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CONFLICT OF LAWS

Cases and Materials

Seventh Edition

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To Our Teachers and Students

Preface to the Seventh Edition

Lea Brilmayer, Jack Goldsmith, and Erin O'Hara O'Connor join forces in welcoming you to the seventh edition of this casebook begun by the late Professor James Martin in 1978. The changes from the sixth edition are mostly not structural, but involve simply updating the cases and notes to reflect recent developments in the field. Probably the chapter that required the greatest amount of updating was the one on personal jurisdiction, where the Supreme Court decided a series of important new cases that contributed greatly to the clarity of the subject (although not to everyone's substantive taste!). The central chapters on choice of law, state and constitutional, have hardly changed; some new cases are included but these are meant simply as better examples of points that had been made previously in other ways. Finally, the chapter on conflict of laws in the federal system, which had been omitted in the sixth edition, was reintroduced by popular demand. We hope that the book continues to meet the needs of teachers in the field and to attract curious students.

Lea Brilmayer
Jack Goldsmith
Erin O'Hara O'Connor

January 2015

Preface to the Second Edition

The teacher of conflicts already knows that it is a fascinating course. The student is about to find out. It is, moreover, one of those courses in which to be "theoretical" is to be "practical"; the supposed war between those two qualities is not even a skirmish in conflicts law, where changes have come (and will no doubt continue to come) so quickly that the only preparation is understanding, not memorization.

This book is organized to present the heart of conflicts first: choice-of-law problems. In the first chapter the "traditional" approach is exposed; in the second, the struggle of the courts and the commentators to come up with a more responsive (but not unduly complicated) approach. The remaining broad topics—constitutional limitations on choice of law, the *Erie* doctrine, personal jurisdiction, recognition of judgments, and conflicts in the international context—are considered in light of the wisdom derived from consideration of the basic choice-of-law problems. I have attempted to make the materials short enough so that they really can be covered in a three-or four-hour course, but we have all experienced the temptation to slow down and inspect in detail some of the particularly intriguing questions that are raised in conflicts.

Questions and comments at the ends of cases or case groupings tend to be brief, concentrating on the problems raised by the principal cases rather than adding notes about other cases. Occasionally the opinion of the editor may show through in questions and comments, but many questions that may seem to present a point of view are asked in the spirit of the devil's advocate.

Cases have been severely edited to eliminate citations. Thus, they do not read like real case reports, but they do read somewhat more smoothly. Citations are retained on some occasions when they refer to other important cases, when they refer to writings of important conflicts scholars, when they cite the editor of this casebook, or otherwise seem worthy of retention. Footnotes in cases and other quoted material have generally been eliminated without the use of ellipses. Those that have survived editing retain their original numbers, while the editor's footnotes employ asterisks and daggers.

Jim Martin

January 1984

Acknowledgments

Numerous people deserve thanks for their contributions to the publication of the seventh edition of this casebook. Yunsieg Kim (Yale Law School Class of 2016) was outstandingly helpful in preparing the chapters on choice of law (state law and constitutional). Suzanna Sherry provided extremely valuable advice in shaping the chapter on conflicts in the federal system.

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Introduction

A (Very) Brief History of the Subject

Conflict of laws encompasses several related areas of law: choice of law, constitutional limitations on choice of law, jurisdiction of courts, recognition of sister-state judgments, and *Erie* problems.

Of these topics, choice of law is at the heart of the course. A choice-of law problem arises in the selection of the governing law for a case with connections to two or more jurisdictions. Choice-of-law questions have arisen wherever people have been subject to the authority of more than one state, nation, or tribal law. The late Professor Yntema said that a choice-of-law rule was found on the wrappings of a crocodile mummy in Egypt. Yntema, The Historic Bases of Private International Law, 2 Am. J. Comp. L. 297, 300 (1953). The Corpus Juris of the Roman Empire tended to eliminate such problems by the direct method of eliminating all laws but one (namely, Roman law). Choice-of-law problems arose again in the Middle Ages, however, especially in Italy, which was divided into many commercially active city-states. The "statutists" of medieval Italy approached conflicts problems by dividing statutes into the "real" and "personal" category—the former applied only within the jurisdiction that promulgated it; the latter followed the person wherever he went. Unfortunately, the statutes were not labeled, and the crunch came in trying to determine which statutes were which. Overriding the Italian efforts in the area was the notion of what is now sometimes termed a "superlaw," which was based in part on the natural law and which was viewed as having more authority than the local laws in conflict.

In the 1600s, Holland became influential in choice-of-law theory. The greatest of the Dutch scholars was Ulric Huber, who took the position that states defer to the law of other states in appropriate cases not because some superlaw requires them to do so, but rather because of "comity"—a kind of golden rule among sovereigns. His book, *De Conflictu Legum Diversarum in Diversis Imperiis* [On The Conflict of Diverse Laws of Different States], translated in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws 136 (1947), set forth three postulates from which he derived his solutions to conflicts problems:

> (1) The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
>
> (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

> (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.

Lorenzen, *supra*, at 163.

Huber's work had a strong effect on Joseph Story, a Justice of the United States Supreme Court who was considered the foremost conflicts scholar in the English-speaking world in the nineteenth century. Story's approach was similar to Huber's and helped entrench the "comity" rather than "superlaw" orientation in the United States. Story's *Commentaries on the Conflict of Laws* (1834) was the most influential work in the field until A. V. Dicey, in England, produced his vested-rights theory at the turn of the century. In the United States, Professor Joseph Beale of the Harvard Law School took up Dicey's vested-rights theory, with strong doses of territorialism. The theory was enshrined in the American Law Institute's *Restatement of Conflict of Laws* (1934) and appeared for a time to be headed for apotheosis by the United States Supreme Court as a branch of the law of due process. Beale's system tended to select a governing law on the basis of where various critical acts occurred, such as where a contract was signed or where a tort was committed.

Beale's approach was heavily criticized by three outstanding scholars—Cook, Lorenzen, and Cavers. But these criticisms had little influence in the courts for many years. In the 1950s, Professor Brainerd Currie attacked the First Restatement approach and suggested in its place a system of conflicts known as "interest analysis." Currie's work influenced courts and provided a basis for others to build on. In 1971, the American Law Institute published the *Restatement (Second) of Conflict of Laws*, which tried to accommodate the policy-based insights of Currie and others. Today choice of law in the United States is something of a hodge-podge. In the context of torts and contracts, most states have rejected the traditional approach and have adopted one of a variety of policy-based approaches. But the traditional approach fares better in other contexts, such as marriage, corporate internal affairs, and real property.

About the Terminology

The late Professor Prosser once said, in an oft-quoted comment, that "[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it." Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 971 (1953). A small amount of introduction to the terminology may then be in order. *Comity*, a term already used above, indicates the nonmandatory acceptance by one jurisdiction of the law of another. *Vested rights* is a term with meaning very similar to its meaning in constitutional law and is used in connection with theories that indicate, for example, that the victim of a tort would acquire a vested right to recovery under the law of the place where the tort occurs, a right that thereafter accompanies the person and may be used as the basis for a lawsuit even in a jurisdiction that would not impose liability if the same

events had taken place within its own borders. Closely connected with vested rights is the phrase *lex loci* and its children, *lex loci contractus* and *lex loci delicti*. *Lex loci* is simply "the law of the place," with *contractus* adding "of the contract" and *delicti* adding "of the tort." Another term important to your reading of the cases is *domicile*, which refers to the political jurisdiction (state, country, etc.) in which a person makes his or her permanent home. We will see many cases elaborating that sketchy definition.

Finally, you will probably already have noted that several terms are used interchangeably for the topic under discussion. "Conflicts of laws," "choice of law," and "private international law" are common labels for what you are about to study, although "choice of law" is often restricted to choice-of-law questions, excluding such other questions as jurisdiction and recognition of judgments.

Conflict of Laws

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