

Casebook on
**Conflict of
Laws in
Australia**

J. L. R. Davis

BUTTERWORTHS

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ON THE
CONFLICT OF LAWS
IN
AUSTRALIA

By

J. L. R. DAVIS

B.A., LL.B. (N.Z.), LL.B. (CANTAB.)

DIP. COMP. LEG. STUD. (CANTAB.)

Barrister and Solicitor of the Supreme Court of New Zealand;

Barrister and Solicitor of the Supreme Court of Victoria;

Reader in Law in the Australian National University.

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Preface

The preparation of Webb & Davis's *Casebook on the Conflict of Laws in New Zealand* prompted me to question whether a similar type of book would not be useful if adapted to deal with the Australian case law and statutory material in this subject. Since *Webb & Davis* is itself based to some extent on Webb & Brown's *Casebook on the Conflict of Laws* published in England in 1960, it can be seen that the present work is related, although only by affinity and not consanguinity, to the original English book. However, Professor Webb and I found, in preparing the New Zealand link in this chain, that the developments in this field since 1960 and the New Zealand legislature's innovations which departed from the English model, were such that we had virtually to start afresh, and could not merely fit New Zealand wine into an English bottle. In the same way I have found that the Australian Parliaments and courts, and the fact of Federation, have made a sufficiently distinctive mark on the conflict of laws in this country to require me to rewrite almost completely some of the chapters (notably those in the area of family law) of *Webb & Davis*. When I explained to Professor Webb and Mr. Brown the situation in which I have been placed, they both expressed themselves to be willing to allow me to use such of their original material as I found necessary; they have also, most nobly, refused to take any credit for such of their work that remains, or that I have expanded. For their most kind generosity I am indeed very grateful.

The aim of this book is to provide, within a reasonable compass, an aid to the teaching of the conflict of laws. With the publication of Nygh's *Conflict of Laws in Australia*, it would be otiose to try to cover every aspect of this subject and I have, therefore, concentrated on those areas which are generally included in a university curriculum. Another reason for the modest scope of the book is to attempt to ease the financial burden on the perennially poor student. Attitudes towards casebooks on any subject vary so much that it is impossible to produce one which will please every teacher and every student. Within the limited number of topics covered, I have nevertheless attempted to give as full a presentation as possible of the case law and statutory material. I have also, wherever feasible, set out the more recent cases at the expense of some older decisions, my view being that whatever a "leading" case may actually say, it is the subsequent interpretation of that case which is more important.

In respect of the cases set out, my aim has been to show not only why the case went to court, but also why the court reached its conclusion on the particular point under discussion. Although very few judgments deal with only one particular facet of the law, economic necessity precludes the setting out of a considerable number of unedited judgments. On the one hand, therefore, each chapter is broken down into a number of topics and each judgment has been edited to bring out its relevance to

the particular topic under review; on the other hand, cross-references are provided wherever necessary so that a case may be seen as a whole. In many areas economy of space has also dictated an editorial note instead of extensive quotations from judgments.

It may be seen that the order and content of the chapters in this book follow, in the main, that in *Nygh*; this has been done deliberately so that this book and Professor Nygh's may be used in conjunction with one another. However, if the emphasis and order of treatment of the subject-matter within each chapter were to follow too closely that of *Nygh*, it is feared that the perennially lazy student would use one or the other book, and lose the advantage which is to be derived from a combination of textbook and casebook presentation of a subject. Within each chapter, therefore, the presentation of the subject-matter is in accordance with my own views, which do not necessarily coincide with those of Professor Nygh.

Some of the chapters in *Nygh* have no direct counterpart in this book. Some of these, such as the "Nature and Scope of the Conflict of Laws" and the "Historical Development" of the subject, obviously do not lend themselves to casebook treatment. With regard to others, however, such as the "Standing of the Parties", the "Selection of the *Lex Causae*", "Substance and Procedure" and the "Proof of Foreign Law", at least part of the material contained therein is also included in this book, but in the various contexts in which problems have arisen. In cases in which there is a considerable divergence between the place at which I have included a case, and that at which it appears in *Nygh*, reference is given to the relevant pages in the latter book.

I have been helped considerably in the preparation of this book by Professor Nygh, who has read the whole of the manuscript, and suggested a number of improvements. My colleague, Mr. A. D. Hambly, has also read part of the manuscript and his comments thereon have been most valuable. To both I offer my sincere thanks. My grateful thanks are also due to Mr. F. C. Judson, of Butterworths, and his staff, who have always shown the greatest co-operation and helpfulness, and to the printers, who have done wonders with the manuscript that was presented to them.

Although at the time of writing Chapter 2 the Supreme Court Act 1970 (N.S.W.) had not come into force, I have acted on the assumption that by the time of publication at least Part IX of the Act will have commenced and the Rules of Court scheduled thereto will have come into operation. References to *Nygh* are to the 2nd edition of *Conflict of Laws in Australia*, references to *Cheshire* are to *Cheshire and North, Private International Law*, 8th ed. (1970), and to *Dicey & Morris* are to the 8th edition (1967) of *The Conflict of Laws*.

J. L. R. DAVIS

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