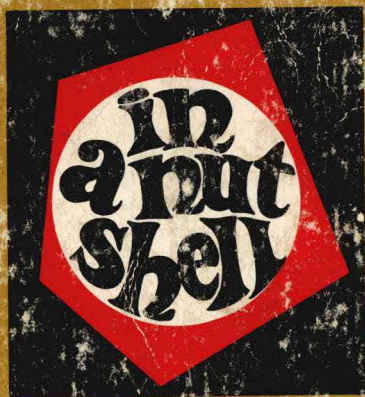


Conflicts



ALBERT A. EHRENZWEIG

CONFLICTS IN A NUTSHELL

by

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Third Edition

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PREFACE TO THE THIRD EDITION

The prefaces to the three editions of this book mirror a shift of emphasis brought about by the somewhat dramatic developments which have occurred in our field during the last decade. While the first preface could still be satisfied with addressing itself to students, the second edition also attempted to offer to the profession a first orientation in the incipient battle for the protection of "hard-won certainty of practice against a spreading anarchy of language." This battle seems to have gained new heights without signs of abating.

Both statutory and judicial law making, to be sure, have remained limited to narrow areas. But what had begun as a "revolution" against petrified dogma, has become a playground of a liquefied "theory" and induced a "counter-revolution" both abroad and at home. Thus, international agreements such as that on traffic accidents have sought to avoid what their draftsmen see as a crisis of American conflicts law. And a realistic analysis of our courts' actual "doing" will, we may hope, support their efforts to preserve what remains as sound tradition or to build anew on its wreckage.

PREFACE TO THE THIRD EDITION

The literature listed in the second preface has been augmented by Weintraub's "Commentary" (1972, W), the new casebook by Reese and Rosenberg (1971), and, above all, the final edition of the Second Restatement (1971, RS). Moreover, references have been added to my and Erik Jayme's second volume of Private International Law (1973, PIL) and the third edition of the Jurisdiction Nutshell (1973), as well as to some parts of my "Psychoanalytic Jurisprudence" (1971, PSA). Citations to my Treatise have been retained, although it is awaiting a second edition by Fritz Juenger. In order to aid the practicing lawyer as well as the student, the case law has not only been brought up to date but broadened to include as many jurisdictions as possible. This time Dan Leer has assisted me with the authorities and Maria Rosenthal has as always prepared the manuscript.

A.A.E.

Berkeley, California
December, 1973

PREFACE TO THE SECOND EDITION

Both in this country and abroad American conflicts law is said to be in a crisis. Indeed, distinguished courts and writers, as well as the American Law Institute, propose to replace old established rules by new indefinite formulae. But, happily, much of the "crisis" is in fact limited to the law of enterprise liability whose obsolete structure precludes satisfactory answers in conflicts cases. Like the second edition of Louisell's and my companion book on Jurisdiction (1968), this new edition of the Nutshell is designed to help in protecting hardwon certainty of practice against a spreading anarchy of language.

In addition to the avalanche of new case law, there has been much important new writing in our field, including Cavers' "Choice-of-Law" Process and three new casebooks by Cramton and Currie, Von Mehren and Trautman, Scoles and Weintraub. Citations had to be added to Leflar's new interstate text on "American Conflicts Law" (L), which I have sought to supplement for the international area by references to my "Private International Law" (PIL) and my Hague Lectures on "Specific Principles of Private Transnational Law" (Recueil). Finally, the controversial Proposed

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Official Draft of the Second Restatement (1967-1969) (RS) has required increased attention.

Reports from former students have encouraged me to assume that the Nutshell has proved of some value for bar review purposes and for a first orientation of the practitioner. Case references have, therefore, been expanded to provide access to current authority not easily available elsewhere. In addition, there remain, of course, those decisions which the student will wish to remember by name as the alphabet of our discipline. Finally, there are those mostly very recent cases which may serve as illustrative material in teaching and learning. Despite this increase in the number of citations easy readability of the text has, I hope, been preserved by their unorthodox brevity which leaves orthodox completeness to the Table of Cases. Many new subheadings are intended to facilitate quick review. But the sections have not been renumbered so as not to disturb cross-references in other books. My colleagues Bernstein, Buxbaum, and Fleming have been thoughtful critics and my students Frank Garfield, John Hoskins and Brian Sax have been faithful helpers.

A.A.E.

Berkeley, California
December, 1969

PREFACE TO THE FIRST EDITION

This book is intended as a text supplemental to course materials, class discussion and review notes. David W. Louisell and I, in the preface to our companion volume "Jurisdiction in a Nutshell", having professed our belief in the case method, pleaded in justification of such a text "the intricacy of the subject, the shortness of life, and a possible mellowing—some would say softening—of our judgment. Many of us may now be prepared to believe that the diligent student who has ground his way through the cases in perplexity and wonder, perhaps has earned the right to know something of the perplexity and wonder of those who have gone before him—and what they have made of it all. As for the less than diligent student—neither this nor any other text will buoy him if he has not learned from the cases how to swim in the current." What is true for jurisdiction, is also true for that equally complex branch of conflicts law which deals with choice of law.

The General Part of this book is a survey of history and theory. Many students will have difficulty with it until they have mastered the traditional chapters on persons, contracts, torts, property and succession. I have nevertheless put his-

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tory and theory first because that is the logical order and saves clumsy references forwards and backwards. The student will do well to reread the General Part after he has studied the other chapters.

Like its companion, "Jurisdiction in a Nutshell," this book has citations only to leading, recent, and other illustrative cases. It relies for full documentation on the texts by Goodrich and Scoles (GS)¹, Leflar (L), and Stumberg (S), as well as on my own treatise (AAE). In the current theoretical controversy which has begun decisively to affect the practice of the courts, I have tried to steer a middle course. I have juxtaposed what is still considered by many to be prevailing opinion, namely the (First) Restatement's rigid formulas, with more modern approaches such as that of the Draft Restatement Second, and with my own reading of the courts' actual holdings which is greatly indebted to my colleagues and the critics of my earlier work. Perusal of some of the literature listed in the Bibliography may help the student in forming his own opinions.

Dedication of this book to Chief Justice Traynor of the California Supreme Court on the occasion of the twenty-fifth anniversary of his tenure, is intended not only as a token of personal respect and affection, but as a tribute to one who has had a decisive share in the creation of the new conflicts law of this country.

A.A.E.

Berkeley, California
April, 1965

ABBREVIATIONS

- AAE** —Ehrenzweig, *Treatise on the Conflict of Laws* (1962)
- E & L** —Ehrenzweig and Louisell, *Jurisdiction in a Nutshell* (3d ed. 1973)
- GS** —Goodrich and Scoles, *Conflict of Laws* (4th ed. 1964)
- L** —Leflar, *American Conflicts Law* (1968)
- PIL** —Ehrenzweig, *Private International Law* (1967); vol. II (with Jayme) (1973)
- Recueil** —Ehrenzweig, *Specific Principles of Private Transnational Law*, *Hague Academy of International Law, Recueil des Cours* 125 (1969) 170-370
- Rest.** —*Restatement of the Law of Conflict of Laws* (1934, Supp.1948, 1954)
- RS** —*Restatement Second, Conflict of Laws* (1971)
- W** —Weintraub, *Commentary on the Conflict of Laws* (1971)

SELECTED TEXTS *

American Law Institute

- Restatement of the Law of Conflict of Laws (1934, Supp.1948, 1954) (*Rest.*)
- Restatement of the Law Continued, Conflict of Laws, Tent.Drafts No. 1 (1953); No. 2 (1954)
- Restatement of the Law Second, Conflict of Laws, Tent.Drafts No. 3 (1956); No. 4 (1957); No. 5 (1959); No. 6 (1960, 1961); No. 7 (1962, 1963); No. 8 (1963); No. 9 (1964); No. 10 (1964); see also RS
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Anton, PIL (1967) (Scotland)

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Baxter, Essays on Private Law: Foreign Law and Foreign Judgments (1966)

Beale, The Conflict of Laws (1935) (3 vols.)

Castel, Conflict of Laws (2d ed. 1968) (Canada)

* For additional references to casebooks, symposia, monographs, foreign treatises, and periodicals, see e. g., AAE XLI-LI; PIL 236-262; Recueil 564-569; Reese and Rosenberg, Conflict of Laws, Cases and Materials (6th ed. 1971) LV-LXXI; Cramton and D. Currie, Conflict of Laws, Cases-Comments-Questions (1968) XXXVII-XLVII.

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- Cheshire and North, *Private International Law* (8th ed. 1970) (England)
- Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942)
- Currie, *Selected Essays on the Conflict of Laws* (1963)
- De Nova, *Le concezioni statunitensi dei conflitti di leggi viste da un continentale* (1964) (American law)
- Dicey and Morris on the *Conflict of Laws* (8th ed. 1967)¹ (England)
- Eek, *The Swedish Conflict of Laws* (1965)
- Ehrenzweig, *Conflict of Laws* (1962) (*AAE*)
- Ehrenzweig, *Private International Law* (1967) (*PIL*); vol. II (with Jayme) (1973)
- Ehrenzweig, *Psychoanalytic Jurisprudence* (1971) (*Psa.*)
- Ehrenzweig and Louisell, *Jurisdiction in a Nutshell* (3d ed. 1973) (*E & L*)
- Falconbridge, *Essays on the Conflict of Laws* (2d ed. 1954) (Canada)
- Gilmore, *Security Interests in Personal Property* (1965)
- Goodrich and Scoles, *Conflict of Laws* (4th ed. 1964) (*GS*)
- Graveson, *The Conflict of Laws* (6th ed. 1969)¹ (England)
- Hancock, *Torts in the Conflict of Laws* (1942)

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- Heilman, *The Conflict of Laws and the Statute of Frauds* (1961)
- Kalenský, *Trends of Private International Law* (1971) (Czechoslovakia)
- Kuhn, *Comparative Commentaries on Private International Law* (1937)
- Lalive, *The Transfer of Chattels in the Conflict of Laws* (1940)
- Land, *Trusts in the Conflict of Laws* (1952)
- Larson, *Workmen's Compensation Law* (1971), vol. 3
- Leflar, *American Conflicts Law* (1968) (L)
- Livermore, *Dissertations on Questions which Arise from the Contrariety of the Positive Laws* (1828)
- Lorenzen, *Selected Articles on the Conflict of Laws* (1947)
- Mádl, *Foreign Trade Monopoly, PIL* (1967)
- Marsh, *Marital Property in Conflict of Laws* (1952)
- Minor, *Conflict of Laws* (1901)
- Morris, *The Conflict of Laws* (1971) (England)
- Nadelmann, *Conflict of Laws: International and Interstate. Selected Essays* (1972)
- Nussbaum, *Principles of Private International Law* (1943)
- Nygh, *Conflict of Laws in Australia* (2d ed. 1971)

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Rabel, *The Conflict of Laws, A Comparative Study* (Vols. I-III, 2d ed. 1958, 1960, 1964; Vol. IV, 1st ed. 1958)

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Symposium on the Restatement (Second) of Laws, 72 *Colum.L.Rev.* 219 (1972)

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—New Trends in the Conflict of Laws, 28 *Law and Contemporary Problems* 673-869 (1963)

—De Conflictu Legum, Essays Presented to Kollewijn and Offerhaus (1962)

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- Twentieth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. Yntema (ed. Nadelmann, von Mehren, and Hazard 1961) 295-432
- Selected Readings on Conflict of Laws, Association of American Law Schools (ed. Culp 1956)
- A Symposium on Conflict of Laws, 6 Vanderbilt Law Review 441-742 (1953)
- Selected Essays in Conflict of Laws, Harvard Law Review (1952)
- Harvard Studies in the Conflict of Laws, vol. I-V (1933-1942) (Harding, Read, Nékám, Robertson, Cook)
- Recueil des Cours, Académie de Droit International, Lectures on American and English law by: Bellot, vol. 3, at 99-175 (1924); Kuhn, vol. 21, at 188-278 (1928); Davies, vol. 62, at 427-546 (1937); Foster, vol. 65, at 399-559 (1938); Wortley, vol. 71, at 5-109 (1947); de Vries, vol. 75, at 205-271 (1949); Graveson, vol. 99, at 25-118 (1960)¹; Cheatham, vol. 99, at 237-355 (1960); Cheshire, vol. 108, at 119-188 (1963); Reese, vol. 110, at 313 (1964); Kegel, vol. 112, at 93 (1964); De Nova, vol. 118, at 441 (1966); Ehrenzweig, vol. 125, at 170 (1969); Cavers, vol. (1970); Lipstein, vol. 135, at 90 (1972)¹

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