BOOK REVIEWS

Essays on Private Law: Foreign Law and Foreign Judgments

Ian F. G. Baxter

University of Toronto Press, Toronto, 1966, pp. vi, 210.

In this book Professor Baxter presents as chapters, seven essays, four of which he published separately in the Canadian Bar Review and the McGill Law Journal in the period from 1961 to 1964. The impact of their thesis is markedly increased by the unified presentation. In them the author advocates a radical reformation of the existing body of law known as Conflict of Laws. He says in his preface that he has chosen the essay form since it provides a much greater choice of weapons and a more open advocacy of law reform than a standard work for practitioners and students.

Although he has avowedly not written a text book, his essential first step toward criticism and advocacy of improvement was to expound the present state of the law and this he has done with more discernment and clarity of expression than is found in some of the standard works. This is especially evident in his treatment of choice of law problems. Only occasionally does he lapse into inept use of terms, such as "jurisdiction" to designate both "power to decide" and "a legally independent unit of territory", and "system of law" to mean "body of law".

The first chapter discusses jurisdiction, and the second, choice of law. In them the author raises and explores, in his words, the "two important questions with which this book is concerned: (a) whether a court ought to hear an issue submitted to it, and (b) if so, by what system are the rights and duties of the parties to be measured?" He argues that the two questions are different, with different considerations of policy, but that they have not always been kept distinct by judges and text-writers and that jurisdictional language and theories have consequently infiltrated discussion of choice of law with deleterious results.

After developing his new groundwork of jurisdictional concept and policy and the foundational principle for his new set of rules for

choice of law, the author refrains from a detailed elaboration of his law of jurisdiction and devotes himself with particularity to: (a) diagnosing the ills of the existing body of choice of law principles and rules and (b) prescribing his curative reforms. This he does in chapters entitled [3] Renvoi as a Symptom, [4] The Interpretation of Written Obligations, [5] Property, [6] Recognition of Status in Family Law, and [7] Recognition of Foreign Corporations. He says that in the fields both of jurisdiction and choice of law his proposals are not intended to be a worked-out blueprint for law but are meant to be merely "suggestions put forward as direction indicators for a re-design of the rules on foreign law and judgments with reference to a system of private law". In chapter [8] Conclusion, he gathers together the principal "suggestions" that he developed in the previous chapters.

In the common law system the concepts that are grouped together under the title Conflict of Laws were chiefly developed during the nineteenth century and the first part of the twentieth. Although derived in part from Roman and Dutch sources, their formulation was largely influenced by historically grounded English ideas and the approach and techniques of analytical jurisprudence. Derived by remorseless deduction from the fundamental doctrines of territorial application of law and vested rights, many rules have been aimed at achieving logical consistency and predictability of results with little or no regard for the demands of justice and social policy. The consequence, during the sociologically oriented second third of this century, has been a continuous controversy that has been described by Professor David A. Cavers as "marked by persistent tension between the quest for simple rules designed to yield uniform, predictable rules of law and the effort to develop principles capable of producing choices that would be meaningful in terms of the interests of the parties and the states involved."

One of the most radical contributors to the controversy has been Professor Albert A. Ehrenzweig of the University of California. Professor Baxter has adopted the approach, basic principle, and method of Ehrenzweig. His approach as quoted by Baxter, is that modern courts have before them the task of moulding "a new common law of convenient jurisdiction from case to case, by trial and error". The approach to choice of law is essentially similar. The basic principle postulates the dominance of the forum in both jurisdiction and choice of law. Under this principle the basic questions are, "Why should the forum *not* accept jurisdiction?" and "Why should the lex fori *not* be applied?" The method by which to find the answer to the first question, when there has been no consent to the local juris-

diction, is to consider in each case such things as "convenience factors", "inadequacy", and public policy, with an over-riding discretion sufficient only to enable the courts to operate their rules of jurisdiction in a fair and flexible manner. The method proposed for reaching an answer to the second question rests upon the principle claimed to be foundational for a new set of rules for choice of law, that is, that "the forum should apply its own standard law to an issue coming before its courts, unless there is good reason for applying the principles of (foreign) solution."

In this book the author confines his discussion of jurisdiction almost exclusively to the question of whether the courts of the forum should or should not adjudicate and provides no systematic treatment of the true conflict of laws problem, that of recognition by the courts of the forum of the exercise of jurisdiction by the courts of foreign states. Perhaps the intended inference is that this problem is to be solved by some device resembling the so-called reciprocity doctrine of *Travers* v. *Holley*. An elucidation of his proposed method of treating this aspect of the subject would be helpful.

As mentioned earlier, most of this book is concerned with choice of law. It provides a cogent and critical analysis of existing case law, mostly of the British Commonwealth, with the purpose of determining in each of the topical areas explored what the criteria should be for determining whether or not the court of the forum when dealing with the merits should modify or supplement its standard law by adding a rule constructed in imitation of an appropriate foreign rule. Although a reader may not accept the principle advocated by the author as foundational nor the method as correct, a great deal of his analysis and criticism is constructively useful for those of us who are content to adhere to established basic principles while engaged in empirical reform designed to reconcile what Professor Elliott E. Cheatham has delineated as the policies of local law, the policies of interstate and international systems, and the competing policies of predictability through rules as contrasted with justice in the particular case.

Now that the urgent need for a sustained program of large-scale law reform has become more widely recognized, there is an even greater need than hitherto for works by teachers of law of the sort under review. Law reform commissions and other agencies may be about to supply some of the financial support for adequate research. It is to be hoped that a sufficient portion will be used by legal scholars for testing the practicality of the results of their research in books by the results of equally thorough research into the functioning of law in the day to day life of the community. Only by a careful evalua-

tion of each in the light of the other can there be any real assurance of useful reform. Legal theory of whatever variety must be brought into a substantial measure of harmony with enlightened common sense and the changing circumstances of community life.

A knowledge of the relevant literature and structure of both civil law and common law has equipped Professor Baxter to guide his readers through familiar territory in a vehicle mounted on an unfamiliar theory and operated by unfamiliar methods. To follow his clear but sometimes intricate trail is a stimulating experience. His book is a welcome Canadian addition to creative legal scholarship.

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The Trust and Corresponding Institutions in the Civil Law

Christian de Wulf

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There has certainly been a need for a comparative study of that series of civil law institutions which corresponds to the trust mechanism of Anglo-American law. It is, of course, generally realized that there is no single generic concept in the civilian tradition which, to use the phrase of Professor Limpens in his Foreword to this work, has served, like the trust, as "maid of all work" over the centuries; where the civil law has generally had to find a contractual or proprietary relationship, the Anglo-American tradition has relied on a third pillar and resolved problems in terms of a trust relationship. This study, written by a Belgian attached to Ghent University, but dealing principally with French experience in the traditional *droit civil* and a number of individual French legislative enactments, is an interesting addition to the growing literature in this field; while not without defects — occasional stylistic inelegancies are a small source of annoyance and the absence of an index is much to be regretted — it is on the whole a provocative study of a complex subject.

Although the author maintains that his study is primarily intended for common law lawyers, it will be of no less interest to civilians interested in retracing to their historical origins some of the fundamental characteristics of the *droit civil* which, for a variety of economic, political, social as well as technically legal reasons, has not been able to produce a unified concept of trusteeship out of the many disparate "trust-like" relationships it does possess. In addition to the all-important exercise of situating these various factors in an historical perspective, Dr. de Wulf undertakes a critical analysis of certain technical features of the trust, and the corresponding civilian institutions, which he has judged especially significant or representative of each tradition.

Dr. de Wulf makes no effort to analyze the operation of those fragments of trust which, in one civilian jurisdiction or another such as Scotland, Quebec, Louisiana or South Africa,[1] have been

[1] References to Scots law (p. 67-8 respecting "apparent" ownership) and South Africa (p. 107 on the doctrine of "tracing") are wholly incidental.

"received" and, in different ways, "naturalized" with varying degrees of success. Nor does he offer the reader a treatise on the English or American laws of trusts. He attempts — and, for the principal part of his work, with considerable success — to outline the essential characteristics of the functioning of the system of trusts and then to explain origins and workings of a number of apparently disconnected civilian institutions which reply to the same end. His conclusion, and one can hardly contest it, is that the trust is more efficient and flexible than the series of corresponding techniques available in civil systems to solve analogous problems.

To reach this conclusion the author has divided his study into two distinct parts. The first, entitled a "vertical" analysis, where his treatment is most successful, consists of an examination of the incidence of trusteeship on the rights of third party acquirers of the trust property and on those of the general creditors of the trustee and the beneficiary of the trust. In the second part, entitled a "horizontal" analysis, various uses of the trust are examined: the "family" function (creation of life and other terminable interests; discretionary, protective and spendthrift trusts); the trust and "social life" (charitable trusts, voluntary associations); and the "trust and commerce" (debenture, voting and investment trusts). In each case the corresponding French institution — the *fiducia*, the substitution *fidéicommissaire*, donation *sub modo*, the *fondation* or special French legislative intervention designed to meet a particular need — is also examined and, more often than not, found wanting. This Part, however, is less successful than the first if only for the reason that the range and complexity of these different aspects of the trust and the parallel civilian institutions is far too considerable to be really meaningfully discussed in a series of sketches to which only some 65 pages, or about one-third of the whole work, are devoted.

The treatment given in Part One to the internal functioning of the trust, and in particular to the positions of third party acquirers of trust property, the general creditors of the trustee and the measure of protection necessary for the beneficiary, is undoubtedly the most instructive. The examination of the English system of notice and the French system of registration, the differing rules respecting apparent title, documentary and oral evidence serve as background for an interesting chapter on the English doctrine of "tracing" trust property into its product and the corresponding French technique of *subrogation réelle*. The English and American legal evolution of this complex technique, whereby it is possible to identify the property of the trust even though it may have passed through a successive number of transactions, is of great interest to civilians; and while it may

not always assure a perfect equilibrium between the rights of the beneficiary, the trustee and the latter's creditors, it is, of course, the great characteristic of the Anglo-American trust system. The potential of the concept of subrogation, as a tool available to French civil law in this respect, has not been developed in modern doctrine, and probably constitutes the greatest, though surely not an insurmountable, obstacle to the functioning of trusts in a civilian context. The ultimate fear, of course, is that a developed concept of subrogation would run counter to the well-established classical French philosophy of *unité du patrimoine.*

The particular usefulness of a comparative study of this kind for those in a jurisdiction like Quebec is obvious. It is true that various *fragments* of a law of trust are to be found scattered throughout the Quebec legal system: the substitution *fidéicommissaire* plays this role in part, the "trusts" of C.C. 869 and 964 have been extended, and somewhat completed, by the addition of C.C. 981a *et seq.*: the *Special Corporate Powers Act,* R.S.Q. 1964, ch. 275 provides an essential tool for the modern corporation and financing; and the dispersed provisions relating to tutors, curators, executors and other administrators, in the *Trust Companies Act,* R.S.Q. 1964, ch. 287 and elsewhere, and the circumstance (now exceptional) where the husband regains the right to administer the private property of his wife (C.C. 1298), — these are all parts of the total mosaic of what might be called, but with some hesitation, the "Quebec law of trusts". But the absence of a general directing principle or philosophy covering this wide sphere of relationships is to be regretted. The present period of reflection upon the basic institutions of the civil law, preliminary (it is hoped) to what will be intensive legislative reform, is certainly the occasion to consider the possibility of further extension or adaptation of the trust principle. Whether this development should take the form of a *propriété fiduciaire,* which would most logically find its place within the Civil Code itself, or whether it might be more happily expressed in terms of juristic personality in distinct statutory enactment, are ultimately political rather than purely technical questions. The study by Dr. de Wulf has enriched the literature which must be considered on these matters.

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