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BOOK REVIEWS

The Logical and Legal Bases of the Conflict of Laws. By WALTER WHEELER COOK. Cambridge: Harvard University Press, 1942. Pp. xx, 473.

"If you can bear to hear the truth you've spoken
Twisted by knaves to make a trap for fools—"
RUDYARD KIPLING

"Veritas Vos Liberabit"[1]
JOHN 8:32

The author's preface, his segregated 1942 additions in this book to the reprints of articles previously written, and his bracketed footnotes as added to such articles, indicate his feeling that his statements have often been misunderstood, if not misused, and that he wants to do all in his power to prevent this. The reviewer sympathizes fully, because on some occasions, he has heard Professor Cook abused by some listener or reader who has not considered carefully the subject matter of his criticism. It is frequently easier to find fault with an assumed position than to discover or criticize the real position of one's opponent. If one reads closely the writings of Professor Cook, it is difficult (for this reviewer impossible) to find any misrepresentation of the cases he discusses or any logical flaws in his arguments.

The instant work is a culmination of many years of effort on the part of Professor Cook to subject the field of conflict of laws to scientific inquiry under the method of "scientific empiricism" as previously elaborated by the same author.[2] This grew out of his being asked to teach the subject in 1919, without ever having been exposed to the current dogma in the field, and his conclusion after an open-minded study of the cases before consulting treatises or articles (and then later reading the treatises, *etc.*) "that nearly all writers were obsessed with indefensible theories which neither accounted for what the courts were doing nor led to useful decisions if logically applied."

This early conclusion led to his presentation before the Association of American Law Schools in 1923 of a paper, since well known as a published article.[3] This article was followed from time to time by other articles on various phases of conflict of laws, indicating that they were to become parts of a forthcoming book. The instant work is comprised of those already published articles[4] (with certain 1942 footnotes and text supplements added) and

[1]Motto of the Johns Hopkins University. Prefacing this review with short quotations is perhaps the result of the reviewer's high-school liking for the Waverly Novels of Sir Walter Scott, revived by Professor Cook's practice of so treating each of his chapters. For example, for the chapter on "Capacity to Marry," where issue is taken with the manner of stating the conflict of laws rule which goes back to Story's treatise, Professor Cook quotes from Shakespeare, "The evil that men do lives after them; the good is oft interred with their bones." Is there any doubt of the author's attitude toward Story's orthodox rule?

[2]See the author's philosophy as expressed in *My Philosophy of Law, Credos of Sixteen American Legal Scholars* (Boston, 1941).

[3]Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457.

[4]Ch. I, *The Logical and Legal Bases of the Conflict of Laws* (33 YALE L. J. 457, 1924);

several chapters not previously published.[5] The book takes its title from the first article, and the article (with minor additions of footnotes and brief supplementary comment) becomes the first chapter of the book. It sets up the belief that law is capable of scientific study and analysis, that this invokes the appropriate use of both deduction and induction, and that the field of conflict of laws is in particularly bad shape because of the unscientific (and illogical) behavior of the writers and judges. This is supported by an analysis of many decisions showing the logical fallacies in their use of terminology and the unscientific use of postulates, not supported by any real testing by inductive method of their contents. While this chapter thus illustrates the appropriate application of scientific method broadly to the field of conflict of laws, it serves also the purpose of establishing a correct description of what the judge does when he decides a conflict of laws case, as compared to judicially stated theories which the author feels are incorrect.

This description, or theory, is simply that the "law" of a conflict of laws decision like the "law" of any other decision is the "local law" of the forum deciding the case, namely its own conflict of laws rule. There is no application of foreign law (as such) or enforcement of a foreign created legal right (as such), as the customary manner of statement would lead one to believe. The reference made by the conflict of laws rule to the "law" of some state other than the forum is a short-hand way of saying that the forum is creating in its own legal system a right and remedy as similar as possible to what the jurisdiction of reference would have done in a purely domestic case. The forum so acts because of the policy of the forum to treat conflict of laws situations differently from its own purely domestic ones, in order to accomplish the more just result of not restricting the parties to the normal domestic rules of a forum which might have little or no contact with the substance of their relations.

This theory is in opposition to the "comity" theory of Story and early cases, and the "vested rights" theory of Holmes, Beale, and many modern cases. Those theories have been adequately discussed in legal writings[6] and restatement of them is not called for here. It is appropriate to say that Professor Cook's approach seems to be a more juristically correct analysis of the nature

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II, *The Logical Bases of Story's Treatise* (31 COL. L. REV. 368, 1931); IV, *The Powers of Congress under the Full Faith and Credit Clause* (28 YALE L. J. 421, 1919); V, *The Federal Courts and the Conflict of Laws* (36 ILL. L. REV. 493, (1942); VI, *"Substance" and "Procedure"* (42 YALE L. J. 333, 1933); VIII, *Characterization* (51 YALE L. J. 191, 1941); X, *"Immovables" and the "Law" of the "Situs"* (52 HARV. L. REV. 1246, 1939); XIII, *Tort Liability* (35 COL. L. REV. 202, 1935); XIV, *The "Validity" of "Contracts": I. The "Place of Contracting" Theory* (31 ILL. L. REV. 143, 1936); XV, *The "Validity" of "Contracts": II. The "Intention" of the Parties* (32 ILL. L. REV. 899, 1938 and 34 ILL. L. REV. 423, 1939).

[5]Ch. III, *The Legal Bases of the Conflict of Laws;* VII, *Domicil;* IX, *Renvoi;* XI, *The Characterization of "Things" as "Tangible" and "Intangible";* XII, *"Movables" and "Immovables";* XVI, *Capacity to Contract;* XVII, *Capacity to Marry;* XVIII, *Jurisdiction to Divorce.*

[6]See Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656; Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of the Conflict of Laws* (1926) 39 HARV. L. REV. 533; STUMBERG, CONFLICT OF LAWS, Ch. I (1937).

of a conflict of laws decision. None of the three theories goes beyond describing the legal nature of the action of the court in deciding a conflict of laws case. They offer little help in the determination of the social, political, economic, or other extrinsic factors, that should be considered in formulating any particular conflict of laws rule. However, it is submitted that Professor Cook's approach, aside from its analytical correctness, has the benefit of opening the door of one's thinking to a clearer consideration of the purpose and policy of conflict of laws and to that extent is more helpful than the others. His approach should make it clear that the judge is making the law in a conflict of laws case to the same extent that he is in a torts case, a contracts case, or any other purely domestic case, and that he should act with his mind open to the purpose for which he is establishing the rule.[7] This does not leave him the mental latitude of (or excuse for) refusing to refer to foreign law that the "comity" theory does;[8] nor does it compel the close-minded, tight reference to *some one correct* law that so easily accompanies the "vested rights" theory.[9]

Thus, this first chapter opens the way for a reconsideration of the confused rules of conflict of laws. The book is not an attempt to delineate (except as incidental to its main purpose) what are, or should be, the accepted rules of law in the field. It is primarily an attempt to subject segments of the field to the logic of scientific inquiry to determine whether generally accepted rules in such segments have been validly derived and are wisely stated. As the author in his preface indicates, he deems it valuable to discover the numerous existing weeds in the garden and to lay the foundation for eliminating them as the prerequisite of having a more healthy garden in the future. In various chapters throughout the book, this has resulted in considerable disagreement with both the method of obtaining the rule and the manner of stating it in judicial decision, text books, articles, and the *Restatement.* This disagreement arises largely: (1) because rules have been derived from assumed rather than from tested propositions; (2) because terms with a well-accepted meaning in some sphere of the law have been carried over to another without recognition that their meaning might (and should) vary according to the context in which used; and, (3) because the terms in which the rules are stated are (or have been construed to be) unduly confining as compared to what the courts have done in the past or should do in the future.

In the successive chapters after the first, the application of Professor Cook's method of inquiry results in many interesting, if unconventional, conclusions.[10] In Chapter II, he explains the extended growth of many misstated rules of conflict of laws by the fact that the first great treatise in the English language, by Story in 1834, was predicated on a series of propositions and postulates mutually inconsistent, and otherwise incapable of standing the test of careful inquiry. This continues in Chapter III with an attack on the legal bases of

[7]Not all judges, even in other fields of the law, are willing to admit that they make law. There is a certain security in being able to blame it on certain fundamental truths and the demands of deductive logic.

[8]For illustration of the consistently narrow view that this approach leads to, see RESTATEMENT, CONFLICT OF LAWS, MD. ANNOT. (1937) § 5.

[9]See Reiblich, *The Conflict of Laws Philosophy of Mr. Justice Holmes* (1939) 28 GEO. L. J. 1.

[10]See notes 4 and 5 *supra* for chapter titles.

conflict of laws as found in the usually stated rules of jurisdiction, particularly the misleading "too-sharp" division of power between actions *in personam* and *in rem*. In this chapter the attack on the *Restatement* begins. In Chapter IV, by careful study of the full faith and credit clause of the national Constitution, the author shows how Congress might use its power to achieve greater uniformity and reduce the confusion that the courts have created. In Chapter V, one of the more intricate but most interesting discussions of the book, sharp issue is taken with the constitutional law dictum of *Erie R. Co. v. Tompkins*,[11] and the easily assumed "too-broad" interpretation of *Klaxon Co. v. Stentor Mfg. Co.*[12] and *Griffin v. McCoach*.[13] Again, the author is trying to reserve in Congress a power to clarify what might be made by the courts into a constitutionally protected muddle. In Chapter VI, in what has been a most helpful article to many teachers, the terrifying problem of distinguishing between *substance* and *procedure* is made relatively simple by a clear emphasis on the wisdom of always being aware of the need of interpreting symbols in the light of the purpose for which they are used. Once again, the author is brought into sharp disagreement with the *Restatement* (which clearly fails to do this in its chapter dealing with the problem). Chapter VII on "domicil" repeats the author's position, as taken on the floor of the American Law Institute, that an attempt to reduce that term to a definition useful for all purposes is not descriptive of the cases and is a violation of the principle of definition above suggested. In Chapter VIII on characterization, and Chapter IX on renvoi, the author continues the application of his method to those most intricate problems and widens the persons guilty of logical errors to include fellow law teachers and writers of the more liberal school, showing that some of the problems deemed to be difficult have been created needlessly by faulty use of terminology. In Chapters X, XI, and XII, discussing the property rules in conflict of laws, the author continues to take sharp issue with the *Restatement*, and with the writers and cases, along the line of emphasizing how words have become the masters rather than the tools of thought.

This continues through Chapter XIII dealing with torts, and through Chapters XIV, XV, and XVI, dealing with phases of the contracts problem. These chapters, however, are particularly characterized by the fact that the author (a little bit more definitely than elsewhere) is moved to indicate his view of what would serve as a better statement of the rules. Also, in both discussions, he is attacking particularly the certainty of the place of reference called for under accepted forms of stating the rules. This, as indicated earlier, is the chief accompanying weakness of the "vested rights" approach to the field. As for torts, Professor Cook would be willing to let the plaintiff have the benefit of whichever domestic rule favors his case. As for contracts, he leans toward allowing the expressed intention of the parties appropriately connected with the "proper law" theory (involving a breaking down of contract problems according to type of contract involved) to govern liability.[14]

In the last two chapters, on capacity to marry and divorce jurisdiction,

[11]304 U. S. 64, 58 Sup. Ct. 817 (1938).
[12]313 U. S. 487, 61 Sup. Ct. 1020 (1941).
[13]313 U. S. 498, 61 Sup. Ct. 1023 (1941).
[14]This is too brief to be fairly descriptive of the author's view. See pp. 418, 431.

there is a similar willingness to suggest possible rules in addition to criticizing existing ones. As to marriage, a preference is manifested toward choosing domicil, rather than place of ceremony, as the controlling contact and "intended family domicil" rather than prior domicil. As to divorce jurisdiction, the author is perfectly willing to question the need for having divorce jurisdiction based on domicil as defined by American divorce cases, particularly if the forum involved looks to the "proper" law for determining the grounds for the divorce (not necessarily the forum's grounds). This chapter suggests particularly fertile ground for study.

This brief survey of ideas from each chapter is necessarily incomplete (and susceptible of inaccurate interpretation except as read with some knowledge of Professor Cook's beliefs or methods as contained in the book). It is made solely to tempt others to look into these chapters for themselves.

The effect of the book may be characterized by a reference to the motto of that great university where this reviewer first had the pleasure of hearing Professor Cook's ideas of logical and legal method—*Veritas Vos Liberabit.* The juristic theory, as above stated from Chapter I, serves to free the judge or legal critic from the psychologically imposed force of the "vested rights" idea or narrowness of the "comity" idea. The carefully established scientific logic of inquiry of the entire work tends to free one from the deceptive certainty of propositions resting on hidden postulates and the logically (deductive) unavoidable conclusions drawn from them. One is free to pursue the truth in the sense of making a scientific formulation of the rule which best describes what courts have done in the past (not veiled by what they have said), as well as to determine the rule for the future in the light of what will achieve the best results for the purpose in mind before any particular court or legislative body.

This embodies, as the author indicates, a recognition that rules of law are predictions of what will happen as a result of the functioning of state officials and processes when confronted with the particular activity for which the rule is laid down. This prediction may be made as a classification of what has happened in the past, as an indication that similar functioning can be expected in the future; but, as such, it is subject to expansion or contraction as new factors enter the picture. The author is unwilling to admit, and is willing to take up his logical cudgels to disprove, that such rules are derived by deduction alone from pre-existing fundamental truths. Even the major premises change with the changing nature of the conditions with which they deal and the social and political organizations which apply them. While postulates may be used, they are but hypotheses to be tested from time to time, not immutable truths that bind their creator.

Professor Cook's writings in conflict of laws, collected and completed to date in this volume have had, and will continue to have, a wholesome influence on the development of the law in that field and on legal thinking generally. There are those who agree with his attitude that this subject was by no means ripe for restatement when it was attempted. This has been vindicated by the many judicial departures from the *Restatement of Conflict of Laws,* which prophesy more to come. It may be significant that in a recent case,[15] the

[15]Hoopeston Canning Co. v. Pink, — U. S. —, —, 63 S. Ct. 602, 605 (1943). "In

United States Supreme Court uses language suggestive of thinking along the lines that are so well illustrated in the instant book and quite opposed to some attitudes of earlier courts to similar problems. The footnotes of the same opinion refer to one of the articles reprinted in the book. No thoughtful student of conflict of laws can afford to ignore the present volume. In so far as its method of inquiry is applicable throughout the legal field, the book should command the attention of all legal scholars. It should be on the *must* list of judges, lawyers, teachers, and students.

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Personal Estate Planning in a Changing World. By RENÉ WORMSER. New York: Simon and Schuster. 1942. Pp. xxii, 311.

This little volume is written by a member of the New York bar as "a guide for the layman to help him plan his estate for his beneficiaries, with particular reference to the adaptation of the old techniques of wills, trusts, life insurance and gifts, to a rapidly changing economic world." The venture is a commendable one. It was designed to stimulate the layman to study his problems before consulting the lawyer, who is to draft his will. Doubtless, the volume will enable the layman to crystallize his ideas on the subject.

Much of the specific advice given by the author is summed up in the title of Chapter 3, "Flexibility and Liquidity." The quality of the advice dispensed is exemplified briefly:

> "Faced with the obscure future, and realizing that much will transpire which cannot now be anticipated, only an opinionated man would attempt to lay down an exact, irrevocable, and rigid plan for himself and, more importantly, for his family. An intelligent man must have opinions. But to be opinionated is unintelligent."

The occasional illustration reveals an insight into human nature that may prompt the layman to action as well as self-analysis. To illustrate: Planning for a spouse may involve the education of the wife.

> "Mrs. Smith was not a stupid woman. She was impulsive, perhaps, and opinionated to a degree. The trouble was that she was totally unprepared for the job which she had to assume when her protector, her husband, died. It was not her fault that she lost her money. It was Mr. Smith's fault.
>
> "While he was alive, Mr. Smith had 'attended to everything.' His wife was a 'dear little woman,' very capable as a housewife and as a home-

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determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance [note omitted]. More recently, it has been recoguized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors."

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maker, but completely unfamiliar with business. Several times, when he had discussed something of importance with her which concerned the family assets and her future, she had said, 'John, dear, I don't know anything about those things. You decide what to do. I know your judgment will be best.' John Smith was flattered at this confidence his wife had in him, and left it at that. He planned nothing."

Economic security is the protection which should be secured for the wife; the motivating objective in planning for the children is preparing them for life. Planning for future generations may be folly.

The author admits that the estate tax is a sad subject, which is getting sadder every year. The tax problems and the problems of charities as well as other problems involved in the planning of a will are discussed at length. Some of the exposition may seem elementary to the lawyer; to the layman it may seem otherwise. If at times the language is rather diffuse, it is not infrequently quite vivid.

"You can't completely preclude your family from fighting over the estate after your death. Families seem to love to do it. But you can minimize the possibilities by leaving a will so carefully prepared that there's little or nothing to scrap about. It will save making wildcats out of your relatives."

There are nine check lists scattered through the book at appropriate places to enable one to see at a glance the material presented in summary form. There are also helpful check lists in the appendices to refresh the memory for further reflection upon the problems which the preparation of a will entails.

Some devotees of insurance may vigorously object to the author's reviving that vulgar myth that insurance is a gamble. "All these types of insurance involve the principle that you gamble with the company, and the very gamble affords a protection." In light of the historical development of insurance, to call the distribution of risk for purposes of social security a gamble is not particularly felicitous. It is suggestive of a primitive fixation long since repudiated by the courts, yet still prevalent in the popular mind.

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Federal Taxes on Estates, Trusts and Gifts, 1942-43. By ROBERT H. MONTGOMERY. New York: The Ronald Press Co. 1943. Pp. viii, 769. $7.50.

This new edition of Colonel Montgomery's book on estates and trusts is a welcome addition to his series of handbooks. It would be hard to name a volume in the tax field where so much useful information is packed into so compact an amount of space. Problems of estates, trusts, and gifts are carefully analyzed, and the leading authorities are stated or cited. Anyone who

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wants to get a quick picture of the law on one of these topics will find what he wants in the present work, though he may want to turn to one of the larger works or to a Tax Service after his bird's eye view has served its purpose.

The present volume includes the changes made by the Revenue Act of 1942 and thus is thoroughly up to date. In some places it would have been interesting to have had a more extensive analysis than was possible in the time available to the author. For instance, he says (p. 122) that in his opinion "the language of the amendments incorporated in section 162 of the Code by the 1942 Act is ambiguous and needs clarification." This is a view that has been shared by others, and it is to be hoped that Colonel Montgomery will be able to enlarge his discussion of the problems arising under this section when it comes time to issue a new edition of his work. Another illustration may be found at page 341, where the author states his opinion that "a power to accelerate, i.e., to distribute the corpus to a designated beneficiary prior to the time otherwise specified in the trust instrument for such distribution should not be construed as a power to terminate." Since this is a very real problem in the case of many outstanding trusts, it would have been helpful if the author could have expanded his argument on this point.

The discussion of the new power of appointment provisions (pp. 341-346) is disappointing, being confined largely to the text of the statute and a long excerpt from a committee report. Now that the regulations on this subject have appeared, it may be expected that the author will soon have occasion to express himself with his accustomed vigor. It may be said, however, that the present book has much less of the super-conservative viewpoint in it than has sometimes been found in some of the author's earlier books.

As usual, there is a final Chapter on Planning the Distribution of an Estate. This contains a number of valuable suggestions, although the opportunities for doing anything startling in this field have been gradually decreasing. The book closes with complete tables and an excellent index. It is a very good handbook, well deserving of the place which it has already established for itself in the field.

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