been given in this country to the relations between the doctrines of conflicts law as here evolved and those of foreign countries other than England. It affords little consolation that the condition is paralleled elsewhere. But it does serve to explain why no systematic effort has been made hitherto to provide a comprehensive, critical comparison of the existing systems of private international law.

Had it not been for this background, the preparation of the Restatement of the Law of Conflict of Laws, initiated in 1923 and promulgated in 1934, might well have been the occasion for such a survey. This, however, was not to be—it was precluded by the prepossessions of the reporter, by the curious determination, deviating from the original plan, to restate "the law as it is," and still more effectually by unfamiliarity with comparable foreign doctrines on the part of those invited

to participate as advisers (except for a time Lorenzen). Hence, the failure in this monumental codification of the Common Law to take account of other systems was not merely an effect of, but has become a cause to perpetuate an inappropriate view of international private law, which no longer befits the United States. On this count alone and apart from other limitations duly noted by critics, we repeat, the Restatement needs to be restated. But the preceding observations will suggest that it is still more important to provide the indispensable basis for such revision, including the comparative information without which inbred doctrines remain unquestioned and their objective, scientific consideration in terms of international needs is excluded *a limine*.

To supply this need, as the author justly observes in the preface, is a large task. The requisite survey of the existing systems of conflicts law involves critical examination and comparison of the significant rules on specific problems with reference to their evolution and purposes, as exemplified in these systems, and in the light of the pertinent literature and jurisprudence for each country, preferably accompanied by corresponding suggestions for improvement. Moreover, as conflicts rules look to reciprocal recognition and understanding of the respective specific institutions of local law, it is necessary that any such survey should be made on the background, however succinctly adumbrated, of the historical development and contemporary nature, significance, and interrelations of these institutions, considered in the context of the legislations of which they form part. The present volume is a first and substantial contribution to this undertaking; in addition to a magistral review of the literature, sources, doctrinal development, and general theories of the subject, it provides a comparative conspectus of the rules applicable to conflicts in the extensive field of family law. It is more than an annotation to the Restatement of the Law of Conflict of Laws, as was at first

contemplated. It is the first comprehensive comparative legal study that has been published in English for many moons, certainly the first in any language to take adequate account of the laws of the Americas as well as of Europe. It is, in sum, a pioneer, intensive exploration of a substantial part of the labyrinth of the laws of conflicts from the indicated international point of view, a contribution not only essential for progress in this field but also of general interest as an exemplar of the comparative method in law.

In pursuance of its undertaking to support this enterprise, the University has made substantial provision to maintain and implement the author's individual researches, including, among other things, accommodations in the Legal Research Library, ministerial assistance as required from time to time, and editorial collaboration, especially in adapting the author's incisive expressions to the idiosyncrasies of English style, the independent verification of all citations, and the preparation of the various tables (except for the index, which was made up by the author). In arranging this assistance, the responsibility for which was cast upon the editor as a condition of the adoption of the undertaking for a time by the University, various obligations have been incurred, which deserve to be acknowledged:

To the University authorities, to the Faculty of Law and Dean Stason in particular, for their constant and generous support in the effective prosecution of the work. To all those who, as members of the research staff, were engaged in one way or another in preparing, editing, and seeing the manuscript through the press, an exacting task in which the comparative use of legal materials from many countries has presented an unusual variety of questions, for their indispensable, respective contributions, efficiently rendered. To Eldon R. James, Law Librarian, Library of Congress, and Arthur C. Pulling, Director of the Harvard Law Library, for the appreciated as-

sistance of their respective staffs, which has made it possible to verify all save perhaps a dozen of the limited number of references to works not available in the Legal Research Library. To Hobart R. Coffey, to whom the editor is indebted equally with the author for expert relief unstintingly given in the revision of the manuscript. And, not least, to the author himself for unfailing co-operation and courageous devotion to a complex task under disturbed conditions.

Yet this is to be added. However indispensable the assistance provided by the University has been for the prosecution of the work, the product is in substance exclusively the author's; he alone collected the materials, and the views expressed herein are his. It is fortunate that a jurist of the author's attainments and scholarly sagacity has addressed himself to the task, which, it is hoped, may be extended in additional volumes to other significant branches of conflicts law.

HESSEL E. YNTEMA

## Preface

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FULL application of comparative methods to the law of conflicts requires a working plan of some magnitude. We ought to take stock of the conflicts rules existing in the different countries of the world, state their similarities or dissimilarities, and investigate their purposes and effects. The solutions thus ascertained should moreover be subjected to an estimation of their usefulness, by the standards appropriate to their natural objective. Conflicts rules have to place private life and business relations upon the legal background suitable to satisfactory intercourse among states and nations. They are valuable to the extent that their practical functioning, rather than their legal appearance, serves this purpose.

To meet the challenge of this program with limited forces is a risky undertaking. Nevertheless it has to be attempted. The conditions of the law of conflicts are deplorable. It may be said, to the reader's and my own consolation, that the staggering provincialism apparent in the international family law presented in this volume is not equaled in other parts. But if conflicts problems have been cultivated by men of the highest erudition, idealism, and endeavor, they have also been the object of prejudice and dogmatism. Suggestions of almost all needed ideas may be found, but little agreement on a sound choice. The courts of this country dealing with a wealth of interstate cases have prevailingly shown sincere respect for foreign legislation and applied an accomplished method of comparative research. But this admirable attitude, which is the most outstanding model for the practice of private international law, suffers exceptions, and in the field of international relations throughout the world, despite enormous efforts, the simple truth that harmony presupposes mutual understanding

and tolerance, has not prevailed in conflicts law more than in foreign affairs.

All considered, the further we extend our comparative survey, the less doubt can subsist about the need for a total reconsideration of the international purpose and the undeveloped resources of this branch of law. The time has passed when we may rest satisfied to state a rule and to regret it. Not that the premature legislation or halfhearted treaty making, familiar to the last decades, should be advocated. What this book is intended to suggest is a patient and concerted world-wide discussion determined to relieve the present chaos. I am convinced that large results must not be deferred to a remote future. The legal profession has great power and deserves great confidence. If it decided to consider conflicts law as a matter of general interest and gave it its unbiased attention, much might be obtained that now seems Utopian. I am particularly hopeful of the lawyers in the United States.

According to the program, I have regarded my foremost task to be the collection and grouping of the significant rules, theories, critical views, and proposals, and the cases animated by them. This task is comprehensive and worth-while enough to dictate sacrifices. It has not been possible to spare the reader and myself tedious enumerations and many a mosaic of incoherent pieces, and I have had to renounce historical and theoretical developments. Neither is there space to describe at length the institutions of private law that are the subject matter of the conflicts rules. This compulsory limitation is the more regrettable, as common law lawyers have not been introduced to the concepts of civil law as European lawyers were informed of Anglo-American institutions during the period between the two wars.

I have also restricted my own critical appraisals, and I have doubted whether any recommendations for the future should be added. Yet, in view of the personal encouragement that I

have received from such scholars as Elliott E. Cheatham, Max Rheinstein, and Hessel E. Yntema, and recently in Ernest Lorenzen's great review of the last period of American conflicts law, it seems to be the writer's duty not entirely to conceal his impressions regarding the desirable path that the evolution may take. Theoretical conclusions of more general scope as well as specified proposals for elaborating the rules may be expected, when comparative research in this singular and disturbed field has become broader and bolder. I hope the survey itself will almost automatically arouse the wish for certain reforms.

Because of the war time, European rules and cases are stated, in principle, as they were in 1939 at the beginning of the war. This is a rather convenient date for a view back, while a new epoch is starting. More recent materials coming through have, of course, been registered.

The Legal Research Library of the University of Michigan in Ann Arbor has afforded me a hospitable haven and ample facilities for work. Its farsighted policy has enabled me, for the first time in a work of this kind, to include a substantial amount of Latin-American doctrine. My satisfaction in this regard is somewhat impaired by the fear that my efforts of analysis have not been entirely successful in regard to certain Latin-American formulations. As these countries possess outstanding scholars in this field who are the natural intermediaries between common law and civil law, it is to be hoped that they will participate in carrying on the work here begun and supply the details not yet mentioned in the literature but with which the courts must deal.

To the American Law Institute, the Dean and Faculty of the Law School, University of Michigan, and the Research Department of the W. W. Cook Foundation directed by Professor Lewis M. Simes, I owe deepest gratitude. Dean Emeritus William Draper Lewis, the eminent and be-

loved director of the American Law Institute, has rescued me from the cataclysm of Europe; he has been the original sponsor of this enterprise and has not ceased to manifest his friendly interest in it. Professor Hessel E. Yntema, since 1940, has fulfilled his task as editor with an unprecedented sacrifice of time and labor. He has generously provided me with informations and suggestions, constantly supervised during all these years the comprehensive ministerial aid furnished by the research staff of the Faculty, and devoted his command of English style to an extremely delicate and exacting revision of the language of my manuscript. Professor Hobart R. Coffey has liberally shared in this burden, and to him, as Law Librarian, as well as to his entire staff, who have been most kind, I am grateful. I feel cordially obligated also for the devoted services of Mrs. Lilly Melchior Roberts, who, with the assistance of Miss Dorothy Karl, has been especially helpful in checking the documentation, to Dr. Vladimir Gsovski, Chief of the Foreign Laws Section, Law Library of the Library of Congress, and to those whose contributions Mr. Yntema has deservedly acknowledged.

Finally, it is my privilege to thank publicly Professor Max Rheinstein of the University of Chicago, the most faithful of friends, for the help he has freely given to this book as well as to me and my family. I am happy to see him represent in this country our common scientific ideals.

ERNST RABEL

Ann Arbor, Michigan

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