BOOK REVIEWS

THE CONFLICT OF LAWS: A COMPARATIVE STUDY: Volume Three. By Ernst Rabel.* Michigan Legal Studies. Chicago: Callaghan & Co., 1950. Pp. xlvi, 611. $12.50.

Of Ernst Rabel's Comparative Study of the Conflict of Laws, the third volume is now available. In the first volume, Rabel, after a brief survey of the literature, the sources and the development of the field, and a concise statement of his methodological program, discussed in detail the problems of personal status, *i.e.*, personal law of individuals; marriage, including marital property law; divorce and annulment; and parental relations. In volume two, Rabel presented his thoughts relating to conflict problems concerning corporations and kindred organizations, torts, and contracts in general. The present, third, volume contains two new parts, viz., *Part Nine—Special Obligations,* and *Part Ten—Modification and Discharge of Obligations.* There remains for further treatment the entire field of property, including negotiable instruments and succession upon death. Let us hope that Rabel will also present us with his views on those other topics which, while they are not strictly concerned with choice of laws, are generally regarded by American lawyers as belonging to the field of conflict of laws, viz., the problems which arise in the administration of "multi-state" estates of decedents, wards, insolvent individuals and corporations, or of other special masses of assets, such as trust funds. They all call for scrutiny by Rabel's penetrating mind.

In the major part of the present volume Rabel has elaborated a far-reaching and, at least for American law, novel idea. In his discussion of contracts in general,[1] Rabel vigorously advocates the general principle of "party autonomy." By his world-wide survey, he has demonstrated that the courts of practically all countries are unanimous in applying to problems of the law of contracts that law which has been chosen by the contracting parties themselves. Theoretical objections to this free choice by the parties have had some disturbing influence, but not to the extent of overthrowing, by any principle of allegedly logical necessity, this practice by which the needs of modern business are more adequately served.

Nowhere has this practice been maintained so consistently as by the British and the German courts, which have seldom wavered in openly honoring the choice of law of the parties. In other countries, especially in France and in this country, the courts have been influenced by the theoretical objec-

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1. 2 RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 355 *et seq.* (1947).

tions to party autonomy or have been under the spell of the time-honored formulae of *lex loci contractus, lex loci solutionis,* etc. But using the vague terms of these formulae, the courts have nevertheless found ways by and large to locate the place of contracting or the place of performance in the very state whose law was chosen by the parties. Perhaps the practice of the courts has not been quite so consistent as it appears to Rabel, but both the trend and the practice of the experienced traders to provide a stable basis for their dealings by an express *stipulatio juris* is undeniable. The demonstration of these needs and practices of international trade and the futility and spuriousness of all the theoretical objections constitute the most important and most impressive results of Rabel's inquiry.

There still remains, however, the question of which law to apply when the contracting parties have not followed the experienced international traders' practice and have failed to include in their contract an express choice of law clause. It is within this large group of cases that the problem of choice of law has been most frequently litigated, and that the various "theories" have been developed whose competing claims to exclusiveness have resulted in all the famous controversies. Critically surveying these problems Rabel concluded in his second volume:

> No one conflicts rule can serve for all obligating contracts. A wrong method had developed when writers, enactments, and judicial decisions tried to apply either always the law of the place of contracting, or always the law of the place of performance, or always the personal law common to the parties, or that of the debtor, or always to connect the making of the contract with one place and its effects or performance with another place. All these doctrines have thoroughly failed.[2]

They have failed because no one doctrine has been able to muster general adherence and because the terms of each are too vague ever to guarantee foreseeable results.

Rabel has shown the like failure of the opposite technique in which all apparently objective formulae are discarded and where there is sought for every contract that law upon which the parties are presumed to have agreed. Where the parties have given no thought to the possibility of future controversies, or of the need of agreeing upon some law under which such controversies should be decided, or of both, it is futile to search for their implied intention. Their "presumed" intention is nothing but the intention which someone else thinks they might or should have had if they had directed their minds to the problem. In other words, the law "presumed" to have been intended by the parties is either the law indicated by some one of the general rules, or it is that law which the court thinks that the parties should or might have intended under the peculiar circumstances of the individual contract.

2. 2 RABEL, *op. cit. supra* note 1, at 480-1.

The former alternative necessitates reliance upon the general rules referred to above, which remain indeterminate and unworkable even when they are labeled rules of presumed party intention; and the second alternative requires a sacrifice of all predictability and stability, even though the approach is described as a search for the law of the place in which the contract has its "center of gravity" or with which it has the most important, or the most essential, or the most intimate contacts, or whatever other formula of similar purport may be employed. Speaking of all these attempts, Rabel states:

> A margin of judicial discretion, of course, must remain so as to do justice to peculiar forms of contracts and individual mentalities of parties. But, roughly speaking, we need a developed system of conflicts rules on contracts, rather than just one or two rules, and we have to build it not on rules so vague as to abandon the judge regularly to his worry or fancy, nor on specifications so tight as to omit important kinds of agreements.[3]

What is needed is neither a strait-jacket of just one or a few oversimplifying rules of general scope, nor an empty reference to the center of gravity of every individual contract, but an answer to the question, "In what jurisdiction a certain *type* of contract is centered."[4]

The types must neither be defined formalistically, nor tied to rules of purely theoretical excogitation. Lists of such kind have been "sketched" in reports to the Institute of International Law, and, under its influence, in such legislative enactments as the *Montevideo Treaties of 1889/1940,* or the *Polish Statute of 1926.* Rabel has characterized these lists as "the unconvincing product of divination rather than inquiry." His own program calls for comparative research in the municipal laws, in the cases, and above all, in commercial practice, aided, particularly, by the study of those standard forms which can be found in international and interstate business. Such work requires much future study by individual scholars or, better, by organizations and other cooperative enterprises. Significantly, Rabel adds that he "does not believe himself able, in a lonely study, to do more than to point out a few examples and to suggest some methods of research."[5]

Rabel's new volume is in its major part devoted to the implementation of the program thus stated. Appraising the results, it is found that Rabel has given a great deal more than just a few examples and some suggestions for future methods of research. He has applied his method to those types of contracts which are of real commercial significance, and in far-reaching but careful investigation of actual practices of business as well as of the courts, he has suggested the ways in which order can be brought out of, and perhaps found in, a seemingly chaotic situation.

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3. 2 RABEL, *op. cit. supra* note 1, at 482.
4. 2 *id.* at 483.
5. 2 *ibid.*

The contract types studied in Part Nine of the volume are money loans and deposits, sales of movables and immovables, contracts of employment and agency, transportation of goods and passengers, insurance, and suretyship; there follows in a special chapter a short discussion of certain obligations of quasi-contractual character, especially unjust enrichment and general average.

Probably no other contract is of greater practical business significance than that of the sale of goods. In legal discussions, especially in conflict of laws, it has been regarded as the prototype of contract in general. For its treatment Rabel has been uniquely qualified. He was the principal draftsman of the International Uniform Sales Act which was prepared in the early 1930s by the League of Nation's Institute for the Unification of Private Law, and he is the author of a comprehensive comparative treatise on the world's substantive laws on the sale of goods. Running parallel with the pre-war efforts to unify the substantive law of international sales were more modest efforts to bring about unity for at least the conflicts rules on sales; the successive drafts which emerged from these discussions play an important role in Rabel's present discussions. While the drafting of the earliest of these proposals[6] is properly characterized by Rabel as "superlatively careless,"[7] the latest,[8] the so-called Hague Draft of 1931, is a remarkable document. Significantly, it refers to the law stipulated by the parties. Significantly, too, it separates from the contract problems the problems which arise in connection with the transfer of the title or security interests in the goods. In accordance with the uniform practice which has developed the world over, it is understood that these problems are to be determined under the law of the situs of the goods. This world-wide uniformity has, of course, been produced by the compelling need of prospective purchasers and mortgagees to know, with the greatest possible ease, to whom the title to the goods belongs and by what security interests it is encumbered. Both the world-wide uniformity of the conflicts rule and the business world's requirement for certainty will be destroyed if there should be enacted into law the grotesque proposal of the American Law Institute's Draft Uniform Commercial Code, which in effect subjects these title problems, together with all contract problems, to the *lex fori, i.e.,* a law which can never be ascertained in advance. It would mean that a title or a security interest which everybody regarded as having vested in a certain person under the law of the situs, to which businessmen will continue

6. International Law Association, Draft of an International Convention for the Unification of Certain Rules Relating to Conflict of Laws, Contracts of Sale, Contracts for Work, and Contracts for Services. 34th Report (1927) 509. It is usually referred to as the Vienna Draft 1926.

7. P. 57.

8. Draft of Convention on the Conflict of Laws in the Matter of Sales of Corporeal Movables, prepared by a Special Committee appointed by the Sixth Hague Conference. in their meeting of May 28 to June 2, 1931.

to look, can retroactively be held—under the *lex fori*—to belong to someone else![9] The manuscript of Rabel's third volume seems to have been completed before the Draft Uniform Commercial Code was published. It would have been interesting to read his reactions.

For those contracts in which the parties have not declared their own choice of law, the Hague Draft of 1931 makes a clear break from all the outworn formulae of place of contracting or place of performance, etc., and simply declares applicable, at least as a general rule, the law of the place of the commercial establishment of the seller. By way of exception, the law of the place of the buyer's establishment is to apply if it was in that country that the order was received by the seller himself or by his representative, agent, or traveling salesman.

These proposals are regarded by Rabel as a step in the right direction, but they do not satisfy him entirely. The practices of international trade and, especially, the standard forms which are constantly used in the trade in such bulk goods as grain, cotton, metals, etc., have convinced him that "in traditional and widespread commercial thinking much emphasis is laid" upon that act of the seller by which he releases the goods from his orbit into that of the buyer, in other words, upon the act of delivery. The types of commercial sales are diverse. They differ according to the peculiarities of various kinds of goods and according to the habits of the various trading centers and commodity exchanges. In spite of these difficulties, Rabel believes it possible to determine the "place of delivery" for every type of sale. This place, therefore, constitutes the center of gravity of the contract, and its law is to constitute the law of the contract, unless the parties have expressly agreed upon some other law.

At a first glance, Rabel's proposal appears to be a return to the old rule of place of performance. But as he spells out his concept of delivery, it becomes apparent that it is simultaneously more clear and more flexible, since it can be determined with a great measure of definiteness for every known type of sale, especially for the commercially important types of f.o.b. and c.i.f. contracts and their variations. Furthermore, the place of delivery of the goods clearly refers to the main obligation of *one* of the two parties to the transaction, while the place of performance rule is ambiguous in itself, since in each bilateral contract it is impossible to ascertain *which* party's duty of performance should furnish the test. Rabel's position also seems sound in maintaining that from the businessman's point of view the delivery of the goods is actually the main and center aspect of the transaction.

The present discussion of Rabel's treatment of sales of goods has been

9. *Cf.* Rheinstein, *Conflict of Laws in the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 114-122 (1951).

lengthy because it reveals both the special strengths of Rabel's method and the source of possible doubts. Rabel, it will be remembered, is anxious to do more than simply recount what has been done and thought in the conflicts laws of the world. From his uniquely comprehensive survey and analysis, he tries to distill those rules which might recommend themselves to the world as uniform solutions for world-wide problems. Such uniformity is shown already to exist in numerous respects. For instance, it exists in the world-wide trend to decide problems arising out of contracts of carriage by sea under the law of the port of dispatch, or the general application of the law of the port of adjustment to problems of general average, or the world-wide tendency to recognize for claims of workmen's compensation the jurisdiction of the state of the location of the headquarters of the enterprise or plant to which the worker is attached. The existence, the possibility, or even the desirability of a uniform conflicts rule is not so certain, however, in certain other connections. For contracts of insurance Rabel advocates as a uniform conflicts rule the application of the law of the location of the risk insured, which has to be determined differently for different kinds of insurance. Such a rule will naturally be welcomed by those states which are primarily interested in the protection of their citizens and their property values. But will it also meet with the general approval of those states in which insurance companies are a factor of political power, where, consequently, the substantive law is likely not to be too harsh on the companies, and where the courts have long been inclined to use conflict rules to achieve the application of the domestic law? Conflicts law can be a tool in the struggle of economic or other social interests. Even in maritime law, where international uniformity has been more conspicuous than in most other fields, it has been no accident that British courts have been more favorable to the law of the flag than have American courts.

With respect to the conflicts treatment of statutes of limitation, the world has long been divided. British and American courts have traditionally classified the problems presented by such statutes as procedural, while in the civil law countries they are regarded as belonging to the sphere of substantive law. Within the latter group we find a subdivision between the French approach and that of the majority of the other countries. The latter regard the problem of time limitation as an incident of the claim in question and consequently apply to every claim the statute of limitation of that state by whose law the claim is generally "governed." The French courts, still following a century-old tradition which is lucidly traced by Rabel, are inclined to look upon statutes of limitation as a device of debtors' protection and consequently to apply the law of the debtor's domicile. Since a debtor is most frequently sued at his domicile, the results of this approach resemble those of the common law system of simply applying the *lex fori,* which is nowadays modified by the almost general enactment of borrowing statutes. This modification means that in

a common law state a claim is barred by the expiration of the shorter period provided by the statute of either the forum or of the state in which the cause of action arose. In a careful and incisive investigation of the substantive limitation laws of both the common law and the civil law countries Rabel demonstrates convincingly that the different classifications as procedural or substantive are due neither to different legal policies nor to differences of municipal laws. The latter are indeed shown to present an almost complete uniformity throughout the world. Under the laws of the countries of both systems a claim is affected by the expiration of the particular period of time so that it can no longer be judicially enforced when the statute is pleaded, as it must be, by the defendant. Likewise, the two systems agree that the claim can be validly paid or ratified after the expiration of the statutory period. Rabel maintains that these effects should more properly be classified as substantive rather than procedural, and consequently he advocates the adoption by all countries as a uniform rule that of applying to each claim the statute of limitation of that law by which the claim is generally governed. Perhaps such a rule might be more "just" than our present approach. But since we have no central legislature for all common law countries, the shift could be achieved only piecemeal through the legislatures or, more realistically, through the courts of every one of our states and territories and every one of the provinces, regions, or other jurisdictions of the British Commonwealth. Not even the greatest optimist can hope for any general movement of this sort, but if the shift is made only by one jurisdiction or another, we shall have lost that unity of approach which now exists within the common law part of the world.

Where conflicts law has reached a state of stability and consolidation within a wide area, it would be neither practicable nor desirable to shift over, in a piecemeal fashion, to some new approach even though it might be "better" from the point of view of an ideal conflicts law. Rabel's carefully considered suggestions ought to be heeded, however, for guidance in those areas in which conflicts law is still in a state of flux, as for instance, in the field of sales of goods or lands, of contracts for employment, and above all, in those fields where Rabel has done real pioneer work, such as agency, quasi-contract, assignment of debts, or set-off and counterclaim. The conflicts problems of these fields have been neglected or, perhaps, not even discovered. The problems have not frequently arisen in American courts because most of the cases are concerned with our own states, whose substantive laws do not differ greatly from each other. However, the choice of law rules become practically important when the choice is between American law and that of a civil law country. The impact of the conflicts rules cannot be properly recognized without an awareness of the differences of substantive law. Rabel has thus found it necessary to present in these chapters brief comparative surveys of the substantive laws in question. These sketches are masterpieces of learning

and artful presentation. They are not only instructive but fascinating, especially where troublesome problems of the present day are clarified through the tracing of their history or the use of historical parallels. High points in this respect are the chapters on agency and the discussion of covenants of title, quiet enjoyment, etc., whose intricacies are brilliantly elucidated by apt references to Greek, Roman and Germanic law.

A book which is composed in such manner differs from the usual legal text, which is usually meant as a reference work to be consulted for case information on some particular point, or as a survey of existing law for purposes of review by examination candidates. Rabel's book may well be used as a vast storehouse of information and reference, but it is primarily meant to be read as a coherent whole and thus to serve as a stimulant for thought and creative development. That it has been completely neglected in the preparation of the conflicts provisions of so important a work as the Draft Uniform Commercial Code, is an almost unbelievable illustration of our disdain of the accumulated wisdom and experience of the past and of other parts of the world. We are the country of bold experiments, but every scientist or inventor knows that, if he is to take a step forward, he must be familiar with the present "state of the art." The scientist would dismally fail if he began his investigations without drawing upon the experiences of those who had performed the earlier experiments. The analogous attempt of the Draft Code will equally fail, but until that failure becomes apparent it will have immeasurably increased the confusion in a field which has already been sufficiently confused by our consistent refusal to look at it in any fashion other than piecemeal. It will also constitute a puzzle to foreign observers, for whom it will be difficult to understand how rules of such plain impracticability could have been enacted in a country which had at its disposal Rabel's work, not to speak of its rich and eminent older literature.

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PUBLIC AND REPUBLIC: POLITICAL REPRESENTATION IN AMERICA. By Alfred de Grazia.* New York: Alfred A. Knopf, Inc., 1951. Pp. xiii, 262. $3.50.

Representation is the crux of the relationship between public and republic; between the people and their government. It is, therefore, rather surprising, and unfortunate, that so little has been done by way of a systematic analysis of the theory and practice of representation in the United States. Alfred de Grazia has made a significant contribution toward the filling of this gap. His stated purpose is to "isolate clusters of ideas on representation, to discover

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