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Marital Property in Conflict of Laws, by Max Rheinstein

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BOOK REVIEWS

MARITAL PROPERTY IN CONFLICT OF LAWS. By Harold Marsh, Jr. Seattle: University of Washington Press. 1952. Pp. xi, 263. \$4.50.

The notion that an entire system of choice of law rules might be deduced from a few over-all principles has been abandoned ever since Beale's numerous critics demonstrated that the structure which he had tried to erect on such foundations was uninhabitable. The same method must be applied in conflicts law as in all other branches of the law. We must carefully and painstakingly investigate what issues are at stake in particular problems, and then apply to their solution those policies which have found expression in our society and, consequently, in its law as the guiding directives for the adjustment of conflicting interests. Mr. Justice Jackson notwithstanding,¹ these policies are more numerous and more varied than the one of establishing a division of law-making powers among the states of the Union along such clear and firm lines that there would never be any doubt or overlapping. The most important of these policies have recently been stated by Professors Cheatham and Reese;² how they are to be applied in the solution of definite type problems of conflicts law has been demonstrated in Professor Rabel's great work.³

The reconstruction of American conflicts law along these lines requires patient investigation and thought. The need has already stimulated a number of monographic investigations of limited topics⁴ and to this valuable body of literature Mr. Marsh's book constitutes a welcome addition.

Mr. Marsh approaches his topic in a refreshingly sober manner, which pleasantly contrasts to the theorizing of the now defunct older school. The author tries to put to work the realistic method of Falconbridge,⁵ Neuner,⁶ Wolff⁷ and, above all, Rabel, and he consistently uses

1. Jackson, *Full Faith and Credit—The Lawyer's Clause in the Constitution*, 45 COL. L. REV. 1 (1945).

2. Cheatham and Reese, *Choice of the Applicable Law*, 52 COL. L. REV. 959 (1952).

3. RABEL, *THE CONFLICT OF LAWS* (1950).

4. CARNAHAN, *CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS* (1942); HANCOCK, *TORTS IN THE CONFLICT OF LAWS* (1942); LAND, *TRUSTS IN THE CONFLICT OF LAWS* (1940); LORENZEN, *THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES* (1919); ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* (1940).

5. FALCONBRIDGE, *ESSAYS ON THE CONFLICT OF LAWS* (1947).

6. Neuner, *Policy Consideration in the Conflict of Laws*, 20 CAN. BAR. REV. 479 (1942); *Marital Property and the Conflict of Laws*, 5 LA. L. REV. 167 (1943).

7. WOLFF, *PRIVATE INTERNATIONAL LAW* (1945).

that semantic caution in the use of language, the importance of which was so forcefully demonstrated by the late Walter Wheeler Cook.⁸ The present state of the conflicts field is characterized by the fact that Mr. Marsh has found it necessary to precede his inquiry into the concrete topic of his book with an extensive discussion of the method of thought in conflicts law in general. The entire second chapter, constituting almost one-fourth of the book, is devoted to this discussion of the basic aspects of the choice-of-law problem. It is carried on under the three headings of characterization, policy considerations in the selection of the law applicable, and conflict of choice-of-law rules, *i.e.*, renvoi. In all three respects the author adopts those refined techniques which have been elaborated through the last twenty years or so, such as Rabel's clarifying approach to those problems which have come to be referred to as characterization, Neuner's differentiating search for policies, and Falconbridge's conciliatory ideas about the use of the renvoi technique. Throughout, Mr. Marsh refuses to follow the give-it-up method which was once advocated by Professor Cavers,⁹ but which we have reason to believe is no longer seriously contemplated by that scholar.

The main part of the book is contained in chapters 3-5. Each one of the three great groups of problems just mentioned is discussed with relation to those choice-of-law problems which arise in connection with questions of marital property laws. All the chapters on conflicts law are preceded by a detailed and extensive analysis of the marital property laws in the United States.

The author's arrangement of the book has unquestionably helped him to achieve those clarifications by which his work is distinguished, but it has also produced a certain repetitiousness. In presenting his general methodology the author naturally resorts to illustrations from the field of marital property law and a great deal of what is said in the three sections of the chapter on method reappears again in the three chapters on concrete application. Both the strengths and the weaknesses of Mr. Marsh's approach are demonstrated by that first chapter in which he surveys the substantive law of all the states of this country. Among the most valuable contributions is his detailed analysis of the practical meaning of those terms of art which are in current use in marital property law. Cutting through such lump sum terms as community property, separate estate, or community debt, Mr. Marsh investigates with infinite patience the law of every one of the forty-eight states. The inquiry includes what concrete interests or expectations the husband has in, or

8. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942).

9. Cavers, *A Critique of the Choice-of-law Problem*, 47 HARV. L. REV. 173 (1933).

with respect to, the assets of the wife, and vice versa; in what respects one spouse has a power to affect through his acts property interests of the other and in what respects such assets are immune against being affected by the other spouse's acts; what either spouse's interests are in cases of divorce or death; and in what ways the various kinds of assets are available for the satisfaction of the creditors of either spouse. From this investigation, which must have required an immense amount of work, it becomes clear that the general labels of separate or community property, etc., have very different meanings in the laws of the different states. This, indeed, is one of the most valuable results of Mr. Marsh's investigation: To have demonstrated the futility and danger of the indiscriminate use of these general labels.

It should for all the future render impossible such decisions as that reached in *La Selle v. Woolery*.¹⁰ In this celebrated case it was held that debts which had been incurred by the husband while he and his wife were residents of a separation of assets state could not be enforced against community assets acquired after the parties had moved to Washington. Had the parties remained in Wisconsin, the debts would have been enforceable against the husband's assets; had the debts been incurred in Washington, they would have been what is there called community debts and could have been enforced against the community assets. But, having been created before there was a community fund, the court argued, they cannot be community debts; hence they must be separate debts of the husband, and under Washington law separate debts cannot be enforced against community assets. Removal to Washington and, it should be added, Arizona,¹¹ thus has results similar to bankruptcy. Perhaps, the court of Washington wished to advertise: "Go West, debtor, go West!" If so, it has skillfully disguised the policy behind a verbal fallacy which has been laid bare by Mr. Marsh's analysis. The court, as he proves, has looked to words rather than to those concrete rules of law to which, in a short-hand way, these words refer. This painstaking investigation into the concrete details of the laws of all American states, as they actually work, and the demonstration of the ambiguity of these verbal expressions is of the highest value, not only for purposes of conflicts law but also for anyone interested in marital property law. Here we have, indeed, a fine illustration of applied functional comparative law.

However, the accumulation of all this meticulously stated detail is also confusing. Sometimes it is difficult to realize that all those trees go to form a forest. The details of the laws of every one of the forty-

10. 14 Wash. 70, 44 Pac. 115 (1896).

11. Cf. *Cosper v. Valley Bank*, 28 Ariz. 373, 237 Pac. 175 (1925).

eight states are held together by some over-all ideas and policies, in the community property states by the idea that marriage is a kind of partnership-like joint venture, in the separation of assets states by the notion that, as far as property is concerned, marriage does not create a community, and that the parties stand to each other in the relationship of strangers. In both systems these over-all ideas are implemented differently in detail or modified in various respects, for example, in relation to the wife's power to dispose of her own earnings, or in the situations arising upon death or in the case of divorce. An attempt to group the mass of detail in some such way and to show how they are held together in each state by some, more or less clearly conceived and more or less consistently implemented, over-all policy would not only have helped the reader to find his way through the welter of state law phenomena, but it might also have been useful in the solution of the problems of conflicts law which arise from the numerous differences between them.

These conflicts problems are, as we have seen, grouped by the author under the three main headings of characterization, selection of law applicable, and renvoi. Perhaps, these problems are more intimately connected with each other than may appear from this tri-partite arrangement. As to the bulk or core of those problems which one is accustomed to discuss under the heading of marital property law, almost universal agreement exists today, at least in this country, that they should be decided under the law of the state in which the parties resided at the time of the acquisition of the particular asset in question or, as the author is intent to point out consistently, of that asset into which the asset now in question can be traced back. Questions arise, however, with respect to the scope of this rule or, in other words, as to the meaning of the term "marital property law." Again, Mr. Marsh in his quest for semantic clarity regards this over-all term of little use and thus sets out to catalogue those concrete type problems which have arisen in connection with property rights as influenced by marriage and the diversity of state laws dealing with these problems. With great care he investigates for each of these problems what interests and conflicting policies they involve, and in what way or ways such conflicts may be solved with the least amount of friction. Most of the results reached in this way are convincing, practicable and sensible, but again, the reader cannot sometimes help feeling lost in all the detail.

Perhaps greater perspicacity might have resulted from an attempt to define that core of problems to which the basic rule, stated above, should properly apply, and then to determine its boundaries against other groups of problems for which other rules of choice of law are more appropriate. Such an attempt might have been facilitated by the clear statement of the

proposition that the basic conflicts rule as to marital property interests is concerned with the determination of the law which is to fix interests in property assets not as isolated items but as constituent parts of a fund. The question of determining in what ways, if any, the property interests existing in a single thing, movable, immovable, or intangible, are affected by a legal transaction between A and B is generally determined by the law of the place where that thing is situated at the time of that transaction. As different things may be situated in different places, the effect of the transaction may have to be determined for each of them under a different law. Each asset is looked upon singly and what effects, if any, the transaction is to have with respect to the property interests existing in it, is to be determined for each under the law of its situs. But what are the effects brought about with respect to interests in assets by the conclusion of the peculiar transaction "marriage" or by the fact that the status of matrimony has been created by a marriage and now exists between two parties? In this respect we, as well as other countries, have found it expedient to look not to every asset as a single, isolated item but as a part of a total fund (or a group of funds) so that the influence of the marriage upon the property interests in those assets is determined simultaneously for all of them. We, in the United States, look for this purpose to the law of the parties' residence at the time of original acquisition. All assets belonging to, or acquired by, one of them during the parties' period of residence in state X are affected in the same way by X law, irrespective of where they happen to be situated. In European doctrine this difference between the *modus operandi* of the rules of *lex rei sitae* and *lex domicilii* is usually referred to as that between *statutum totale* and *statutum singulare*. This distinction is, of course, not made for its own sake but for sensible reasons of policy.

As far as the relations between a husband and his wife are concerned, it would be impractical to treat each property asset as a single item with the possibility of different interests existing for each under different situs laws. The treatment as a general fund might be dangerous, however, for prospective third purchasers, mortgagees, and creditors, who must have an easy and reliable way of determining the property interests in assets which they contemplate to purchase or to treat as a security for credit to be extended. Determination under the law of the situs constitutes the easiest way to satisfy this need. How then are the two needs to be reconciled, those of the spouses for uniform treatment, and that of outsiders for separate treatment? Here is an over-all approach which might simplify and unify the treatment of many concrete problems. Of course, these considerations do appear in the author's treatment of the concrete

problems, but the reader's understanding might be helped by some effort to place them in broader perspectives. Just as the scope of the conflicts rule subjecting problems of marital property interests in general to the law of the parties' residence at the time of the original acquisition must be demarcated from the scope of the rule which refers problems of changes in property interests in single assets to the law of the situs, so the scope of the former rule must be delimited against that which refers problems of the law of succession to property upon death to the law of the decedent's domicile as of the time of his death. Here, we are also dealing with a rule which relates to certain assets not as single items but as parts of a fund, viz., the decedent's estate.

The demarcation of this *statutum successioneis* from that of the scope of the conflicts rule on marital property law has been particularly troublesome. It was, indeed, in this connection that the celebrated problem of characterization made its first appearance. Assume H and W have ever since their marriage resided in Illinois, and during their long residence there the husband has accumulated considerable wealth, let us say \$600,000, all of which he has invested in securities and other movables. The parties move to Louisiana and just a few days thereafter H dies intestate. Had the parties remained residents of Illinois, W would now be entitled to an intestate share of one-third of the estate if H is survived by issue or, if not, to his entire estate. Had the parties been residents of Louisiana all the time, the fortune accumulated by H would have been community property, and W would be entitled to one-half as her share. But under the circumstances it seems that W is to receive nothing. The fund owned by H before he moved to Louisiana cannot be community property; hence, it must be separate estate, and under Louisiana law the surviving spouse is, at least regularly, not entitled to any share in the separate estate of the predeceasing spouse. That rule makes good sense within the framework of Louisiana law which gives the surviving spouse his or her one-half share in the community. But it turns out, or seems to turn out, to produce nonsense in the peculiar situation of coincidence of the two laws of Illinois and Louisiana. Clearly the widow must get at least as much as she would be given by the less generous of the two laws. This also seems to be Mr. Marsh's answer,¹² but, I have to confess, I do not quite see how it is reached by him. Yet, the way, which has been shown by Neuner,¹³ is plain: We must refine the choice of law rules.

The traditional formulation of both rules, that relating to problems of marital property law and that relating to the law of succession are too

12. Pp. 226 *et seq.*

13. See note 6 *supra*.

crude and must be limited and supplemented by a new rule, or new rules, by which specific reference is made to the case of a change of residence from a separation of assets state to a community property state, and vice versa. In the same way the choice of law rules must be rephrased from their present overgeneralizing and oversimplifying formulae, and must be broken down to a very much larger number of narrower rules of more specific application, until they are similar to the rules in all other fields of law, of which nobody dreams that they would be encompassed in just one or two dozen general maxims. If we do this consistently the law of conflict of laws will come to be like all other law; it will lose its mystifying aspects and, quite particularly, there will disappear those two bogeys by which it has been haunted too long, characterization and renvoi. But that is a story which cannot be told in a book review.

How refinement of the choice of law rules can be achieved in a field of great practical importance, has been instructively demonstrated by Mr. Marsh. He has not gone the whole length of the way, but he has carried us far. His book constitutes an important contribution to that reconstruction of conflicts law in which we are presently engaged in this country as well as abroad. Conflicts between American and foreign substantive laws as well as foreign conflicts law have been considered by Mr. Marsh only insofar as they have been treated by Rabel, Wolff and other authors writing in English. It is to be hoped that Mr. Marsh's book will attract the attention not only of the American practitioners and scholars but also of the foreign workers in the vineyard.

Max Rheinstein†