REVIEWS AND NOTICES

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The Logical and Legal Bases of the Conflict of Laws. By WALTER WHEELER COOK, Professor of Law, Northwestern University. Cambridge, Massachusetts: Harvard University Press. 1942. Pp. xx, 473. ($5.00)

The title of this book has for nearly twenty years been familiar to students of the conflict of laws, because in 1924 under that title an article was published in 33 Yale L.J. 457, in which the same author stated his general point of view. The original article contained no forecast of further articles, but in the course of the years 1931 to 1942 the author wrote for various law reviews in the United States a series of articles which were stated to be chapters or portions of chapters in a forthcoming book. One result of this serial publication has been that the author's views are already well known and the author has been able to answer criticisms of his earlier articles and of his arguments in favour of a new approach to problems of the conflict of laws.

The book in question has now appeared, chapter 1 being a reproduction of the original article with some additional footnotes in square brackets, and "supplementary remarks, 1942". In these supplementary remarks the author points out some cases in which his point of view seems to have been misunderstood. The hitherto unpublished material consists of eight new chapters, and supplementary remarks appended to the reprint of articles already published, and amounts to from one-fourth to one-third of the book.

As the author points out, the book is not intended to be a "complete treatise" on the conflict of laws. His purpose is not primarily expository, but rather he analyzes and criticizes orthodox methods, or methods commonly used, for the solution of conflict problems with the view of the substitution of a different approach to those problems. He discusses a great variety of topics, but makes no attempt completely to expound the 'law' on any topic. He is concerned more with selecting some typical situations in different fields of law and with elaborating the solution of the problems arising from these situations in accordance with his own general point of view, as contrasted with methods usually adopted.

The author accepts with equanimity (p. 46) the "baptism" of his method under the name of "scientific empiricism". He objects to the method which assumes fundamental postulates, and then deduces from them detailed conflict rules, without sufficient or any investigation of the bases upon which the postulates are supposed to rest and without sufficient or any investigation of the social convenience or practical expediency of the rules thus deduced and applied. The author does not object to postulates (or assumptions); on the contrary he considers initial assumptions to be an essential element in the collection and intelligent study of data in the field of the conflict of laws, but, as in the field of physical science, such assumptions must be provisionally formulated in the light of

past experience and must be used merely as tentative working hypotheses, subject to the possibility of revision and improvement as the enquiry proceeds (pp. 47, 70).

Consequently, we find running through the author's discussion, firstly, his criticism of fundamental postulates commonly assumed in the conflict of laws (some of them inconsistent with others), and, secondly, his insistence that a conflict rule should not be a mere deduction from a postulate, but should always be based on social convenience and practical expediency and should be expressed in terms which suggest its real basis. If a choice has to be made between conflicting rules,

> the basis must be a pragmatic one — of the effect of a decision one way or the other, in giving a practical working rule. In this connection it may be that in some cases it makes little difference which rule is adopted, so long as it is reasonably clear and definite and after its adoption is not departed from in cases clearly falling within it, but in others clearly vital problems of social and economic policy must be considered before a wise choice between conflicting rules can be made. (pp. 45, 46: the "but" clause was added in 1942 to the original article of 1924).
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> The actual process in settling a situation of doubt — a 'new' case, if we are dealing with law — involves a comparison of the data of the new situation with the facts of a large number of prior situations which have been subsumed under a ' rule ' or ' principle ' within the terms of which it is thought the new situation may be brought. This comparison, if carried on intelligently, necessarily involves a consideration of the policy involved in the prior decisions and of the effects which those decisions have produced. If the points in which the new situation resembles the older situations already dealt with are thought to be the qualities the existence of which were decisive in leading to the decisions in the prior cases, the new case will be put under the old rule or principle. In doing this, the rule or principle as it existed has not been merely 'applied'; it has been extended to take in the new situation. In other words, however great the appearance of purely deductive reasoning may be, the real decision where a case presents novel elements consists in a redefining of the middle term of the major and minor premises of the syllogism; that is, of the *construction or creation of premises* for the case in hand, which premises did not preexist. The statement of the premises of the deductive syllogism is therefore a statement of the conclusion which has been reached on other grounds, and not of the real reason for the decision. When once the premises have been thus constructed, the conclusion inevitably follows. (pp. 43, 44).

A good example of the author's method is found in his discussion (see chapter 1, *passim*) of the common form of statement that in a given type of situation the forum should or must 'apply' the 'law' of a given country (or, alternatively, that a particular question is 'governed' or 'determined' by the 'law' of a particular country). Here, both the basis of the rule, and the inherent ambiguities of its wording require investigation. As to its basis, it is impossible within the limits of a review of moderate length to do more than mention the author's devastating criticism of the theory (expounded in the Restatement and elsewhere) that the forum recognizes and enforces 'rights' created by a foreign 'law', or 'applies' the foreign 'law' because the foreign state has exclusive 'legislative jurisdiction' in the particular circumstances. He discusses (pp. 29 *ff.*) the nature of a 'right' as merely the embodiment of a prediction that the courts and officials of a particular country will give relief in certain circumstances (so that a person in a given situation may have a 'right' in one country and no 'right' in

another country), and vigorously criticizes the tendency to reify a 'right' and to think of it as something that can be acquired in one country and carried to another country and there enforced. Here he is able of course to quote Holmes J. against the same judge's statement of the *obligatio* theory (p. 36).

Again, the ambiguities inherent in the proposition that the forum 'applies' the 'law' of a foreign country or that the 'law' of that country 'governs' or 'determines' a given question, are manifold and intricate. What part of the foreign law is to be applied? Its domestic rules or its conflict rules? Its rules of procedure and public policy as well as its substantive rules? And if the forum must pick and choose among these foreign rules, what is left of the theory that the forum applies the foreign law or enforces rights created by the foreign law, and what conceivable advantage is there in stating a rule in a way which furnishes no practical guide to the forum? While courts have sometimes paid lip service to the foreign law theory or acquired rights theory (pp. 41, 42), what they have done is inconsistent with the theory. As a general rule, and probably without being fully conscious of the logic involved, they have ignored, or refused to accept, the doctrine of the *renvoi* (implicit in the foreign law theory), and have looked at the domestic rules of the foreign law, that is, the rules which would be applicable in the foreign country to a purely domestic situation there, and have applied rules identical with or similar to those rules, but subject to limitations which on investigation destroy all illusion that they are literally applying the foreign law (p. 20, and chapter 1, *passim*). The law applied by the forum is therefore its own law, and the extent to which its own rules are based upon foreign rules is dictated or limited by considerations of practical expediency and social convenience. In some exceptional cases these considerations lead the forum to decide a case in the same way as the very case would be decided if it arose before a foreign court (as, for example, if the question is one of title to, or the right to possession of, land situated in a foreign country), so that in effect the forum follows the conflict rules of the law of the situs. Again, if the facts of the situation (apart from the place of litigation) are, from the point of view of the foreign country, purely domestic facts, the forum should decide a case as it would be decided by the foreign court. Even in these exceptional cases, however, the forum does not enforce foreign 'law' or a foreign 'right', but adopts as its law a rule reaching the same, or at least a highly similar, result to that which would be reached by the foreign court (pp. 21, 22, 29).

An outstanding limitation on the attempt of a court in one country to 'apply' the 'law' of another country in any sense is commonly expressed in the rule that the application of foreign law is confined to substantive rules, and that the forum always applies its own procedural rules. The author points out various reasons for the confusion which pervades the application of this rule, including the inherent elusiveness of categories, and the fact that the line between different categories may be, and sometimes should be, drawn in one place for one purpose and in another for another purpose. He submits that the distinction between 'substance' and 'procedure' is drawn by a court for its own protection: it cannot devote too great effort to an attempt to give precisely what a foreign court would give. As a purely practical matter it cannot undertake to follow the foreign rules for service of process, of pleading, of evidence, etc. It may happen, however, that a foreign rule, commonly characterized, at least for some

purposes, as procedural, such as a rule with regard to burden of proof, may not be too difficult of ascertainment and application, and may at the same time be so important in its effect on the plaintiff's chance of recovery that the forum is justified in characterizing the rule as substantive for the purpose of its own conflict rules without regard to the way in which the rule is characterized by the foreign law for other purposes. This involves of course the rejection of the theory of secondary characterization in accordance with the *lex causae*. The author's whole discussion of substance and procedure in chapters 6 and 8 is especially interesting. In the latter chapter the author's discussion of the Statute (or Statutes) of Frauds and statutes of limitation constitutes an important contribution towards satisfactory solutions for the problems connected with these two troublesome topics.

The foregoing bald outline of some features of the author's approach to problems of the conflict of laws fails of course to reflect the vigor of his style of writing and the keenness of his analysis of the great variety of factual situations which he uses as illustrations of his arguments.

Specific reference to the new chapters must be brief. The author's criticism of what the Restatement calls the "legislative jurisdiction" of states, already mentioned, is supplemented in new chapter 3. The chapter on characterization is now preceded by a new chapter 7 on domicile, and followed by a new chapter 9 on *renvoi*. In connection with the last mentioned topic the author raises interesting questions as to what is the purpose of the conflict rule which refers the distribution of a decedent's movables to the 'law' of the domicile, and to what extent the doctrine of the *renvoi* may accomplish that purpose (pp. 240 ff). In chapter 1, as noticed above, the author mentions the *renvoi* as an element of ambiguity implicit in any conflict rule which purports to say that a court should 'apply' the 'law' of a given foreign country. The chapter on 'immovables' and the 'law' of the 'situs' contains some "supplementary remarks" and is further supplemented by new chapters 11 and 12 on the characterization of 'things' as 'tangible' and 'intangible' and on 'movables' and 'immovables'. Here the author points out the confusion which results from the failure to distinguish between physical things (which may be either movable or immovable and which have an actual situs) and interests in things or legal relations concerning things (pp. 281, 284 *ff.*), and the failure to observe that the characterization of these intangible interests by the forum for the purpose of its conflict rules is a matter of policy, not of logic (p. 292). The chapters on torts and contracts (which contain, *inter alia*, an acute analysis and criticism of the Restatement's provisions on these topics) are followed by new chapters 16, 17 and 18 on capacity to contract, capacity to marry and divorce jurisdiction.

Inevitably the author's method leads him to some highly 'unorthodox' conclusions, and the outright manner in which he denounces methods which he regards as misleading or unfruitful is apt to provoke opposition, especially in 'orthodox' circles, but it seems unlikely that the author would be very much perturbed either by lack of agreement with his conclusions or intelligent criticism of his method. He seems more inclined to be sensitive about misunderstanding of what he means to say. The present reviewer, having always been a bit of a heretic himself in a humbler way, and being of the opinion that the 'law' of the conflict of laws is still in a formative stage, believes that the author's work is of great importance, disturbing complacency, and stimulating new investigation of the bases of

the conflict of laws. It is hardly conceivable that any serious student of the conflict of laws should ignore the book or that any careful reader should fail to be incited to a reconsideration of the foundations of some of his own views.

The index seems too slight, and, especially in view of the fact that the book is not, and does not purport to be, an orderly exposition of the subject, a more elaborate analytical index would have been helpful. Perhaps, however, the answer to this criticism is that the only way to read a book of this kind is to follow the instructions given by the King of Hearts to the White Rabbit during the trial of the Knave of Hearts, namely, to "begin at the beginning and go on till you come to the end: then stop."

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An Historical Introduction to English Law and Its Institutions. Second Edition. By HAROLD POTTER. London: Sweet & Maxwell. Toronto: The Carswell Company. 1943. Pp. x, 588. (25s.)

The second edition of Dr. Potter's *Historical Introduction to English Law* is, in this reviewer's opinion, the best thing of its kind for student purposes published in one volume. As the author expressly states, he has not been concerned with a study of English legal history merely to provide "a little polite learning", and the result is a book, which, in the main, is concerned with substantive doctrines of law set in such historical perspective as will enable the student to appreciate many of the quaint doctrines which, failing such an explanation, either irritate or, more commonly, completely baffle him.

The book is still in three main parts; the first dealing with judicial institutions, the second with development of the common law, and the third dealing with the history of equity. In the second part Dr. Potter has added a new chapter on forms of action which supplements the chapter on common law procedure. It is refreshing to find that in this chapter, as indeed throughout the entire book, the reader is not left with the impression that he is dealing with a period completely foreign to that in which he lives, and reference to cases as recent as those of yesterday or the day before continually focus attention on the continuity of development which is one of the fascinating aspects of English law.

The author believes that such a study as he has planned in this book should be at the beginning of a course of legal studies. With this view one may express concurrence as a theoretical ideal, although the student who is capable of grasping the full significance of much that is found in this book would seem to require very little else in legal education. In other words, Dr. Potter's book is by no means a simple or elementary treatise. It presupposes a considerable knowledge of substantive doctrine. For example, the new section he has added at the end of Part I entitled "An Interlude on Substantive Law", while one of the most fascinating sections of the book and one which serves to whet the curiosity of the reader for the

following parts of the book, contains considerable jurisprudential material which may tax the ability of beginning students who are unaccustomed to abstract or philosophical discussion. This section illustrates another feature of the book, apparent in all chapters, namely, the injection of the writer's personal comments and observations regarding the co-relation of juristic thought as it has developed or, as it has appeared to the writer to have developed, in the course of its long history. This cannot fail to instil the breath of life into a subject which can only too readily deteriorate into a dissection of moribund antiquities.

The present book is one which we would like to see made compulsory reading for every law student before he was admitted to the practice of law, Whether it should be read as an introduction to law is comparatively unimportant provided that it is read along with work in the various subjects a student will encounter and, in particular, provided it is read as a whole after he has attained some familiarity with existing doctrine. At any stage in the development of a common law lawyer this book will not fail to illuminate much that will otherwise remain a mystery and we heartily recommend it to student and practitioner alike.

C. A. W.

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Handbook of the Law of Real Property. By WILLIAM E. BURBY. Hornbrook Series. St. Paul: West Publishing Company. 1943. Pp. xxvi, 658. ($5.00)

The folder advertising this book described it as "The Student Book Covering All the Law of Real Property", and listed thereunder four columns of chapter and section headings, each column running to some eighteen inches in length. The chapters numbered 35. The sections numbered 376, and in addition there was an Appendix of all the early fundamental English statutes. To be quite frank, if the writer had not actually seen and read a book covering this amount of material in the short space of less than 600 comparatively small pages, he would not have believed it possible. In view of the fact that it took Professor Simes three volumes to deal with the Law of Future Interests, whereas the entire subject matter of those three volumes is here dealt with in about 120 pages, one may form some estimate of the condensation required and, bearing in mind the objects of the book, achieved in the present volume.

There is practically nothing dealing with Real Property which is omitted from mention at least in this book. Part 2, entitled Rights in Land, deals with such matters as waste, rights to support, water rights, easements, licenses and restrictive covenants in equity. Part 3, entitled Possessory Estates, has five chapters on leasehold interests with all their difficult problems and three chapters on the freehold estates. Part 4 deals with such matters as joint tenancies and tenancies in common, as well as

homestead interests. Part 5 dealing with titles, runs through adverse possession, conveyances and recording systems and registration, while Part 6 is devoted to Future Interests, with all their complicated problems of vesting and construction, to say nothing of class gifts, powers of appointment and restraints on alienation such as the rule against perpetuities, etc. It would be easy to ridicule an attempt to include such a tremendous body of law in one small volume, and time was when this reviewer was inclined to view askance books such as the present. There is, however, an extremely useful purpose which such a book can and does fulfil, and to write such a book as accurately as Professor Burby has done is as difficult as it would be easy to criticise his task. The book follows, of course, the customary Hornbook style of black letter statement with short comment. Sometimes one would like to have had more comment, and frequently there is very little in addition to the black letter statement. On the other hand a student who is trying to see the law of Real Property as one whole, rather than chopped up into many parts, as has become the custom of late years in academic circles, will find Professor Burby's book extremely useful. The book is adequately furnished with citation of cases, but not overburdened with useless reiteration merely to create an appearance of learning. Reference is made throughout to numerous law review articles, to relevant sections of the Restatement of Property and to other treatises such as Simes, previously mentioned. If education in law consists, as this reviewer believes it does in large part, in engendering an awareness of problems, the present book should, and we believe it will, make its place in acquainting students with those things which they should know in a field which can become hopelessly confused and complicated. No doubt many persons will object to the present book because it is neither as confused nor complicated as books on Real Property are supposed to be. Professor Burby has achieved the acme of simplicity in a subject where he could easily have been forgiven for being obscure. If it be heresy for one who has endeavoured to lead students through the mysteries of future interests for several years to applaud a text which makes his complicated class room efforts seem entirely unnecessary and confusing, then the reviewer is a heretic. With English books on Real Property getting further and further away from common law doctrine, in view of the 1925 legislation, this reviewer has found that frequently he can obtain more assistance in understanding much Canadian law from American rather than English books. Burby's book is no exception, and with the warning that the subject of Real Property is, from the standpoint of actual use to achieve given results, more complicated than the present book would have us believe, this reviewer is of opinion that for concise statement of the principles applicable to the tremendous field outlined above, the present book will be hailed as a godsend by the lazy student and as a base of operations by the more industrious.

Before reading the book we were appalled by the temerity of a writer who was willing to undertake the task which Professor Burby set himself. After reading the book we can only express admiration for the manner in which a seemingly hopeless task was brought to a successful conclusion,

since one of the great difficulties which the writer surmounted was in knowing what to omit and what to include. On both counts, from a student's standpoint, he has been eminently successful.

C. A. W