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Book Reviews

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condition precedent or more liberally designated as a promissory warranty, it should, nevertheless, be properly construed as being intended to be embraced within the meaning of the word "warranty" as found in the statute. *Accord, Headen v. Metropolitan Life Ins. Co.*, 206 N.C. 270, 173 S.E. 349 (1934); *Schmidt v. Prudential Ins. Co. of America*, 190 Minn. 239, 251 N.W. 683 (1933). *Contra, Fondi v. Boston Mutual Life Ins. Co.*, 224 Mass. 6, 112 N.E. 612 (1916); *Metropolitan Life Ins. Co. v. Howle*, 62 Ohio St. 204, 56 N.E. 908 (1900).

In four states, Iowa, Pennsylvania, South Dakota, and Wisconsin, statutes have been enacted which literally make the delivery in good health clause a nullity if the insured was examined by the company's doctor at the time of application. IOWA CODE ANN. § 511.31 (1946); PA. STAT. ANN. tit. 40, § 511a (1954); S.D. CODE § 31.1507 (1939); WIS. STAT. § 209.07 (1953). These statutes are sign posts indicating the present trend to deprive the insurance companies of their protection under the delivery in good health clause.

The decision in the instant case has conclusively defeated the purpose of the delivery in good health clause. Not even a limited effectiveness remains as in most other jurisdictions. This decision for all intents and purposes has written the epitaph of the delivery clause, at least in California. In its opinion the court made no reference to the California "representation" statute, but based its decision solely on public policy. It is submitted that, considering the present day economic situation, the decision is justifiable on the theory that the insurance companies can better assume the risk of an undiscovered illness than an innocent insured.

Ralph R. Blume

BOOK REVIEWS

THE CONSTITUTION AND WHAT IT MEANS TODAY. Eleventh Edition (revised). By Edward S. Corwin.¹ Princeton: Princeton University Press, 1954. Pp. xiv, 340. \$5.00.

BILL OF RIGHTS READER. Milton R. Konvitz² (ed.). Ithaca, New

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² Professor in the New York State School of Industrial and Labor Relations, Cornell University; Director of the Liberian Codification Project, A Point Four undertaking.

York: Cornell University Press, 1954. Pp. xix, 591. \$6.50. Little books on various phases of constitutional law abound. Many of them make lively reading and at the same time prove to be useful guides to an understanding of difficult portions of a highly complicated subject of investigation. Perhaps the most celebrated series of these little books consists of those by Professor Corwin. (He has, of course, contributed some big books too.) Professor Corwin's writings on constitutional law have been coming off the press in abundant flow for longer than most of us can remember. *The Constitution and What It Means Today*, however, while not a big book, is not restricted to a few special topics but is a brief commentary on the entire Constitution of the United States. The first edition was published in 1920. It has run to fourteen printings including this latest, eleventh, edition. Decisions of the Supreme Court "approximately to the end of the 1953 term"³ have been taken into account in this edition.

As in the earlier editions, the author has in his comments followed the order of the Constitution itself, the text of which is quoted from Preamble to Amendment XXII in convenient segments (sections or paragraphs, as the case may be) with explanations of cases and critical remarks thereon appended to the appropriate segment of the Constitution that is quoted. The facts and holdings stated in the text are supported by citations to decisions in the footnotes. Over 1000 cases are cited. Other materials are cited also, such as the *Congressional Record*, law review articles, and textbooks. The table of cases makes the commentary on a decision readily available for reference purposes. The index, however, does not list materials other than the cases in a systematic manner either by subject matter or author. Nevertheless the book is a handy reference tool for an initial attack on any problem involving constitutional law.

But the book is far more than a mere reference work or index book. It is not just a collection of quotations and citations conveniently arranged. The views of the learned and judicious author are expressed on almost every page in vivid and trenchant prose. The reader's interest is stimulated throughout the book, so that it is not only practicable but profitable to read the entire volume from cover to cover without boredom. It must be conceded that this is an extraordinary achievement in a scholarly work.

Many persons, including eminent judges, have professed the belief that the Constitution means the same thing today as it did at its adoption except in so far as it has been formally amended. Others maintain that the Constitution is what the judges say it is.

³ Text at v (Corwin).

What does the Constitution mean today? Corwin's book presumably is intended to supply an answer or, at the least, a partial answer. The reader can find out what the Supreme Court has determined with respect to the meaning of the Constitution. He will see that the Court has read the Constitution in different senses at different times. The Court itself has decided that it has made mistakes in interpreting the Constitution. It would seem, therefore, that the Constitution, under the Court's own theories, may have some meaning independent of and different from what the Court decides. Whatever theory the reader may prefer, however, it is clear that what the Court has decided with respect to questions involving construction of the Constitution is the best evidence for determining what the Constitution means today for most practical purposes. It must be realized, on the other hand, that there are many questions concerning the interpretation of the Constitution that are not considered by the Court at all. So-called "political questions" are examples.

Corwin's book should be made available not only to all lawyers and students of law but to all citizens. All who can afford to buy it should do so and keep it handy whenever such questions as the adoption of the Bricker Amendment, segregation in the schools, and other controversial constitutional issues are raised for consideration and possible action.

Dr. Konvitz's book may be fairly characterized as a casebook designed for the general reader who is interested in American decisions on human freedom. The edited text of the opinions in some 73 cases is set forth with editorial notes preceding the judicial pronouncements in each case. The cases selected are for the most part those of the last twenty years. A few from earlier years are to be found as well as a few from courts other than the Supreme Court of the United States. But the great bulk of the cases are the recent ones from that Court. Konvitz's book, therefore, can be very profitably used in conjunction with Corwin's. Indeed, it would be advisable for the reader of Konvitz to have Corwin's book at his elbow. An example of the interesting results of such a combination of Konvitz and Corwin will be given presently.

First, however, it should be indicated that Konvitz uses "bill of rights" in a broader sense than do, perhaps, most writers on constitutional law. It will be recalled that in *The Federalist* the argument is made that the original Constitution prior to its amendment contained a bill of rights.⁴ In that view Konvitz includes such provisions of the original Constitution as those prohibiting bills of attainder and test oaths, within the bill of rights.

⁴ THE FEDERALIST No. 84 (Hamilton).

And in addition to the first ten amendments he includes the Civil War amendments and the Woman's Suffrage amendment.

The very first case set forth in Konvitz is the famous *Steel Seizure Case*⁵ of 1952. It constitutes his first exhibit under the caption "The Rule of Law."⁶ Compare the high significance that Konvitz seems to place on this case with what Corwin has to say concerning the same case: "The lesson of the case, therefore, if it has a lesson, is that escape from Presidential autocracy today is to be sought along the legislative route rather than that of judicial review."⁷

Both books are recommended as valuable aids for the comprehension of important issues facing not only the student of law but all citizens today.

*Roger Paul Peters**

THE ENGLISH CONFLICT OF LAWS. By Clive M. Schmitthoff.¹ Third Edition. London: Stevens & Sons, Ltd. 1954. Pp. xliii, 514. The Conflict of Laws has indeed "ceased to be the Cinderella of the common law," as the author remarks in his preface.² Multiplying decisions now permit judicial statements to take the place of conjecture and opinion. The accompanying compulsion to "codify" by statute has added to the "profound" changes which made advisable a complete revision of this text published in its second edition only six years ago. Within the limits of some five hundred pages Dr. Schmitthoff succeeds in presenting clearly, concisely and comprehensively the English conflict of law rules. We have an admirable example of what a short text in an extremely difficult legal field can and should be. Although restricted to English cases and statutes, American teachers, practitioners and students will find it of the greatest value when re-examining both the "solved" and the "unsolved" conflict of laws problems arising in American courts.

Perhaps no field of law exercises greater fascinations on the legal theorist than the Conflict of Laws. When Justice Story wrote our first great text in 1834, paucity of precedent led him to wholesale borrowings from the rich continental inheritance of theoretic-

⁵ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁶ Text at 5 (Konvitz).

⁷ Text at 128 (Corwin).

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² Text at v.

cal speculation on "Private International Law." Even today the nature of the subject is such that the approach to the solution of its problems almost of necessity reveals one's own basic philosophy of law. Dr. Schmitthoff's text maintains a judicious balance between the practical and the inevitable theoretical side of the Conflict of Laws. His brilliant brevity and felicity of expression in restating the leading English cases give the welcome impression that here is no "paste pot and shears" compilation. There is, on the other hand, nothing of the deadening blight of the apodictic horn-book "black letter," for there is just enough of the theoretical or philosophical to impart a sense that the cases and rules discussed are alive. This is not to imply that the author lacks the commendable courage to be definite, or, better still, definitive, when the occasion arises. Unlike others fearful of the charge of "conceptualism" and thus dodging or disclaiming definition, Dr. Schmitthoff defines the Conflict of Laws at the outset of his work.³

Thus it will shock some to note that he "accepts" the "vested rights" doctrine of Dicey and Beale and rejects the "local law" or "local rights" theory of the late Walter Wheeler Cook.⁴ The difference between the two is "hardly substantial" from the "practical point of view."⁵ Nevertheless Dr. Schmitthoff has a "talent for the jugular" in getting at the essential weakness of the Cook doctrine:

The most serious objection to the local rights theory is, however, that it is destructive without, at the same time, being constructive; it denies the existence of a general principle justifying the solution of an issue arising in the municipal courts by reference to a foreign law rule. Those supporting the vested rights theory, on the other hand, believe that such a principle exists, and that it is ultimately founded on the idea that there exist human rights which should be recognized and protected by the courts of all civilized countries subject to the exigencies of municipal public policy. By proclaiming the Universal Declaration of Human Rights and by adopting the Convention on Human Rights the United Nations have, made an attempt to provide some degree of protection for such rights in the international sphere; although in the municipal sphere these attempts cannot be called in aid of the argument in favor of the vested rights theory it is believed that they are founded on the same conception of justice from which the doctrine of vested rights arose in the Anglo-American conflict of laws.⁶

The vested rights doctrine is the "only" foundation of an "intelligible and coherent system of the conflict of laws."⁷ The lead-

³ *Id.* at 6.

⁴ *Id.* at 33.

⁵ *Id.* at 34.

⁶ *Ibid.*

⁷ Text at 16.

ing English cases support it.⁸ Acceptance of it therefore gives Dr. Schmitthoff's work unity and consistency. He is able to give a completely lucid explanation of the difficult problems of "classification," "characterisation" and "connection" of the right.⁹ In the past these problems have not often been fully explored by the American cases. If, as is believed, their careful examination will soon demand increased attention, the English experience with them must be of importance to us. This experience is discussed nowhere with greater clarity and conciseness than by the author in his work. His entire third chapter is rewarding reading.

Dr. Schmitthoff discusses *renvoi* in his treatment of the law of domicile as the *locus classicus* of the problem.¹⁰ The comparatively few American cases on *renvoi* suggest the simple solution that the forum's reference to foreign law in a conflicts case is a reference solely to the foreign "internal" or "domestic" law, exclusive of its conflict of laws rules.¹¹ This was the personal view of Lord Russell as the author points out.¹² Dean Falconbridge has strongly advocated this "short cut" or "short route"¹³ out of the "*circulus inextricabilis*" in which as Maughan, J. remarked, the forum and the foreign court "bow to each other like the officers at Fontenoy."¹⁴ Yet Rabel thinks this simple short cut is but "the vanishing theoretical fashion of yesterday."¹⁵ Dr. Schmitthoff shows that the English rule is based on the "foreign courts theory." When the English forum is referred by its choice of law rules to a foreign legal system it proceeds to "decide the case as if [it] were sitting as the foreign court at the place of domicile of the *de cuius*."¹⁶ The English rule is said to be explicable on the basis of the English courts' "view on jurisdiction and the vested right in general."¹⁷ It is not "easy to apply," but "ensures at least that the same law is applied to the issue in the English court as, in the judgment of the English judge, is applied by the competent foreign court."¹⁸ The author discusses "international understanding as a basis of simplifying the problems

⁸ *Id.* at 15.

⁹ *Id.* 35-54.

¹⁰ *Id.* 96.

¹¹ *In re Tallmadge*, 181 N.Y. Supp. 336 (1919); but cf. *In re Schneider*, 96 N. Y. Supp. 2d 652 (1950).

¹² *In re Annesley* [1926] Ch. 709.

¹³ 46 L.Q.R. 465 (1930); 47 L.Q.R. 271 (1931), (cited in Text at 96 n.).

¹⁴ *In re Askew, Marjoribanks v. Askew*, 2 Ch. 259 267 [1930] (cited in Text at 97 n.)

¹⁵ *In 4 Int. Law R.* 402, 403 (1951).

¹⁶ Text at 97.

¹⁷ *Ibid.*

¹⁸ Text at 101.

raised by renvoi,"¹⁹ but insists upon adequate protection at all events for what he calls "the most valuable feature of the English conception of domicile"—the fact that it "has a uniform connotation in all branches of the conflict of laws."²⁰

Review space permits only passing mention of the author's practical treatment of the "choice of law" problem in the various fields. Grouped in Division One are Contract and Torts; in Division Two, the Law of the Person, including Marriage and Dissolution of Marriage. Final chapters deal with Jurisdiction and the Law of Procedure. The American reader will find the chapters on contracts and torts particularly stimulating in view of the contrasted American rule[s]. Choice of law governing the essential validity of a contract has been called by an American author "the most confused subject in the field of Conflict of Laws."²¹ The manner in which the English doctrine of the "proper law," attributing a "particular position to the intention of the parties" in determining the law which is to govern their contractual obligations has developed is carefully set forth by Dr. Schmitthoff.²² Reading this should enable one to gauge the soundness of Beale's long standing criticism of the English rule,²³ deriving from Mansfield's opinion in *Robinson v. Bland*.²⁴ Dr. Schmitthoff is aware, of course, of the root of the problem of choice of law in the contract field—the old controversy between the "subjective" and "objective" theory of contract itself. The battle repeatedly won and lost in other fields must apparently be fought anew in the conflict of laws area. The nature of the battlefield can be ascertained from Dr. Schmitthoff's discussion of the English cases which place a premium on the "intention of the parties" eked out, as it were, by a variety of presumptions when the parties express no intention at all.

Choice of law in the tort field as worked out in the English cases may be profitably compared with the American rule. Dr. Schmitthoff thinks that there is no basis for the "obligatio" theory in *Phillips v. Eyre*²⁵ and that the English rule which requires that the foreign tort must be "actionable" (or at least "unjustifi-

¹⁹ *Id.* at 102.

²⁰ *Ibid.* Cf. remarks of Professor Cook, AMERICAN LAW INSTITUTE PROCEEDINGS (1925) pp. 226-231.

²¹ GOODRICH, CONFLICT OF LAWS (3d ed.) 321 (1949).

²² Text at 105-117.

²³ "The doctrine was adopted bodily from the continental writers, and is an anomaly in our law, though quite consistent with the principles of the modern civil law." Beal, *What Law Governs the Validity of a Contract*, 23 Harv. L. R. 1, 7 (1909); 2 BEALE, CONFLICT OF LAWS 1096 (1935).

²⁴ 2 Burr. 1077 (1760).

²⁵ 6 Q.B. 1, 30 (1870). Text at 152 n.

able") at the place of its commission as well as "actionable" in English law is the resultant compromise between the "*lex loci delicti*" and "*lex fori*" theories.²⁶ Behind the compromise is the consideration that the "*lex loci delicti*" rule carried to its logical conclusion would give foreign suitors preferential treatment over suits basing their claims on torts committed within the jurisdiction of the forum.²⁷ In this connection the author discusses briefly the "obligatio" theory of Holmes,²⁸ Cardozo²⁹ and Beale.³⁰ He quotes Judge Learned Hand's rejection of the theory.³¹ The reviewer could wish that the author had developed his own views on the matter since the quotation from Judge Hand is based on the Judge's own version of the "local law" theory and Dr. Schmitthoff has previously rejected this theory as the basis of Conflict of Laws. However, it is the author's submission that the "obligation theory is not supported by the English authorities" in any event.³² In passing it may be noted also that under the English rule it is not yet clearly settled whether the foreign tort must be "actionable" under the *lex loci delicti* or merely "unjustifiable."³³

The Conflict of Laws will probably owe much in its future development to Comparative Law. Whether we shall be helped considerably by reference to the continental Conflict of Laws is debatable. No legal Luther Burbank has yet appeared in our midst with demonstrated capacity to graft on the solid trunk of the common law cuttings or slicings from the alien civil law. This being so, the American student of the Conflict of Laws will more profitably turn to the body of conflicts rules developed in the home of the common law. He will find in Dr. Schmitthoff's small volume a succinct and "easily understandable" explanation.

Edward F. Barrett*

²⁶ Text at 152.

²⁷ Text at 151.

²⁸ *In Western Union Telegraph Co. v. Brown*, 234 U.S. 542, 547 (1924); *Slater v. Mexican Railway*, 194 U.S. 120, 126 (1904).

²⁹ *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918).

³⁰ 1 BEALE, *CONFLICT OF LAWS*, 66-67 (1935).

³¹ Text at 151-152 citing *Guinness v. Miller*, 291 Fed. 769,770 (1923).

³² Text at 151.

³³ Text at 153.

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BOOKS RECEIVED

- BANNED BOOKS. Second Edition. By Anne Lyon Haight. New York: R.R. Bowker Company, 1955. Pp. II, 172. \$2.50.
- *BILL OF RIGHTS READER; Leading Constitutional Cases. By Milton R. Konvitz. Ithaca: Cornell University Press, 1954. Pp. XI, 591. \$6.50.
- *CONSTITUTION & WHAT IT MEANS TODAY. Eleventh Edition. By Edward S. Corwin. Princeton: Princeton University Press, 1954. Pp. v, 340. \$5.00.
- *THE ENGLISH CONFLICT OF LAWS. Third Edition. By Clive M. Schmitthoff. London: Stevens & Sons Limited, 1954. Pp. xv, 514. \$8.50.
- JUDGE MEDINA SPEAKS, A Group of Addresses. By Hon. Harold R. Medina. Edited by Maxine Boord Virtue. Albany: Matthew Bender & Co., 1954. Pp. VIII, 319. \$5.00.
- LAW & GOVERNMENT; THE SCHOOL SEGREGATION DECISION. By James C. N. Paul. Chapel Hill: University of North Carolina Press, 1954. Pp. III, 132. \$2.00.
- NATURAL LAW & NATURAL RIGHTS; Studies in Jurisprudence: II. By Arthur L. Harding. Dallas: Southern Methodist University Press, 1955. Pp. IV, 99. \$3.00.
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- TRIAL AND TORT TRENDS; 1954 NACCA *Convention Proceedings*. By Melvin M. Belli. San Francisco: Recorder—Sunset Press, 1955. Pp. XI, 459.
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- THE UNIVERSITY TEACHING OF SOCIAL SCIENCES LAW. By Charles Eisenmann. New York: Columbia University Press, 1954. Pp. II, 133. \$1.00.

* Reviewed in this issue.