before (194-203).

No doubt there are other interesting questions concerning the diplomatic protest to which the author might have addressed himself, such as, for example, its function in relation to obsolescence of rules of international law by persistent breach.[2] These, however, are marginal to his concern; the field he has chosen is coherent in itself, and he has ably performed the task which he set himself within it. The book should have a valued place on the shelves not only of international lawyers, political scientists and students of international relations, but also (and above all) on the shelves of those concerned with the guidance and conduct of a nation's foreign policy.

JULIUS STONE*

A Treatise on the Conflict of Laws, by A. A. Ehrenzweig, Walter Perry Johnson Professor of Law in the University of California at Berkeley. St. Paul, Minn., West Publishing Co., 1962. li and 824 pp. ($10.00 in U.S.).

Few judges have contributed as much as Justice Traynor of the Supreme Court of California has contributed to the development of the conflict of laws. Still fewer have deliberately encouraged and inspired academic research into this difficult but important subject. Consequently it is most appropriate that Professor Ehrenzweig has chosen to preface his work with the following statement by Justice Traynor:[1]

> In Conflict of Laws, the wilderness grows wilder, faster than the axes of discriminating men can keep it under control. The concepts of the Restatement have been shattered by the devastating attacks of Cook and Lorenzen. . . . The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage. . . . He has a better chance to arrive at the least erroneous answer if the scholars have laboured in advance to break ground for new paths . . .

Clearly this passage was an encouragement to Professor Ehrenzweig. He *has* laboured and he *has* broken ground for new paths. This is an exciting, scholarly text which should be read by every teacher of conflicts because, however learned that teacher may be, he will gain new insights from Ehrenzweig's penetrating analysis. Unfortunately Ehrenzweig will not be satisfied with the plaudits of fellow academics. This book is written with missionary zeal and it is clear that Ehrenzweig believes that he has explained accurately the law which is (and ought to be) administered by the courts. Difficulties arise immediately. Insofar as the author's general theory is represented to be an accurate explanation of American decisions, probably it is misleading. Certainly his theory is not consistent with the decisions of English and Australian courts in conflicts cases. Still more important is the fact that there are considerable objections to the acceptance of the author's general approach at some future date.

In Professor Ehrenzweig's thesis "jurisdiction" and "choice-of-law" questions are intimately linked. In his view a "nascent doctrine of forum

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[2] See, e.g., Julius Stone, *Legal Controls of International Conflict* (1954, revised impression 1958) c. 12.

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[1] At vii.

conveniens"[2] will be generally accepted so that courts will refuse to exercise jurisdiction unless there are sufficient substantial contacts with the jurisdiction to make it a convenient or proper forum. This development will facilitate the acceptance of the rule that a proper forum should apply primarily the *lex fori*.[3] Ehrenzweig concedes that there will be exceptions (and, possibly, many exceptions) to this basic rule so that there will be cases where the courts will refer to foreign law because it is required by statutory or common law authority or, in the absence of such authority, because the local rule, as "interpreted" by the courts, requires such a reference.[4]

The principal weakness in this theory is this link between "jurisdiction" and "choice-of-law" questions. It would be impossible to justify the application of forum law if the forum was purely adventitious so Ehrenzweig is forced to argue that the existing, and admittedly unsatisfactory, rules governing jurisdiction will be abandoned and replaced by new jurisdictional concepts including an extended doctrine of *forum non conveniens*. When we consider how critical this concept is to his basic theory it is surprising to find that it is discussed in a mere twenty pages!

In any event, there is a more basic difficulty. Is it desirable that the jurisdictional rules should be so limited? Surely it should not be too difficult to have a dispute litigated? Even if we admit the desirability of some *forum non conveniens* doctrine the considerations which will determine whether a forum is convenient or proper (for example, location of plaintiff, defendant, witnesses and other evidence at the time the proceedings are instituted) will be very different from the considerations which will determine whether the *lex fori* or some foreign law should be applied to determine the merits of the case. A sophisticated legal system should distinguish "jurisdiction" questions from "choice-of-law" questions. But as soon as this is done it is impossible to support the view that the *lex fori* is the law primarily to be applied.

Moreover, there are some lawyers who take the old-fashioned view that their task is to keep their clients out of the courts. If Ehrenzweig's thesis is correct, a lawyer advising his client before any litigation is contemplated can protect his client's interests only if he complies with the laws of every conceivable forum. Few lawyers would feel competent to meet such an obligation—and laymen are entitled to criticize a conflicts' system under which it is impossible to predict the legal rights and liabilities arising from an interstate or international transaction.

In fact, these objections to Ehrenzweig's general approach do not significantly affect his discussion of more specific topics for Ehrenzweig frequently permits a reference to a law other than the *lex fori*. However the rules which he suggests to determine (1) when it is appropriate to refer to a foreign law and (2) to what foreign law reference should be made are, to say the least, controversial. It is refreshing to find that Professor Ehrenzweig, in his discussion of torts, distinguishes the various kinds of liabilities encompassed within that rubric. That section of the law of torts which is the "means by which society controls the distribution of accidental losses"[5] receives separate and extended consideration. This analysis in depth demonstrates the complete inadequacy of the existing concepts in this very important section of torts law. Nevertheless it might be argued that Ehrenzweig's resort to the *lex fori* is just as much a "give-it-up formula" as the theory of a "proper law of torts"

[2] At 352.
[3] At 326.
[4] At 352.
[5] At 568. The actual discussion of "ACCIDENTS (ENTERPRISE LIABILITY)" extends from 568-597.

propounded by Professor Morris.[6]

Certainly a rule requiring the application of the *lex fori* is unsatisfactory while the present jurisdictional rules exist and, even if the jurisdictional rules were amended in accordance with Ehrenzweig's views, it might be doubted whether any generalized rule is necessary or desirable in the complex fact situations under discussion. Without further empirical study the hasty generalization of today may become the inconvenient dogma of tomorrow.

On the other hand, it might be argued that we do need dogmatic rules to enable us to determine the validity of marriages, contracts and transfers of property. In these areas the need for certainty outweighs the injustice which undoubtedly arises under generalized, dogmatic rules. In each of these contexts Ehrenzweig argues generally in favour of a rule of validation. Now it is true that courts endeavour to preserve, rather than destroy, marriages and other transactions but Ehrenzweig's argument goes beyond this. He suggests, for example, that a contract will be held valid if it was valid under any proper law.[7] Having stated this general proposition he is forced immediately to qualify it, and it is suggested that his exceptions make the basic rule a poor guide. Moreover the rule of validation hardly gives sufficient weight to the policies underlying an increasing amount of legislation inhibiting the autonomy of the parties. Consider, for example, *Regazzoni* v. *K. C. Sethia (1944) Ltd.*,[8] a decision of the House of Lords which will be familiar to English and Australian readers. It is quite clear that the decision reached in that case is inconsistent with Ehrenzweig's general argument. Whatever may be the position in the United States, it would seem that English and Australian courts do recognize the proper interests of other states involved in a marriage or commercial transaction. Whether those interests need to be reflected in dogmatic rules for the sake of certainty or whether it is preferable to have an empirical investigation of governmental interests in each case will depend on the sophistication of the dogmatic rules and personal preferences—but some analysis of governmental interests is required. This is one of the areas in which there is a marked divergence between the views of Currie and Ehrenzweig and, in this area, Currie's analysis[9] is more acceptable.

A review is not an appropriate venue for an extended discussion of Ehrenzweig's controversial theories and I have selected only a few illustrations of the difficulties inherent in his emphasis on the *lex fori*. There is a grave danger that the brilliant contributions of Currie and Ehrenzweig may incline courts to exchange the dogmatic heritage of the "vested rights" theory for an equally dogmatic proposition about the *lex fori*. In conflicts all forms of dogma are dangerous.

There are certain distinctive features of this treatise which deserve comment. For example, the author has chosen to follow the American realist tradition and examine the decisions of the courts rather than the language used in the

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[6] It is Ehrenzweig, and not the reviewer, who describes the search for a "proper law of torts" as a "give-it-up formula" (at 548). It is surprising that Ehrenzweig is not more sympathetic to this theory for both Ehrenzweig and Morris are relying on empirical arguments to justify a revolution against a rigid formula which had its origin in "vested rights" philosophy.

[7] At 464. Ehrenzweig emphasizes that he is not referring to *the* proper law doctrine of English law. Any law whose application the parties can reasonably be assumed to have taken into account will be "a proper law".

[8] (1958) A.C. 301.

[9] B. Currie, "Married Women's Contracts. A Study in Conflicts-of-Laws Method" (1958) 25 *Univ. of Chicago L.R.* 227. Currie and Ehrenzweig are sometimes referred to as the "joint heirs" of the "local law" tradition. Both emphasize the *lex fori* but Currie, adopting language used in the U.S. Supreme Court in recent years, suggests that the courts should consider "governmental interests" to determine whether or not the *lex fori* should be displaced. Ehrenzweig criticizes Currie's theory at 347-351.

judgments. In fact, most of the traditional concepts of conflicts law are dismissed as "pseudo rules" or "artificial devices". As well as the usual objections to this form of analysis it might be argued that Ehrenzweig abandons the traditional concepts too readily, for there is little consideration of the problems which provoked the existing conceptual machinery.

Although Ehrenzweig states that his primary concern is everyday practice in interstate conflicts law the treatise contains an intimidating number of references to European authorities. Technically the book is produced to the high standard expected from this publisher although the reviewer noted two minor errors[10] which should be corrected in the next edition. In that edition one would hope, also, that the author would delete the suggestion that English courts show a preference for English litigants.[11]

Of course, there will be another edition of this treatise. Ehrenzweig's theories may be commended or condemned but no responsible expert in private international law can ignore them. In fact, we can anticipate a series of attacks and counter-attacks and that is a satisfying prospect because the working concepts of a conflicts system should be forged in the furnace of controversy.

D. J. MacDOUGALL*

The Constitutions of the Australian States, by R. D. Lumb, Senior Lecturer in Law in the University of Queensland, Brisbane, University of Queensland Press, 1963. viii and 96 pp. (£1/9/0 in Australia.)

This book is a very short account indeed of the history and structure of the Australian State Constitutions.

A comprehensive work on this topic has been greatly needed. Students and teachers alike have been frustrated for too long by the need to refer to multiple sources in order to cover adequately an essential aspect of Australian government. As the author points out,[1] the major emphasis in schools and universities on study of the Federal Constitution has led to a situation where many students are but dimly aware that the federal structure was, and is, based upon the continued existence of viable States with long established constitutions. Dr. Lumb's work will be a useful working tool for students and they will most certainly appreciate its brevity.

The goal of brevity appears to have been reached, however, at the cost of comprehensive cover. Reception of English law into Australia is dealt with in a few sentences.[2] Students who wish to know what interpretation the courts have placed on s.24 of the Australian Courts Act are referred in a footnote to a few leading cases—but this will give them no idea at all of the important statutes and constitutional principles introduced by the section. A discussion of the States' powers to enact legislation having extra-territorial effect is inadequate and uncritical.[3] Fuller discussion of the case law and practical effects is surely essential to a book of this nature.

The most disappointing feature—again resulting from an apparent compulsion towards brevity—is that an opportunity has been missed for a full

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[10] At 514 we are introduced to the process of "peudo-'interpretation'" and the author's summary of *Cole* v. *Steinlauf* (at 609) is meaningless because the text states that the plaintiff was the vendor of certain land whereas, in fact, the plaintiff was the purchaser.

[11] At 489.

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[1] At viii.

[2] At 11 and 12.

[3] At 77 and 78.