

BOOK REVIEWS

INTRODUCTION TO CONFLICT OF LAWS,
by M. T. Hertz, Carswell, Toronto, 1978, pp. xv and 126.

INTRODUCTION TO CONFLICT OF LAWS,
by J. G. Castel, Butterworths, Toronto, 1978, pp. xvii and 182.

One might be accused of ascertaining subjectively the proper law when comparing books on the conflict of laws. However both these books claim to be introductions which gives the reviewer an immediate point for comparison.

In Hertz' preface he claims that his book is both a genuine introduction and a rapid review for the student and practitioner. His goal is to describe a general approach to solving conflict of laws problems. I liked the way the book started with an outline of a tort action showing its potential conflicts ingredients. The illustration is straight-forward:

Jones has just left his house in Toronto when he is struck by a careless driver named Smith, who lives in the State of Illinois in the United States. Jones is taken to hospital and suffers injuries valued at \$5,000. Smith leaves his name and returns to the United States. Smith's insurer refuses to pay Jones on the ground that Jones' carelessness in crossing the street caused the accident.

Hertz notes that there is little evidence and therefore Jones' chances of winning his case will depend on who has the burden of proof. Under Ontario law the onus is on Smith whereas under Illinois law Jones would have to prove that Smith was careless. Hertz continues:

For Jones' lawyer, the case boils down to four problems:

- (1) Where can he bring an action against Smith? Just in Illinois where Smith lives, or also in Ontario?
- (2) If he brings it in Ontario and wins, can he collect on the judgment in Ontario? If not, can he enforce the Ontario judgment in Illinois?
- (3) Assuming that on a successful case in Ontario he can collect in Ontario or enforce the judgment in Illinois, will Ontario apply its own rule concerning the pedestrian's burden of proof? Assuming that he cannot collect in Ontario or enforce the Ontario judgment in Illinois and therefore must bring an original action in Illinois, will Illinois apply the Ontario pedestrian rule or its own rule on burden of proof?
- (4) Is there any other rule, in either Ontario or Illinois, such as a statute of limitations or rule of evidence, which would make the bringing of an action in either place impossible or render it exceedingly difficult?

From these series of problems, Hertz identifies the three main areas that make up the chapters in his book: (1) "Local Jurisdiction", (2) "Enforcement of Foreign Judgements" and (3) "Choice of Law". Thus from the very start the reader is thrust into a factual situation and is able to see some of the principles of conflict of laws at work. It is a good introduction.

It should be pointed out that if one looks at some of the traditional textbooks such as Cheshire's *Private International Law* (Butterworths, London, 1974), Morris's *The Conflict of Laws* (Stevens and Sons Ltd., London, 1971) or Castel's *Canadian Conflict of Laws* (Butterworths, Toronto, 1975), the treatment of recognition of foreign judgements is usually left to the end of the books. Hertz, however, makes it clear from his hypothetical problem that a lawyer must be acutely aware of whether a judgment is enforceable or recognizable in the defendant's country. If the judgment is not enforceable, then the lawyer does the client no favour through litigation. Thus it is clear from page one that this book is not a "potted" version of the subject of conflict of laws. The reader will also not find the usual table of contents at the beginning of the book; in keeping with an introductory work, the author does not even attempt to cover the whole range.

At first I was skeptical of how one could break down this complex subject into three compartments. Yet, surprisingly, an abundance of traditional categories are present in a coherent form. For instance, under "Local Jurisdiction" there is a discussion of the usual matters such as consent and submission, service ex juris, and the doctrine of forum *non conveniens*. Under "Recognition of Foreign Judgements" there is a treatment of the reasons why courts will not enforce foreign penal or revenue laws. More unusually, under "Choice of Law" characterization, the connecting factor, renvoi and the incidental question are dealt with. Overall, Hertz' organization of subject matter is quite different from the traditional texts which put items such as characterization under Preliminary Considerations, followed by "Jurisdiction" and then the various substantive areas such as torts, contracts, status, property and succession. Rather than have a series of isolated compartments, Hertz weaves the important factors effectively into a whole. His use of case law is limited to a few important cases and the footnotes are not numerous. Hertz does not hesitate to use the facts of the cases he does cite to illustrate the point he is making. This is in marked contrast to Castel's introduction, where cases are not used for their factual content but rather as authority for a bare legal proposition. For a person being introduced to the subject for the first time, I think Hertz' treatment of the case law is preferable to the more concise method adopted by Castel. I do disagree somewhat with Hertz when he states in his preface that his book can be used as a rapid review: it depends on what one wants to review. If the reader is looking for an overview, then Hertz' claim can be supported. However if the reader is looking for a "potted" version of black letter law, he could spend his time more profitably looking elsewhere.

As with any author's treatment of a subject of controversy, it is possible to quibble now and then with Hertz' conclusions. At page 24 he cites the cases of *Maharenee of Baroda v. Wildenstein*¹ and *The Atlantic Star*² in support of the statement that:

the presence (of the defendant) may indicate that it is not unfair to require him to defend locally; in fact the English courts have required him to show that it would be highly inconvenient — amounting almost to harassment — to escape from having to defend.

It is my submission that this statement is not completely accurate and that the House of Lord's decision in *MacShannon v. Rockware Glass Ltd.*³ might usefully have been cited, especially as the case was reported in *The Times*, January 28, 1978 and the author's preface was dated January 1978. In that case the House of Lords reversed the Court of Appeal and held that where England was not the natural forum and the plaintiff could not establish some real advantage to him in bringing the action in England, the court would grant a stay if the defendant showed that there would be inconvenience and unnecessary expense if the proceedings were allowed to continue in England. The current test, therefore, seems to be something well short of harassment and is for all practical purposes a forum *non conveniens* approach.

At page 45, Hertz cites the Court of Appeal decision in *MacShannon v. Rockware Glass Ltd.*⁴ as an authority for the proposition that the House of

1. (1975) 2 Q.B. 283

2. (1974) A.C. 436

3. (1978) 1 All E.R. 625

4. (1977) 2 All E.R. 449

Lords has not adopted the doctrine of forum *non conveniens* current in Scotland and the United States. Although the House of Lords reversed the Court of Appeal⁵, the proposition remains correct in theory. However as Lord Fraser said in *MacShannon*.⁶

If these appeals had been from decisions of the Scottish courts in actions against companies registered by Englishmen living and working in England in respect of accidents suffered in England, I think that pleas of forum non conveniens would probably have been sustained, on the ground that the Scottish court was not the appropriate forum to try the actions. The solution, which appears, at least on the surface, to be relatively simple, is not available in England, but the same result is reached by the application of tests that differ more in theoretical approach than in practical substance from those that would have been applicable in Scotland.

Quibbles aside, the book does introduce the reader to the subject and emphasizes that justice in conflict of laws is not served by a mechanical application of a series of rules. Furthermore, the book advocates approaches which may be used by the Canadian courts one day. In 126 well set out pages, it gives the reader a general approach to the subject which a reader, being introduced to the field for the first time, can readily understand.

With Castel's book I had an initial problem of characterization. Castel calls it a *handbook*, viz. a concise reference book covering a particular area. Butterworth's calls the book an *introduction*, viz. a textbook or treatise explaining the elementary principles of a subject. I decided to renvoi the matter back to the author's preface which clearly states that this is a handbook as opposed to an introduction.

This is a very different book from that of Hertz. The contents support this view. The note on the back cover states that the book is part of a series designed to provide both students and practitioners with a clear and concise introductory text. While claiming to be an introduction, it is essentially a summary of Castel's textbook on Canadian Conflict of Laws, 2 Volumes, (1975-77). In fact, in the handbook there are many sections where the wording is identical to that found in the larger work. I could probably be accused of having an unreasonable expectation that the handbook would explain the subject as well as Castel's 2 Volume work. In 182 pages the handbook cannot hope to do that and often the reader will be forced to go into the larger volumes for more introductory material and for a better understanding. The lay out of the handbook facilitates cross-referencing and it is an easy task to flip back and forth from the handbook to the larger volumes. This is in marked contrast to Hertz' introduction which is not as compartmentalised. The table of contents is a mere 1½ pages and the book does not lend itself to being used as a reference source.

Castel's actual introduction is some 17 pages long: thereafter follows a summary of black letter law which is well indexed in an 8 page table of contents. The exposition of methods used by the Canadian courts to solve conflict of laws problem is concise, as is the discussion of modern methods which are not yet in favour. As with any summary, there are bound to be limitations. Indeed, if one were to treat this as a genuine introduction and turned to the subject for the first time, I do not think that this book would leave one

5. At p. 42 of his introduction, Hertz cites the Court of Appeal decision in *MacShannon v. Rockware Glass Ltd.* (1977) 2 All E.R. 449 in support of a general proposition that "the court will scrutinise the case very carefully to see that the nature of the case points to the local forum as the appropriate adjudicator." The House of Lords reversal of the Court of Appeal (fn. 6 supra) does not affect that general proposition and in fact gives the court a wider scope for granting stays.

6. (1978) 1 All E.R. 625 at 639

with an overall appreciation of the topic. What is presented is a summary of rules which might be useful as a rapid review provided the reader had a grasp of the subject beforehand.

Its function as a rapid review is assisted by the often bare statements of what the law is in a given area. For instance at page 148, the reader is told that the essential validity of an inter vivos transfer of an intangible movable is governed by the proper law of the assignment. Indeed, the law governing inter vivos transfers of movables and immovables is summarised in 9 pages.

Sometimes though, the statement can be too concise. For instance, at pages 169-70 in the Contracts section, Castel puts forward the English proposition that a contract which is illegal by the *lex loci solutionis* cannot be enforced.⁷ Castel then relies on Falconbridge's explanation of the case and states:

(t)here is no valid reason for Canadian courts to apply domestic rules of contracts where the illegality exists by a *lex loci solutionis* that is not the proper law of the contract. To do so destroys the foundation of the proper law doctrine. It is for the proper law of the contract exclusively to determine whether illegality at the place of performance affects the obligations of the parties. The domestic *lex loci solutionis* and *lex fori* have nothing to do with this question.

However North in the 9th edition of Cheshire's *Private International Law* writes:⁸

The essential fact to realise is that no case has yet arisen requiring the court to consider the effect of illegality at the foreign place of performance upon a contract, the proper law of which is the law of still another foreign country. When it does arise, there is a danger that the frequent dicta attributing decisive effect to illegality by the *lex loci solutionis* will prevail, despite the indifference they display to general principles.

The point is that Castel's concise statement that the *lex loci solutionis* has nothing to do with the question gives the reader, especially if he is being introduced to the subject for the first time, the impression that everything is cut and dried. In many areas of conflict of laws this is just not so and in this particular area North's inclination is that the *lex loci solutionis* will regretably have plenty to do with the question.

Despite a tendency to generalize, there is no doubt that this book does serve as a precis of Castel's 2 volume work and is consequently more affordable for the student; for that reason and the fact that Castel reviews succinctly all the major areas, the book will be popular.

In reviewing these two introductory texts, an attempt has been made to compare the general with the specific. As an introduction I preferred Hertz' work. The book lends itself to being read from cover to cover, giving the reader an overview. Castel's is essentially a reference book and dictionary of terms. I found that Hertz presented an introduction to what conflicts problems generally involve, whereas Castel was purposely specific throughout his text, condensing 709 pages of his 2 volume work into 182 pages in an attempt to cover a vast range of material in a short space; it is certainly valuable as a rapid review. Both books have their uses and although they have identical titles and similar claims, they serve very different functions. If I were to choose to read an introductory text, I would choose Hertz.

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7. Dicey and Morris, *The Conflict of Laws*, 9th Ed., at 781, Exception to Rule 151.

8. p. 235