organized crusade, and more than he, they are willing to use the Court to promote the public policies in which they believe.

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THE CONFLICT OF LAWS: A COMPARATIVE STUDY. Volume II. Foreign Corporations: Torts: Contracts in General. By Ernst Rabel.* Ann Arbor: University of Michigan Press; Chicago: Callaghan & Company, 1947. (Michigan Legal Studies.) Pp. xli, 705. $8.00.

Sincere tribute must be paid to Ernst Rabel for his new book on Conflict of Laws.[1] Like his earlier volume on the sale of goods, this work again reveals the author's vast knowledge and wide experience, and it demonstrates both his unerring capacity for clear thought and his mastery over an immense wealth of material. The statutory and case law of all the countries of Europe and the Americas, as well as of all States belonging to the British Commonwealth of Nations, form the rich and variegated background of his work. In assembling his material he enjoyed the help afforded by incomparable law libraries and the invaluable assistance of many gifted lawyers. But it is his own energy, his own creative ideas, and his own sure touch that have woven the immense mass of raw material into the finished tapestry; that have transformed innumerable single "foreign" laws into a true "comparison of laws." The value of such comparison is much more evident in every chapter of his book than in all the numerous apologetic and methodological es-

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1. The first volume of Rabel's work, published in 1945, dealt in the Introduction not only with the historical background, the literature, the sources, and the "structure" of conflict rules (where Rabel's well-known views on classification were repeated) but also with what the author calls "Development of Conflicts Law." By this phrase he understands certain general principles and methods, such as "misuse of logic," *renvoi*, autonomy of the parties, the tendency to uniformity, "specialization" of conflict rules, and internationalization. Parts Two to Five of the first volume discuss the personal law of individuals (including determination of domicil and nationality); marriage; divorce and annulment; and parental relations.

says, lectures, discourses and reviews that have been published at various times and places.

One may be inclined to oppose some of the author's views on the practical uses of comparative law. Thus it seems to the reviewer that the author overestimates the value of comparative law in the field of classification (or characterization, as he calls it), and the reviewer shares Lepaulle's recent pertinent criticism of Rabel's classification doctrine.[2] But that is a particular point, and one which theorists have been inclined to stress unduly.

The second volume of Rabel's work—which forms the subject of this review—deals with three topics: *corporations, torts,* and *contracts in general.*

In the first topic, *corporations* and kindred organizations, the author describes the various kinds of organizations to be found in any legal system. He contrasts legal persons (corporations and foundations) with unincorporated associations (partnerships and nonincorporated nonprofit associations) and mere "contracts of joint undertaking" (that is, merely contractual arrangements). This last group apparently includes societies with a sleeping partner (the *stille Gesellschaft* of German law). He uses the term organization to cover all these types—even those mere contractual arrangements in which there is nothing to be organized. He outlines further the characteristics of those types of organizations where corporate and partnership elements are mixed, such as *de facto* corporations or the unincorporated associations of German civil law, and he stresses the fact that it is the "corporate element" in such mixed types which allows private international law to ascribe to them a personal law.[3] These foundations of civil law countries are comparable to the charitable trusts of common law countries which—like foundations—should, in the author's view, be localized at the place of management rather than at the *situs* of the assets.

The famous problem of the nationality of corporations is satisfactorily solved. The extreme variation in the rules relating to the personal law of "foreign" corporations and their recognition, in addition to the widely differing provisions of administrative, procedural, fiscal, and penal law which are applied to such corporations makes it impossible

2. See LEPAULLE, LE DROIT INTERNATIONAL PRIVE (1948).
3. Pp. 10-100.

to set up or follow an identical criterion of nationality. A uniform solution is therefore unattainable. The so-called Argentine doctrine according to which legal persons are neither national nor foreign, and in consequence cannot claim diplomatic intervention, is not favoured by the author.[4]

In dealing with the personal law of business corporations, Dr. Rabel describes the two rival principles of the common law system, according to which the law of the state of incorporation is decisive, and the civil law system, under which the law of the place of central control is applicable. He adds, however, that "The true point of difference between the two systems is not that under the one incorporation is sufficient, and in the other the situation of the main office would suffice to determine the personal law. . . . The requirement of domicil is additional to that of incorporation and does not by any means replace it."[5] The author does not say what in his opinion is the "true point of difference" between the two systems.[6] The theory that in certain circumstances the personal law and the nationality of a company are determined neither by incorporation nor by the central office, but by the nationality of the members (partners) is vehemently rejected by the author, who speaks of the "usual confusion," of "crude solutions," "absurd" decisions, etc.[7] Here, in the reviewer's opinion, he goes rather too far. In some cases, particularly where it is necessary to determine whether or not a company has enemy character, it is incumbent on the investigator to draw aside the screen of legal personality and to scrutinize the individuals who in fact control the company.

The author also details the scope of the personal law of a corporation which "accompanies the legal entity from birth to death."[8] That law determines whether a corporation has come into existence,[9] furthers its capacity,[10] regnlates its internal organization,[11] fixes its rights and duties in re-

4. Pp. 24-27.
5. P. 38.
6. See, however, pp. 63-65.
7. Pp. 56-62.
8. P. 68.
9. P. 64.
10. P. 71.
11. P. 74.

spect to third persons,[12] and determines alterations of the corporation's memorandum and articles, and its dissolution.[13] In particular the author discusses in detail the consequences of Soviet nationalization of Russian companies abroad and the consequences of the so-called "Litvinov agreement." The decision of the Supreme Court of the United States in the *Pink* case,[14] which recognized the nationalization decrees is rightly called by the author "a regrettable deviation from well-settled principles of international law."[15]

An ensuing chapter deals with unincorporated business organizations.[16] The author lays justifiable stress on the fact that there are many established "gradations" between a mere contract of associates and a complete legal person. This has long been recognized, and the term "relative legal person" has been used to designate the commercial partnership of German and Swiss law. It is certainly true that all business organizations, whether incorporated or not, have a personal law *"at least to the extent that corporate attributes attach to them."*[17] In civil law countries the personal law for partnerships and other unincorporated bodies is determined by the "seat" or central office, just as in the case of incorporated legal persons. As regards the United States, the author, though with some reserve, considers that the law under which the quasi-corporation has been organized is probably that which is applicable to it.[18] He does not discuss the question in regard to England.

Attention is then given to the matter of the recognition, as opposed to the creation, of corporations.[19] The old concept of a merely territorial effect of incorporation has been replaced nearly everywhere, though not in Beale's work, by a more liberal view. A corporation can exist outside the country which creates it, but abroad it needs recognition, as distinct from the constitution of a new personality. The extent of recognition is determined by domestic law.[20] The

12. P. 80.
13. P. 85.
14. United States v. Pink, 315 U. S. 203 (1942).
15. P. 90.
16. P. 93 *et seq.*
17. P. 100.
18. P. 113.
19. P. 124 *et seq.*
20. See especially p. 150 *et seq.* As to the English ultra vires doctrine, see p. 158 *et seq.*

last chapter of the topic on corporations deals with the admission of foreign corporations to do business. This may depend on special authorization, on registration, or on reciprocity.

The second topic of Dr. Rabel's work deals with *torts*. In furtherance of his doctrine of classification, the author uses "comparative law" as a medium for his attempt to establish a general notion of torts which will cover liability for fault as well as liability for risk; which will even include certain liabilities without fault which attend acts that are permitted "on account of the superior interests" of the actor;[21] but which will exclude violations of contractual duties by the debtor.[22] It must be doubted whether a useful general formula has been or can be found. Dr. Rabel says: " 'Tort' . . . in the meaning of the conflicts rule, is any unlawful invasion of the interests of another person, causing damage or harm to a person."[23] But that formula does not take us very far, especially in view of Rabel's own wish to include in the concept of tort certain acts "permitted" despite the damage they cause.[24] He tries to overcome the difficulty by saying that such acts are lawful "only in a formal or restricted sense." But surely this statement is too vague to constitute a real solution? Moreover, damaging acts may be committed by the possessor of a thing who is not its owner. The obligation to repair the damage may be incurred as a consequence either of a tort (the classification in English law), or of the violation of a *rei vindicatio*—that is, of a relation between two persons (as in German law)—and therefore not a tort. There are other difficulties in the case of acts that are lawful *per se* but create obligations if done in misuse of a right *(abus de droit)*.

The governing conflict rule in the case of torts is now nearly everywhere the law of the place where the tort was committed. The author's description of the predicament caused by the unfortunate English decision in *Machado v. Fontes*[25] is very impressive. He also calls attention to the "shocking results amounting to outright denial of justice"

21. P. 230.
22. P. 235.
23. *Ibid.*
24. P. 230.
25. [1897] 2 Q. B. 231.

in the case of actions involving determination of title to land and actions for trespassing on land.[26]

The two chapters on the scope of the governing rule and on the "place of wrong" are particularly instructive, even fascinating; but it is impossible in this short review to give details. The topic on torts ends with a survey of maritime and aeronautic torts.[27]

The third and final topic in this second volume deals with *contracts in general.* With careful precision the author illuminates the various systems prevailing in practice, legislation, and doctrine. He strongly opposes the views of Beale and the American Restatement, which favour the law of the place of contracting, and he is no more inclined to agree with Lorenzen's choice of the law of the place of performance. Dr. Rabel is undoubtedly right in stating that during four centuries courts have "increasingly and with few interruptions" applied the doctrine that the intention of the contracting parties governs the entire area of contractual obligations. That is what English lawyers mean when they use the unsuitable expression "the proper law of the contract." Dr. Rabel rightly emphasizes that all doctrines which deny the autonomy of the contracting parties are inconsistent with the unambiguous trend of decisions in nearly all countries and particularly in the United States. The question is, however, whether the parties' autonomy is in any way restricted. Rabel, after careful study of the practice of the courts in the "mercantile countries" of England,. France and Germany, considers that there are no restrictions—except where the application of the chosen law would violate the *ordre public* of the forum. The law chosen by the parties is to be applied "with all its implications," and it would be wrong to resort to any other law "solely because it would be applicable in the absence of a party intention."[28] He refuses therefore to distinguish between imperative and optional rules of the law most closely concerned.

True, the courts have often expressed themselves to the effect that "the proper law of the contract is the law which the parties intended to apply," and that the "intention expressed in the contract will be conclusive." But phrases of

26. Pp. 246, 247.
27. P. 336 *et seq.*
28. P. 399.

this kind, like all other generalizations, are inevitably to a certain degree inexact. As Cheshire has shown in his recent book on *International Contracts*, such statements are inconsistent with the main principle of private international law, according to which every relationship is governed by that law with which it has the closest connection. No court would be prepared to sacrifice this principle to the autonomy of the parties. The famous case on which Dr. Rabel relies in particular is the *Vita Food* case, in which indeed the contracting persons had expressly subjected their relationship to English law, although their domicil, the place of contracting, the place of destination, and the place of violation of the contract pointed to Newfoundland, to New York, and to Nova Scotia, and nothing showed a connection with England. The Privy Council (*per* Lord Wright) declared that the parties were in no way prevented from choosing whatever law they pleased, and that the only impediments that might exist were lack of *bona fides*, illegality, and the public order of the forum. This pronouncement however, is ambiguous. What *bona fides* and illegality mean is not beyond doubt. Is *bona fides* lacking only where the declaration is not genuine, that is, where it does not correspond to the true intention of the parties? Or is it sufficient to establish *mala fides* if the (genuine) declaration was made in order fraudulently to evade some compulsory rule? And by what law is the legality of the choice to be tested? The reviewer shares the view of Professor Cheshire and Mr. J. H. C. Morris, who sharply reject Lord Wright's formula. "It is scarcely credible," says Cheshire "that [the decision] will survive as an authority."[30] Apart from the *Vita Food* decision, the following proposition stands, as Cheshire's careful study of the cases has shown: "Where the law expressly chosen by the parties has been accepted by the court as the proper law to govern the substance of the obligation, there has always been some factual connection, and generally a substantial connection, between the contract and the country of the chosen law."[31] The same is true of the German decisions mentioned by Melchior.[32] In all the cases decided by the

29. Vita Food Products, Inc. v. Unus Shipping Co., [1939] A. C. 277.
30. INTERNATIONAL CONTRACTS 33 (1948).
31. *Ibid.*
32. DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS 506 (1932).

German Supreme Court or the German Appeal Courts the parties had chosen a legal system with which the contract had some connection. With regard to France, Batiffol's analysis reaches the same result.[33]

Dr. Rabel's doctrine of unrestricted autonomy can also be impugned by consideration of the following: It is beyond doubt that a contract lacking all foreign elements cannot be subjected by the parties to any foreign law rule by which they would violate some imperative rule of domestic law. For example, if two domiciled Englishmen conclude a contract in England to be performed in England they cannot evade the English rule of "consideration" by agreeing to have their contract governed by French law (where consideration plays no part). Can it be assumed that if the contract had been concluded in England between an Englishman and a domiciled citizen of Nova Scotia (where consideration is required as in England) they could agree on the applicability of French law?

The author then examines the law applicable where there is no agreement (express or implied) by the parties. His admirable formula announces that the task of the court is "first, to state whether the individual facts of the contract are colored by a certain law; if not, second, whether the contract belongs to a class typically centering in a certain country."[34] Westlake's famous formula, applicability of the law with which the contract has the most real connection,[35] is here developed into the more precise maxim that the court has to discover "the *most characteristic* connection of an individual contract and, certainly, that of the usual types of business contracts." He discusses the two most important "prima facie connecting factors": the *lex loci contractus*, which prevails by virtue of a presumption in France, Belgium, Spain and other countries belonging to the French law family; and the *lex loci solutionis*, which, under Savigny's influence, obtains in Germany and several American jurisdictions and is often favoured in British courts.[37] But he emphasizes that even a rebuttable, *i.e.*, a prima facie, rule

33. LES CONFLITS DE LOIS EN MATIERE DES CONTRATS 27-9 (1938).
34. P. 440.
35. WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW § 212 (Bentwich ed. 1925).
36. P. 442.
37. Pp. 445-462.

is too rigid to be helpful. On the other hand, following Griswold, he sees a danger in the "unlimited dissolution of fixed conflicts rules."[38] "If we could do no better than refer the courts to their own estimates of what is *in every single case* the most closely connected law . . . the judges would soon fall back on their formulas."[39] It is therefore not the single contract but the single type of contract which should be studied. Insurance, banking, sale of goods, and carriage contracts may be distinguished under "rational rather than local criteria."

The succeeding chapter deals with the form of contracts. Of particular interest is the author's attempt to find an exact definition of the concept "form" for the purpose of conflicts law. Form, so he claims, is "the external side of the making of the contract, the expression as opposed to the content of legal declarations."[40] Though sometimes helpful, the formula does not remove doubts as to classification. The term "external side" is a little vague. It may have the same meaning as Zitelmann's more precise pronouncement: "A legal provision concerns the form only if the content of the contract remains the same whether the provision is obeyed or not."[41] Neither definition however is potent enough to dissolve classification doubts. Consent by an authority or by a third party may be regarded as pertaining to form, as in English law, because it is something "external" to the agreement, or may be substantive, as is the law outside England. A prohibition to act through an agent (which indubitably concerns substance) may be distinguished with Zitelmann from a prohibition to use a messenger to declare intention. In most countries marriage banns are part of the form; French law has good reasons for taking a different view.

Dr. Rabel's next chapter, on the scope of the law of the contract, abounds in particularly happy solutions. His last chapter on the doctrine of public policy shows the author's strong opposition to such practically unlimited use of that doctrine as is to be found notably in Italy and in other countries swayed by "Europe's darkest currents of national-

38. P. 481.
39. P. 482. (Italics supplied.)
40. P. 498.
41. 2 ZITELMANN, INTERNATIONALES PRIVATRECHT 158 (1897-1912).

ism."[42] Rightly, like Lewald and other scholars before him, Dr. Rabel would like to see the *ordre public* clause restricted to those branches of law which "have to serve public interests."

May the next volume of this admirable work soon be accessible to all those who, like the reviewer, are grateful for what the first two volumes have taught them.

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LEGAL BIBLIOGRAPHY AND THE USE OF LAW BOOKS. By Arthur S. Beardsley* and Oscar C. Orman.** Brooklyn: The Foundation Press, Inc., 2nd ed. 1947. Pp. xii, 653. $6.00.

It is refreshing to find, in a book on legal bibliography designed to assist law students and legal researchers, at least a passing reference, where statutory construction is discussed, to the subject of legislative intent. The authors devote one chapter to Legislation, wherein they say, "It is sometimes desirable to trace a bill from its introduction to final passage by the Congress."[1] This faint recognition of the importance of legislative history is an all too tentative and timid step to be sure, but still a step in the right direction.

Any law library these days that feels it is complete when it has provided the standard reports, digests, statutes and treatises is indeed living in the good old days. And any law school which neglects to prepare its students in the use of "nonlegal legal material" as well as in the use of the conventional research sources is turning out ill-equipped graduates. Particularly are the graduates handicapped if they find themselves involved in a question of federal law. More and more the federal courts are relying on the legislative history of a statute when interpreting it, and more and more

42. P. 556.

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1. P. 63.