Michigan Law Review

Volume 58 | Issue 2

1959

Ehrenzweig: Conflict of Laws Part One Jurisdiction and Judgments

Charles D. Kelso
Indiana University

RECENT BOOKS

CONFLICT OF LAWS. PART ONE. JURISDICTION AND JUDGMENTS. By *Albert A. Ehrenzweig.* St. Paul: West Publishing Co. 1959. Pp. XXXIV, 367. $6.

Professor Ehrenzweig[1] has explored or discovered many dramatic new legal principles, e.g., "negligence without fault" and " 'full aid' insurance." He is expert in analyzing court decisions to demonstrate that some theretofore unformulated generality accounts for the results. By intense study of specific fact situations he shows that the old or accepted rule either has been eaten up by exceptions, dissolved in the pattern of case results, or, historically, was never grounded in sound reason or never really operated as a rule. Thus it comes as no surprise that Ehrenzweig on Conflict of Laws, Part One,[2] brims with fresh ideas involving "the interstate problems of everyday practice"[3] in Jurisdiction, Recognition of Foreign Judgments, and Divorce, Annulment and their Incidents.

The Preface indicates that the book is for teachers, law students and practicing lawyers. For teachers it is required reading to help retest old opinions, check late developments, and consider possibilities for reorganization.[4] The more adventurous may well take Ehrenzweig's suggestion that the book be assigned as a supplement to case method instruction.

Law students will probably continue to ignore unassigned readings or will invest in Stumberg[5] or Goodrich[6] at least until the choice of law volume (Part Two) is published. However, even before Part Two appears, Part One would be a valuable addition to the library of a practicing lawyer. If a choice must be made, I should think that for the topics covered Ehrenzweig would today have greater law-office potential than either Goodrich or Stumberg for these reasons: First, it is thoroughly documented with the most recent materials in this fast developing field, in addition to containing guide lines to old materials. Second, it deals in greater refinement with many of the most troublesome recurrent fact situations, helping to point out distinctions which may be or become crucial. Third, it provides materials for briefs or arguments by pointing up new relationships between fact

1 Albert Ehrenzweig is a Professor of Law at the University of California, Berkeley. He is the author of MISTAKE AND UNLAWFULNESS (1931); TORT LIABILITY (1936); A NEW LAW OF TORTS (1937) (in German); INCOME TAX TREATIES (1950); NEGLIGENCE WITHOUT FAULT (1951); FULL AID INSURANCE: A VOLUNTARY COMPENSATION PLAN (1954): AMERICAN-GREEK PRIVATE INTERNATIONAL LAW (1957); and numerous articles in American and Continental legal periodicals.

2 Part One is expected to be republished with Part Two (on Choice of Law) as an integrated volume. Part One includes a summary of contents, a table of contents, a key to abbreviations, a lengthy bibliography, a table of cases, a detailed index, copious footnotes, and many cross references in the text and index.

3 EHRENZWEIG, CONFLICT OF LAWS, Part One, p. XI (1959).

4 New ideas on organization include the consideration of capacity as part of Jurisdiction; the separation of international and interstate conflicts; arbitration agreements classified under mandatory dismissal; and the statute of limitations and "public policy" dealt with as phases of discretionary dismissal.

5 STUMBERG, CONFLICT OF LAWS, 2d ed. (1951).

6 GOODRICH, CONFLICT OF LAWS, 3d ed. (1949).

situations, rules and cases. Ehrenzweig openly takes sides and tells why. But his work is never dogmatic or doctrinaire because he has an appetite for detail, a tolerance for diversity, and a mania for thoroughness.

The book begins with an introduction to the most general thories of conflict of laws, a plea for partial separation of international and interstate conflicts law, and an appraisal of the relative significance of the sources of conflicts law.

Chapter One, entitled "Will the Court Take the Case?" is divided into sub-chapters the first of which considers active and passive procedural capacity, i.e., standing to sue or be sued. Ehrenzweig is not sympathetic with denial of jurisdiction on the ground that a party has capacity to sue dependent on a foreign[7] law or is a foreign-created entity such as a foreign corporation, guardian, personal representative, or receiver. Lawyers faced with jurisdictional hurdles on this ground will find a hopeful statement of the rules, promising exceptions, or the arguments necessary to produce a desired result either by inducing reform or favorably closing a gap in the forum's law.

In the second sub-chapter, "(Local) Jurisdiction and Proper Process," Ehrenzweig renews his attack on the rule that purports to allow in personam judgments based on personal service on a transient defendant.[8] He treats in rem jurisdiction from a more conventional viewpoint but suggests, contrary to the *Restatement*,[9] that the courts do and should examine and approve adoptions whenever it seems proper for the welfare of the child, even though the forum is not the domicil of the child or of the natural parents. The sub-chapter concludes with a review and summary of the law of in personam jurisdiction. It points out that the future growth of "convenient jurisdiction" under the *International Shoe*[10] banner of "fair play" will be a case by case, trial and error process.

The third sub-chapter, "Will the Court Take Jurisdiction?" deals with discretionary and mandatory dismissal. As to forum non conveniens in nonadmiralty cases, Professor Ehrenzweig finds that little more can be said than that "'a court will not exercise jurisdiction if it is a seriously inappropriate forum for the trial of the action so long as an appropriate forum is available to the plaintiff.'"[11]

However, where suits are brought on the same claim in two different courts, he finds the law governing stays a bit more specific: in general stays will be granted only in favor of proceedings commenced earlier and

> "the primary test for the court's decision is the question whether on principles of res judicata and full faith and credit . . ., the foreign

[7] It should be noted that Ehrenzweig carefully distinguishes between "foreign" which refers to non-forum, and "extranational" which is related only to foreign countries.

[8] See Ehrenzweig, "The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens," 65 YALE L. J. 289 (1956). Many portions of the book have been shaped from the author's previously published articles.

[9] See CONFLICT OF LAWS RESTATEMENT §142 (1934).

[10] International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

[11] EHRENZWEIG, CONFLICT OF LAWS, Part One, §35, p. 124 (1959).

judgment will be recognized in the state of the forum for the purposes of both enforcement and bar, except that such stay may be denied in any event if the forum would offer the plaintiff a more expedient relief than the foreign court; and that, on the other hand, a stay may well be granted in cases of less than compulsory potential recognition."[12]

As to mandatory dismissal, Ehrenzweig predicts abandonment of the use of the Constitution. Consistent with this, he believes that *Hughes v. Fetter*,[13] which precluded dismissal on constitutional grounds, is limited to cases where all elements occurred in the state whose law plaintiff invoked, and that its doctrine will not be further developed. He foresees greater enforcement of arbitration agreements, thereby limiting the forum for settling disputes, provided the agreement is not unreasonable because of unequal bargaining power, change of circumstances or other factors.

Chapter Two deals with "Recognition of Foreign Judgments" and has its quota of new concepts, including wider recognition of administrative acts of sister states — such as the recordation of marriages. Ehrenzweig foresees and suggests close interstate cooperation in matters of adjudication of status — perhaps by new types of proceedings. An example pointing up the need is his finding that although the authorities seem hopelessly split on the theory of recognition of foreign adjudications of insanity, recognition will quite generally be given if it protects residents or local transactions or proceedings.

Chapter Three on "Divorce, Annulment and their Incidents" deals with dissolution of marriage, support, children's custody, and annulment. It carefully traces the growth of estoppel under *Sherrer* and *Coe*[14] to uphold sister state divorces in which both parties have "participated," and concludes with a plea for federal legislation or uniform state legislation. In the absence of legislation Ehrenzweig would prefer a jurisdiction theory based on local contacts other than domicil. He points up the most effective rules by which to enforce modifiable support obligations and prevent undesirable relitigation. He carefully documents the theory that foreign custody decrees usually will be subject to reexamination, even though circumstances have not changed, except where "dirty hands" are involved — as where there has been disobedience to the prior support order of another jurisdiction.

Whether the reader is looking for arguments or education, he should find satisfaction in this book. The next installment should prove even more interesting. Let us hope it is not long in coming.

Charles D. Kelso,
Assistant Professor of Law,
Indiana University,
Indianapolis Division

[12] Id., §36, p. 127.
[13] 341 U.S. 609 (1951).
[14] Sherrer v. Sherrer, 334 U.S. 343 (1948); Coe v. Coe, 334 U.S. 378 (1948).