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REVIEWS

A FUNCTIONAL APPROACH TO THE CONFLICT OF LAWS

Philip A. Trautman*

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

Professor Weintraub has produced a text which within a very short time will take its place as a standard reference work along with those of Cavers, Currie, Ehrenzweig, Goodrich and Scoles, Leflar, Stumberg, and von Mehren and Trautman.¹ While a considerable portion of the book has previously appeared in print in various articles by the author, much of it is new and all of it is updated and timely. Commentary is included upon most of the traditional areas of conflict of laws, including jurisdiction, choice of law, constitutional limitations on each of these, and the particular problems in federal courts. There is no separate treatment of judgments, but some of the problems involved are discussed at appropriate places throughout the text. For those not particularly conversant with conflicts terminology, the book should prove to be readable and understandable. For those acquainted with the subject matter, the book should serve to stimulate and challenge previously formulated premises and conclusions.

The subject of jurisdiction, which has not previously been treated by Professor Weintraub in his writings, receives major discussion. The constitutional framework of due process is first outlined, followed by a detailed discussion of the bases for in personam, in rem and quasi in rem jurisdiction, concluding with an analysis of *Seider v. Roth*² and

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1. D. CAVERS, THE CHOICE OF LAW PROCESS (1965); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); A. EHRENZWEIG, CONFLICT OF LAWS (1962); H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS (4th ed. 1964); R. LEFLAR, AMERICAN CONFLICTS LAW (1968); G. STUMBERG, PRINCIPLES OF CONFLICTS OF LAWS (3d ed. 1963); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965).

2. 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966). *Seider* allowed quasi in rem jurisdiction to be obtained against an insured by attachment of the insurer's contractual obligation to defend and indemnify.

its accompanying problems. Several major themes of the jurisdiction discussion deserve particular mention.

The relationship between jurisdiction and choice of law, both as to constitutional limitations and practical implementation of relevant policies, is pointed out throughout the text. This relationship is sometimes overlooked in the literature and it is desirable to recall it from time to time. Likewise desirable is the author's emphasis that the interpretation of constitutional limitations upon jurisdiction is a continuing process. It has changed in the past and will continue to do so in the future. Thus, the present importance of physical nexus between a defendant and a state may in time give way to a general test of whether, under all the circumstances, it is reasonable to exercise jurisdiction.

There is a particularly good examination of modern long-arm statutes which provide for jurisdiction upon the commission of a tort. Included are the problems which arise in deciding whether a statute applies when the defendant has acted in the forum with resultant harm there, or has acted outside the forum with harm therein, or has only put a product in the stream of commerce. Concerning the last two of these cases, foreseeability of harm in the forum is stated to be the key to satisfaction of the requirements of due process. When the tort is a libel published in the forum, the question arises whether the first amendment imposes requirements upon the exercise of jurisdiction additional to those of due process. The author suggests that restraint should be exercised in protecting the publisher from suit in view of the plaintiff's interest in a convenient forum and the likelihood that witnesses will be present in the forum and that forum law will govern the substantive issue of libel. The protection of the publisher, it is asserted, should derive not so much from jurisdictional limitations as from constitutional protection of free speech.³

Weintraub justifiably takes issue, as have others, with the use of quasi in rem jurisdiction to determine claims against the defendant which are unrelated to the property when there is an appropriate forum reasonably available elsewhere for in personam jurisdiction. Such practice should be declared a denial of due process, and until

3. See, e.g., *New York Times Company v. Sullivan*, 376 U.S. 254 (1964); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

this is done it is urged that greater use be made of the doctrine of forum non conveniens to dismiss such suits.⁴

While the due process clause has been the chief constitutional limitation on state court jurisdiction, the point is made that the commerce clause can serve as a useful addition to due process concepts. The national interest in avoiding unreasonable burdens on interstate commerce may serve as the limiting factor in those instances where the exercise of jurisdiction comes close to the due process line. And with the trend toward the enactment and liberal interpretation of long-arm statutes, the limits of due process may be approached more often in the future.

The jurisdiction chapter provides the reader with an excellent overview of the subject and an analysis of many of the present critical problems. The book also contains a full but concise treatment of the principal problems relating to marriage, divorce and custody, including an analysis of principles of jurisdiction, choice of law, and recognition of judgment pertaining to each topic. An illustration of each is useful.

Regarding jurisdiction, a persuasive argument is presented for the adoption of long-arm provisions to enable the marital domicile to exercise jurisdiction over a non-domiciliary husband for the purpose of making an alimony and support decree for the benefit of his wife and children. Likewise, it is urged that a state that has a reasonable basis for in personam jurisdiction over an absent spouse and parent should have a long-arm statute which provides for jurisdiction in custody proceedings. An appropriate long-arm provision at the marital domicile would presumably have such a reasonable basis.

As to choice of law, the author points out that the usual result has been that the state which is the marital domicile will hold a marriage valid if valid under the law of the state where it was celebrated, even though the marriage would have been invalid if celebrated at the domicile. This result may be desirable, but a better explanation might be based upon dissatisfaction with the domicile's invalidating statute

4. The author wisely counsels a general greater usage of forum non conveniens to increase efficiency in the courts and fairness to the parties. *But see* *Lansverk v. Studebaker-Packard Corp.*, 54 Wn.2d 124, 338 P.2d 747 (1959), which rejects the doctrine. *See* Trautman, *Forum Non Conveniens in Washington—A Dead Issue?*, 35 WASH. L. REV. 88 (1960).

rather than a pretense at choice of law analysis.⁵ Weintraub's reaction to the situation is particularly appropriate:⁶

If . . . courts continue, as they probably will, to use a pseudo-conflicts analysis in order to avoid draconian marriage law, this conduct is understandable. There is great temptation to elude the local rule. We should recognize, however, that this sort of adjudication bears about as much resemblance to the kind of state-interest analysis that, in other areas, produces wise and just solutions to conflicts problems, as reading tea leaves.

In the area of judgments, custody decrees are subject to modification in all states upon changes in circumstances. This has resulted in repeated litigation of custody awards. As a partial solution, Weintraub offers the welcome suggestion that courts voluntarily refrain from modifying a custody decree of another state when (1) that decree was rendered by a court that had sufficient contacts with the parties to reach an intelligent decision, (2) that other court still has these contacts so that it could make an informed determination of the request for modification, and (3) there is no compelling reason, such as imminent threat of irreparable harm to the child, why the parties should not be remitted to that other state for decision on the requested modification. This concept of self-restraint should be suggested to each court presented with a modification petition.

A chapter of the book is devoted to the problems of choice of law in federal courts. The development of *Erie Railroad Co. v. Tompkins*⁷ is traced through the outcome-determinative test, *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*,⁸ and *Hanna v. Plumer*.⁹ Particular treatment is given to the *Klaxon*¹⁰ principle that state choice of law rules govern in federal diversity cases. Weintraub asserts that the validity of requiring federal courts to apply state conflicts rules turns upon a considera-

5. A state-interest analysis, the approach generally advocated in the book for the resolution of choice of law problems, would perhaps suggest the invalidation of the marriage. Though much can be said for the application of the "better law," the better law ought to be that of a state with a reasonable contact. Certainly, it should not be the law of a state selected by the parties for the very purpose of avoiding the law of the only state with a reasonable contact.

6. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 173 (1971).

7. 304 U.S. 64 (1938).

8. 356 U.S. 525 (1958).

9. 380 U.S. 460 (1965).

10. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

tion of the policy against intrastate forum-shopping as compared with certain "countervailing considerations." He concludes that the following are examples of situations in which countervailing considerations predominate and in which, when jurisdiction in personam is available in a federal court and not available in a state court in the state where the federal court is sitting, a federal district court should not be required to follow state conflicts rules: cases under the Federal Interpleader Act, and 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.

Another principal topic of the text is the constitutional limitations on choice of law. Emphasis is placed upon due process and full faith and credit considerations. As in other areas, the limitation of due process on choice of law is that of reasonableness under the circumstances. The full faith and credit clause is seen as adding the limitation that even though a state may have a reasonable contact so as to permit the application of its domestic law without violating due process, the interest of that state must be weighed against the need for national uniformity of result under a public act, record or judicial proceeding of a sister state. The same full faith and credit standard that applies to judicial proceedings of sister states is said to apply to public acts of sister states, though the application of that standard may produce different results in the case of recognition of judgments than it does with statutes.

The author traces the United States Supreme Court opinions from those imposing somewhat strict limitations on the states' power to determine their choice of law rules to the more recent opinions allowing for much freedom by the states. This constitutional development has permitted the states to move from territorial choice of law rules to "functional" and "state-interest" approaches to choice of law.

The principal contribution of the book is its statement and argument for a functional method of choice of law analysis, as contrasted with the traditional, territorially-oriented approach. The point is well made that under the orthodox approach much time has been spent seeking to give meaning to such terms as "substance," "procedure," "domicile," "place of wrong," "place of contract," and the like, without keeping in mind the purpose of determining such meaning. An approach concerned with identifying which states have contacts with the parties and the transaction, the policies behind each state's

rules, and the likelihood that each state's policies would be advanced by the application of its domestic law is more likely to lead to the right results than an approach which attempts to determine what is substance and what is the domicile. As time passes and decisions are rendered under a functional approach, rules will develop as guidelines and thus ad hoc decisions will be avoided. It is, of course, important that no law be chosen as governing until the content of that law is known and the policies it represents are evaluated. This in turn requires that the methods of notice and proof of foreign law be flexible and easy of application. Otherwise, there may be a tendency to apply forum law because it is known, or there may be an application or non-application of foreign law when its full content and policies are not known. The full meaning and implications of Weintraub's functional analysis are developed in conjunction with the treatment of particular subjects, such as torts, contracts and property.

Weintraub discusses in considerable detail what he labels "a method for resolving torts conflicts problems." First, there should be the identification and elimination of spurious or false conflicts. To do this it is necessary to determine the purposes or policies behind the rules of the states having some contact with the parties or the occurrence. If only one state has policies that would be advanced by applying its internal law, there is a false conflict and the law of that state should be applied. It is essential that the process of identifying policies not be one of attempting to dream up policies, but rather the usual process of lawyers of examining the relevant legislative history of any statutes, the cases articulating policies in domestic situations, and the legal journals in which the rules in question are discussed.¹¹

If an evaluation of the policies behind the laws of the interested states establishes a true conflict, further analysis is necessary. Then to be considered are the general direction or trend in the area of law involved, possible unfair surprise to the defendant, and the choice of law rule in the foreign state. Weintraub summarizes as follows: "An actor is liable for his conduct if he is liable under the law of any state

11. The avoidance of speculation as to policies is difficult. As an example of an instance in which the author may have engaged in such speculation, reference might be made to a discussion in which the statement is made that "Texas might be regarded as having a [particular] policy" with no indication of the basis for identifying the particular policy. R. WEINTRAUB, *supra* note 6, at 238 n.45.

whose interests would be advanced significantly by imposing liability, unless imposition of liability would unfairly surprise the actor.”¹²

Some points must be particularly stressed with respect to an interest-analysis approach. First, an ad hoc procedure is not intended nor anticipated, since cases will presumably fall into patterns over a period of time. Second, though interest analysis involves a consideration of the particular issue involved, it is important to keep in mind possible interrelationships between different rules in the same state or shared purposes of what appear to be different rules in the interested states. Third, an interest-analysis approach is not one of counting contacts nor is it one of “weighing” the interests of various states.

In the contracts chapter, Weintraub identifies and criticizes the diverse choice of law rules which have been applied to determine the validity of contracts. The controlling factors have variously been: place of making, place of performance, law intended or chosen by the parties, state with the most significant relationship, and law of the forum. In their stead, he advocates an approach similar to that in torts, namely, determining the policies that underlie domestic rules relating to the validity of contracts, appraising the relevance of those policies to the contacts that the parties or transaction have with the states, and thereby identifying false conflicts. In the event of a true conflict, where one state would legitimately validate the contract but another would invalidate it, several factors are suggested for consideration. These include a rebuttable presumption of validity, determination of the general trends in the law of contracts, consideration of whether the difference between the validating and the invalidating rule is one of detail or basic policy, possible unfair surprise to one of the parties in applying one of the state’s domestic law, whether the contract is “commercial” or “non-commercial,” and an analysis of the foreign state’s choice of law rule and its purpose. Though such an approach may lack the merit of certainty and predictability of result, one may question whether there actually has been such certainty in the past with the multiplicity of rules that has existed and whether the courts perhaps have been engaged in a state-interest analysis without saying so. The advantages of Weintraub’s approach are that it is an honest recognition of the problems presented in the contracts-conflicts

12. *Id.* at 209.

area and that it encourages counsel and the courts to state the factors which actually affect their decisions. Hopefully, such an approach will eventually lead to greater predictability as patterns of analysis develop.

In arguing for interest analysis in the areas of torts and contracts, Weintraub has the support of a considerable number of courts. He departs from most of the present authority in convincingly advocating a similiar approach for property questions, even to the extent of overturning the situs rule which presently controls as to real property or "immovables." While such an approach may often lead to the eventual application of the domestic law of the situs, it at least allows for the possibility of some other domestic law should an examination of the interests and policies of the interested states and the trends and developments in the particular substantive area so indicate.

The discussion of choice of law problems concerning personal property is divided between gift transactions and commercial transactions. While the orthodox rules governing choice of law in gift transactions have looked to the situs or domicile, Weintraub notes some willingness by the courts in more recent cases to inquire into the policies of interested states. In accordance with the distinction typically drawn in commercial transactions cases, the discussion includes an analysis of problems arising between the secured creditor and his debtor and between the secured creditor and third parties. There is a further breakdown between choice of law principles in cases decided prior to the Uniform Commercial Code and the principles included therein. The discussion and criticism of the conflicts rules in the Code are the most inclusive and penetrating of any in the standard conflicts texts and should prove extremely helpful to counsel and students alike, particularly during the immediate period while we await further court decisions applying and clarifying the Code.

Weintraub's treatment of the concept of domicile is consistent with his general thesis of proper conflicts analysis. The importance of domicile is discussed both for jurisdictional purposes and as a contact under orthodox, territorially-oriented choice of law rules. Instead of using domicile as a word evidencing contact and varying its meaning for different purposes, as for example to determine intestate succession to movables or the validity of a will disposing of movables or the capacity of a wife to sue her husband for negligence, Weintraub advocates a more direct and honest analysis of the policies underlying the

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domestic rules of the interested states. The appropriate domestic law then can be applied without the necessity of characterizing any of the states as the domicile. In short, just as the “place of the wrong” rule in the tort-conflicts area is being abandoned, so likewise might the rules referring to domicile.

Weintraub’s attack upon the orthodoxy of conflicts thinking and his argument for an interest-analysis approach is thorough and persuasive. The book ably describes what has happened and is happening in conflicts, and, more importantly, leads the way for what will happen in the future.