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Robert Allen Sedler
Wayne State University

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CASEBOOKS ON THE CONFLICT OF LAWS: REFLECTIONS UPON THE PUBLICATION OF A NEW BOOK

*Robert Allen Sedler**

CONFLICT OF LAWS: CASES AND MATERIALS. By *James A. Martin*. Boston: Little, Brown, 1978. Pp. xii, 739. \$20.75.

With the publication of *Conflict of Laws: Cases and Materials* by Professor James A. Martin of the University of Michigan,¹ the already ample choice of casebooks for conflicts teachers is made even more ample. Those who favor the more traditional pedagogy continue to have a choice between Reese & Rosenberg² or Scoles & Weintraub.³ Those who emphasize competing theories and methodologies and the interrelationship between the various areas of the subject⁴ can now choose between Cramton, Currie & Kay⁵ and Professor Martin's new book. Within either category the choice is not momentous. The casebooks all reflect the standard of excellence long associated with conflicts scholarship,⁶ and Professor Martin's book clearly follows in this tradition.⁷

Like the Cramton, Currie & Kay opus, Professor Martin's book develops the choice-of-law process by examining at length

* Professor of Law, Wayne State University. A.B., 1956 J.D., 1959, University of Pittsburgh.—Ed.

1. J. MARTIN, *CONFLICT OF LAWS: CASES AND MATERIALS* (1978).

2. W. REESE & M. ROSENBERG, *CASES ON CONFLICT OF LAWS* (7th ed. 1978) [hereinafter cited as REESE & ROSENBERG].

3. E. SCOLES & J. WEINTRAUB, *CONFLICT OF LAWS* (2d ed. 1972 & Supp. 1978) [hereinafter cited as SCOLES & WEINTRAUB].

4. "A substantial core of common considerations underlie jurisdiction, choice of law, and judgments, on both federal and state levels." R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* xii (2d ed. 1975) [hereinafter cited as CRAMTON, CURRIE & KAY].

5. See CRAMTON, CURRIE & KAY note 4 *supra*.

6. As a distinguished scholar in another field observed some years ago: "[o]n a generous estimate, one litigated case out of every hundred may involve a question of conflicts of laws. Yet the subject of conflicts has attracted the best thinking and the most diligent research of a host of capable scholars. Magnificent treatises explore its every intricacy; fruitful theories abound by which it may be explained and understood and reshaped." Wright, *The Law of Remedies as a Social Institution*, 18 U. DET. L.J. 376, 376 (1955).

7. As to the impact of the existing body of conflicts scholarship on the direction of future scholarly efforts, see the discussion in Sedler, *Book Review*, 50 TEXAS L. REV. 1064, 1065-66 (1972) (review of R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* (1971)).

first the theory of the traditional approach,⁸ and its operation in practice, and then the "New Learning," or as Professor Martin says in his *Preface*, "the struggle of the courts and the commentators to come up with a more responsive (but not unduly complicated) approach."⁹ The other components of the subject—constitutional limitations on choice of law, *Erie* and federal matters, jurisdiction, recognition of judgments, and divorce and family matters—Professor Martin relates to the book's treatment of the choice-of-law process. The distinctive feature of Professor Martin's book is his presentation of the materials: the very careful selection of cases and academic commentary and the often penetrating questions and comments that follow.¹⁰ My only substantive criticism is that Professor Martin could have paid a little more attention to choice of law in contracts and to the application of the "New Learning" in this area. This omission does not detract from the overall excellence of the book, and my criticism simply reflects my own desire that policy-centered solutions should apply in this area as well.¹¹

In my review of the Cramton, Currie & Kay book,¹² I commented on the book's potential for "revolutionary conflicts pedagogy" because the materials were structured in such a way as to make choice of law "manageable," to allow ample time for coverage of the other components of the subject, and to relate all of the components to each other.¹³ In addition, I noted that the approach of the authors to the subject made it clear that the course in conflicts is a course about *federalism*, particularly the interstate aspect of "our Federalism."¹⁴ These comments are equally applicable to Professor Martin's book. Thus, there is an important difference in approach between the Cramton, Currie & Kay and Martin books, on one hand, and the Reese & Rosenberg and Scoles & Weintraub books on the other. This difference in approach will necessarily affect how the course is taught, so that selection of a casebook should depend on the approach to the

8. Professor Martin refers to this as the "Territorialist Approach," and begins with a discussion of the conflicts issues involved in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

9. *Preface* to J. MARTIN, *supra* note 1, at xix.

10. Not to mention some very clever cartoons.

11. See generally Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279, 302-15 (1972).

12. Sedler, Book Review, 28 J. LEGAL EDUC. 592 (1977).

13. *Id.* at 594-96.

14. In my view, this is the primary justification for a comprehensive course in conflicts in the law school curriculum. *Id.* at 596-97.

subject the particular teacher favors.

The Cramton-Currie-Kay-Martin approach focuses on competing theories and methodologies and the interrelationship between choice of law and the other components of the subject. The emphasis is on the choice-of-law process as a whole and on the transferability of its theory and methodology to "tort, contract, and the other pigeonholes."¹⁵ Similarly, the student's consideration of the interrelationship between choice of law and the other components of the subject may lead to a more refined analysis both of choice-of-law problems and problems arising in regard to jurisdiction, recognition of judgments, and the like.¹⁶

The Reese-Rosenberg-Scoles-Weintraub approach, in contrast, despite some effort to "tie things together," still ends up discussing particularized solutions. Although both books include a chapter on "pervasive" or "threshold" problems,¹⁷ choice of law is essentially considered in terms of the different substantive areas of torts, contracts, and the like. In Scoles & Weintraub, the field is explicitly divided in this way. There is no detailed consideration of competing theories and methodologies or of the choice-of-law process as a whole.¹⁸ Reese & Rosenberg purport both to discuss competing theories and methodologies and to "preserve useful . . . classifications."¹⁹ The authors state that in Chapters Eight and Nine they deal with "the whole sweep of choice-of-law problems" and that in later chapters they deal with substantive areas such as property, family law, administration of estates, and business associations.²⁰ Chapter Eight is headed "The Problem of Choosing the Rule of Decision" and covers the traditional approach, escape devices, the search for new approaches, and the "new era." Most of the cases in that chapter, however, are tort cases, and the consideration of the "scholarly camps" does little more than summarize the principal methodologies. There is no

15. Preface to CRAMTON, CURRIE & KAY, *supra* note 4, at xiii.

16. See Sedler, *Judicial Jurisdiction and Choice of Law in Interstate Accident Cases: The Implications of Shaffer v. Heitner*, 1978 WASH. U. L.Q. 329; Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031 (1978).

17. These chapters cover questions of public policy, substance-procedure distinctions, and proof of foreign law. Both books also have a separate chapter on domicile.

18. Only in the chapters on torts and contracts is there a separation of the traditional approach and modern solutions.

19. Preface to REESE & ROSENBERG, *supra* note 2, at xix. The change from previous editions occurred in the sixth edition of the continuing series. The first edition was published in 1936: E. CHEATHAM, N. DOWLING & H. GOODRICH, *CASES AND OTHER MATERIALS ON CONFLICT OF LAWS*.

20. Preface to REESE & ROSENBERG, *supra* note 2, at xix.

extended analysis of these methodologies nor any specific illustration of their operation. The emphasis is still on cases, and it is almost as if the "new approach" material has been superimposed on what was formerly the chapter on torts. Chapter Nine, titled "Choice of the Applicable Law: Further Considerations," is subdivided into sections on contracts, trusts, workmen's compensation, marriage, and property, with an additional section on "Changing Choice-of-Law Approaches, International and Interstate." Again, cases predominate over theory and methodology, and substantive areas predominate over a view of the choice-of-law process as a whole.

In regard to jurisdiction and recognition of judgments, Cramton, Currie, Kay, and Martin treat these areas "in light of the wisdom derived from consideration of the basic choice-of-law problems."²¹ Their treatment differs from that of Reese, Rosenberg, Scoles, and Weintraub, who cover these areas in substantially more detail and to a large extent independently of their coverage of choice of law. The same difference in treatment appears with respect to the *Erie* doctrine and federal common law.²²

Clearly, then, conflicts teachers have both a "basic choice" and a "peripheral choice" of casebooks. The "basic choice" is whether to follow the Cramton-Currie-Kay-Martin approach to conflicts pedagogy, which stresses competing theories and methodologies and the interrelationship between choice of law and the other components of the subject, or the Reese-Rosenberg-Scoles-Weintraub approach, which emphasizes cases, substantive areas of choice of law, and detailed but essentially independent treatment of the various components of the subject. Once the "basic choice" is made, the decision whether to use Cramton, Currie & Kay or Martin on one hand, or Reese & Rosenberg or Scoles & Weintraub on the other, is rather "peripheral."

Thus far, I have discussed the basic difference in approach between the two sets of casebooks. What is equally interesting is that despite this basic difference, these casebook writers substantially agree both on the methodologies and on the cases that should be included. All the casebooks necessarily pay considerable attention to the traditional approach to choice of law. Not only does a substantial minority of American state courts still

21. *Preface to J. MARTIN, supra note 1, at xix.*

22. In addition, REESE & ROSENBERG, *supra note 2*, and SCOLES & WEINTRAUB, *supra note 3*, cover a number of areas that are not covered in CRAMTON, CURRIE & KAY, *supra note 4*, and J. MARTIN, *supra note 1*, such as business associations.

follow the traditional approach,²³ but an understanding of its theory and practice is crucial to an understanding of modern methodologies, all of which have been developed in one way or another in reaction to the traditional approach. Similarly, all of the casebooks examine carefully the Restatement Second,²⁴ which a number of courts explicitly follow²⁵ and which may be likened to a "modern rules" approach with policy overtones.²⁶

There is also a clear pattern in the treatment of the other methodologies by the casebook authors. Cramton, Currie & Kay and Martin divide their treatment into essentially two parts: interest analysis and "others." The "others" include both those methodologies that, while building on interest analysis as developed by the late Brainerd Currie,²⁷ propose solutions to true conflicts other than applying the forum's own law,²⁸ and those that are comprehensive methodologies in themselves. Both Cramton, Currie & Kay and Martin present Leflar's choice-influencing considerations,²⁹ neoterritorialism (as developed by Cavers and Twerski),³⁰ Ehrenzweig's "true rules,"³¹ and Baxter's comparative-impairment solution to the resolution of the true conflict.³² Cramton, Currie & Kay, however, differ from Martin by offering an extended look at functional analysis, as developed by Weintraub³³ and by Trautman and von Mehren.³⁴ Returning

23. See the listing in Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 975 n.2 (1977).

24. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

25. For a listing of some of the states, see Sedler, *supra* note 23, at 1000 n. 109.

26. I consider it to be essentially a "modern rules" approach. See Sedler, *supra* note 11, at 284-85. As to its "policy overtones," see the discussion in CRAMTON, CURRIE & KAY, *supra* note 4, at 306-13.

27. As to the underlying theory and methodology of Currie's interest analysis, see generally the discussion in Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 UCLA L. REV. 181, 183-90 (1977).

28. Such as Baxter's comparative impairment, see Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1965), and Weintraub's functional analysis, see generally R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (1971).

29. See generally R. LEFLAR, AMERICAN CONFLICTS LAW ch. 11 (3d ed. 1977); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

30. See generally D. CAVERS, THE CHOICE-OF-LAW PROCESS (1955); Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQ. L. REV. 373 (1971).

31. See generally A. EHRENZWEIG, CONFLICT OF LAWS (1962); Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach"*, 18 OKLA. L. REV. 340 (1965).

32. See generally Baxter, *supra* note 28.

33. See generally R. WEINTRAUB, *supra* note 28.

34. See generally A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS (1965).

to areas of agreement, both books treat extensively the criticisms and refinements the "younger generation of conflicts scholars" have made of the various methodologies.³⁵

Reese & Rosenberg generally agree with Cramton, Currie, Kay and Martin on which methodologies to include, but they weight the methodologies differently. Reese & Rosenberg allocate equal, if limited, space to Currie's interest analysis, Ehrenzweig's "true rules," Leflar's choice-influencing considerations, von Mehren and Trautman's functional analysis, and Cavers's principles of preference.³⁶ Unlike the other authors, however, they virtually disregard the "younger generation."

What is perhaps even more interesting, in light of the basic difference between Cramton, Currie, Kay, and Martin, on the one hand, and Reese, Rosenberg, Scoles, and Weintraub, on the other, is the agreement among the four sets of authors on the cases to include in the casebook. I have identified thirty-two cases described as principal cases in all four books and forty-nine cases that are listed as principal cases in three of them.³⁷ These eighty-one cases may be called the "core cases" of conflicts. Of these, forty-seven are United States Supreme Court cases, and, not surprisingly, nineteen of the thirty-two cases common to all four books are Supreme Court cases. But it is the remaining cases that are most illustrative of the "core concept."

I want to briefly note here what appear to be the "core cases" in the major areas of the subject. In regards to theory and rules of the traditional approach to choice of law, we have *Alabama Great Southern Railroad v. Carroll*,³⁸ *Milliken v. Pratt*,³⁹ *In re Estate of Barrie*,⁴⁰ *Loucks v. Standard Oil Co. of New York*,⁴¹ *Levy*

35. The term is taken from CRAMTON, CURRIE & KAY, *supra* note 4, at 7.

36. These principles of preference are territorially based and were originally formulated as solutions to the true conflict. Professor Cavers subsequently indicated that they may have broader application, and Professor Twerski has built on them to develop what may be called the neo-territorialism approach. See the discussion in Sedler, *supra* note 27, at 204-07.

37. I have taken the author's definition of "principal case," as indicated in the Table of Cases to each book. However, the authors differ somewhat among themselves in their definition: some include set off cases given extensive note coverage following the "main case" as principal cases, others only the "main cases" and do not set off other cases.

My method of determining the "core cases" actually understates the extent of agreement among the casebook authors. I have not included the cases which two of the books list as principal cases and which receive substantial note treatment in the other two books, although they are not listed as principal cases.

38. 97 Ala. 126, 11 So. 803 (1892). It is included in all four casebooks. The number of inclusions will hereafter be indicated in parentheses.

39. 125 Mass. 374 (1878) (3).

40. 240 Iowa 431, 35 N.W.2d 658 (1949) (4).

41. 224 N.Y. 99, 120 N.E. 198 (1918) (3).

v. Steiger,⁴² and *Walton v. Arabian American Oil Co.*⁴³ For domicile, there is *White v. Tennant*,⁴⁴ for marriage, *In re Estate of May*,⁴⁵ and for the statute of limitations, *Bournias v. Atlantic Maritime Co.*⁴⁶ When we want to teach the use of "escape devices" to avoid the operation of the rules of the traditional approach, the "core cases" are *Grant v. McAuliffe*,⁴⁷ *University of Chicago v. Dater*,⁴⁸ *Levy v. Daniels' U-Drive Auto Renting Co.*,⁴⁹ *Haumschild v. Continental Casualty Co.*,⁵⁰ and *Kilberg v. Northeast Airlines, Inc.*⁵¹ The "core cases" illustrating modern approaches to choice of law are *Auten v. Auten*,⁵² *Babcock v. Jackson*,⁵³ *Lilienthal v. Kaufman*,⁵⁴ *Bernkrant v. Fowler*,⁵⁵ *Neumeir v. Kuehner*,⁵⁶ *Dym v. Gordon*,⁵⁷ *Cipolla v. Shaposka*,⁵⁸ *Wyatt v. Fulrath*,⁵⁹ *Addison v. Addison*,⁶⁰ and *Western Airlines, Inc. v. Sobieski*.⁶¹ Other "casebook favorites," apart from Supreme Court cases, are *Worthley v. Worthley*,⁶² *Pritchard v. Norton*,⁶³ *Seeman v. Philadelphia Warehouse Co.*,⁶⁴ *Rosenstiel v. Rosenstiel*,⁶⁵ *Minichiello v. Rosenberg*,⁶⁶ *Atkinson v. Superior Court*,⁶⁷ *Alton v. Alton*,⁶⁸ and *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*⁶⁹

42. 233 Mass. 600, 124 N.E. 477 (1919) (3).

43. 233 F.2d 541 (2d Cir. 1956) (4).

44. 31 W.Va. 790, 8 S.E. 596 (1888) (3).

45. 305 N.Y. 486, 114 N.E.2d 4 (1953) (4).

46. 220 F.2d 152 (2d Cir. 1955) (3).

47. 41 Cal. 2d 859, 264 P.2d 944 (1953) (4).

48. 277 Mich. 658, 270 N.W. 175 (1936) (4).

49. 108 Conn. 333, 143 A. 163 (1928) (3).

50. 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (3).

51. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (3).

52. 308 N.Y. 155, 124 N.E.2d 99 (1954) (3).

53. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (4).

54. 239 Or. 1, 395 P.2d 543 (1964) (4).

55. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961) (4).

56. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (4).

57. 16 N.Y.2d 120, 290 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (3).

58. 439 Pa. 563, 267 A.2d 854 (1970) (3).

59. 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965) (3).

60. 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965) (3).

61. 191 Cal.App. 2d 399, 12 Cal. Rptr. 719 (1961) (3).

62. 44 Cal. 2d 465, 283 P.2d 19 (1955) (3).

63. 106 U.S. 124 (1882) (3).

64. 274 U.S. 403 (1927) (3).

65. 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965) (3).

66. 410 F.2d 106 (2d Cir. 1968), *affd. on rehearing en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969) (4).

67. 49 Cal. 2d 333, 316 P.2d 960 (1957) (4).

68. 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954) (4).

69. 189 Miss. 73, 191 So. 94 (1939), *affd. on rehearing*, 189 Miss. 73, 195 So. 322 (1940) (3).

My rough—and possibly not fully accurate—arithmetic indicates the following degree of inclusion in the various casebooks. Of the 114 cases in Professor Martin's book fifty-two, or 45.6% are "core cases." Of the 118 cases in the Cramton, Currie & Kay book, seventy-four, or 62.7% are "core cases." Since the Reese & Rosenberg and Scoles & Weintraub books both contain many more cases than the other two and cover a number of areas the other two do not, they predictably have a smaller percentage, but not necessarily a smaller number, of "core cases." Of the 188 cases in Reese & Rosenberg, seventy-four, or 34%, are "core cases." Of the 188 cases in Scoles & Weintraub, seventy-three or 29% are "core cases." Clearly the authors of the conflicts casebooks substantially agree as to the "core cases" in the field.

This agreement as to the "core cases" indicates that teachers of the subject and casebook authors have found them to be good teaching vehicles. A number of them are "older" cases, and there is no disposition to appear "modern" by including cases simply because of their more recent vintage. The "core cases" illustrate effectively the kinds of conflicts problems that have arisen and the differing ways that the courts have dealt with those problems. It may also be that by "common consent" these cases provide a frame of reference by which conflicts problems can be studied and analyzed and different methodologies explored. In any event, to the teacher of the subject, it is comforting to know that there is agreement as to the "core cases."

My review of Professor Martin's excellent casebook has occasioned an analysis of the other casebooks in the field as well. The experience has been an enlightening one, at least for me. The casebooks reflect two basic pedagogical approaches to the teaching of conflicts, and for each approach, there are two excellent casebooks. At the same time, there seems to be a good deal of agreement on the methodologies that should be emphasized and on the "core cases" that should be included. The teachers of conflicts have been well served by their colleagues who have undertaken to produce casebooks for their use.