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Cramton & Currie: Conflict of Laws: Cases--Comments--Questions

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Conflict of Laws: Cases—Comments—Questions. By *Roger C. Cramton* and *David P. Currie*. St. Paul, Minn.: West. 1968. Pp. xlvii, 915. \$14.50.

When two new casebooks on the same subject are issued by the same publisher within a period of a few months, an explanation is called for. In the case of the new Cramton and Currie book on conflict of laws, just out, and the Scoles and Weintraub book¹ which barely preceded it, current controversies about directions of growth of the subject, plus increased interest in it, furnish the answer. The Scoles-Weintraub volume presents the traditional materials in an essentially traditional form (though the materials presented and the conflicts theory represented would have shocked Joseph H. Beale a few years ago). The Cramton-Currie casebook, on the other hand, employs altogether new approaches, both as to the pedagogy and as to the philosophical theory of conflict of laws. This volume is for questing young conflicts teachers who want to make a fresh start in the course and for whom Beale, Story, Huber, and Dicey are only historic landmarks. There are enough of these youngers in the law schools to create a demand for this newest teaching tool. At the same time, the "radicals" of a decade ago—today's "moderates"—will for the most part prefer to consider the cases and the issues in a more customary order.

To one who has kept up with cases decided in the 1960's, there is nothing startling in the contents of the Cramton-Currie book. One would not expect to find very many of the old cases, and indeed the book is filled with cases that have attracted attention recently. Nor is the inclusion of a considerable amount of excellent text material—some by the editors and some taken from the writings of other scholars—along with abstracts of hundreds of cases and many thought-provoking questions, any departure from the format of other top new casebooks. Such casebooks, including this one, serve almost the same reference purposes as would good textbooks on the same subjects.

1. F. SCOLES & E. WEINTRAUB, *CASES AND MATERIALS ON CONFLICT OF LAWS* (1967). It also is published by West.

What is pedagogically new in the Cramton-Currie book is the sequence of the materials—the way they are organized into chapters.

The three main segments of the law school course—choice of law, jurisdiction, and judgments—are taken to have a common theoretical base. Since problems of choice of law afford the clearest explanation of the nature of that base, this subject is studied first. Because such basic problems require some time for study before understanding can be achieved, this may be a difficult place for the student to begin. It is like teaching swimming by tossing the beginner into the lake; if he stays afloat he can be taught the niceties of the strokes later. It can be assumed that most third-year law students are capable of staying afloat, and this initial difficulty probably affords no real objection to presenting the conflicts material first.

Choice of law is not presented under the standard subject headings (torts, contracts, property, and so forth) but rather in terms of choice-of-law theory applicable to all subjects. Materials on jurisdiction, appearing in the middle of the book, are held to a minimum on the sound assumption that they have been studied earlier in the law school curriculum. Divorce law is presented separately, late in the book, because it neither fits in with nor helpfully explains, but rather affords historical contrast to, other areas of conflicts law. The total effect is to present conflicts as an independent subject in the law—a discipline within itself—instead of something to be studied as a sub-branch of one after another of the traditional law school courses. This may largely destroy the review function of the third-year conflicts course, and that may be a serious pedagogical loss. The justification is that conflicts law in America today is sufficiently important that it needs to be studied and understood for its own sake. Another traditional incidental function of the conflicts course was to provide a sort of analytical study of jurisprudence near the close of the student's law school career. This too will fade away, but whatever value such analytical study may have had will be more than adequately replaced by the socioeconomic and political insights into jurisprudence that inhere in a realistic approach to the modern law of conflicts.

Apart from pedagogy, the main feature of the new book is its devotion to the studies and writings of a man who tried to make sense of modern conflicts law, the late Professor Brainerd Currie. The book is dedicated to Professor Currie, and one of its editors is his son. Key excerpts from his writings appear throughout the book, particularly in the choice-of-law sections, and many of the editors' excellent questions (real questions and not just rhetorical ones, despite the editors' modest disclaimer)² call upon the student to test Currie's governmental-interest analysis against the problems and

2. Cf. Preface, p. xii.

conclusions presented in case after case. It must be emphasized that, despite the omnipresence of Currie's work, the editors do not try to cram acceptance of his theory down the students' throats. On the contrary, they leave the master to speak for himself through his relevant writings, and then make sure by asking skeptical questions that the student has fair opportunity to decide on his own whether to accept Currie unalloyed.

One conclusion, though, is inevitable from the book's contents: some modern version of conflicts law has to be accepted; Beale's formulations are simply relics of the past. The law that the student discovers through this casebook is law that Beale never knew, nor even dreamed of.

In addition to the excerpts from Brainerd Currie, the editors make frequent reference to Ehrenzweig's work and reprint several pages from the writings of other conflicts commentators³ whose views—though not those of Currie—are still modern. It might be inferred that this calls for a choice among the approaches taken by these writers, but that does not necessarily follow. There is a clear trend in current judicial opinions toward combining all or most of the new choice-of-law theories, using each of them to supplement the others in supporting results arrived at in particular cases. A qualitative significant relationships test, governmental interest analysis, and the five integrated choice-influencing considerations all may appear in a single opinion⁴ and still make reasonably good sense. The point may be that a qualitative measurement of significance requires some standard for value judgment beyond the mere listing of contacts, that interest analysis by itself does not identify all the factors that may legitimately influence a court in a choice-of-law decision, and that reference to the basic choice-influencing considerations is needed to tie the loose ends together. At any rate, the materials in this casebook will enable a wide-ranging student to reach his own conclusion.

One major query, small in relation to the whole casebook but important in itself, persists. This relates to the frequent use of the term "false conflict" (p. 261, et alia), meaning "no conflict." Among commentators, a tendency has developed to use the term "false conflict" to describe cases in which the choice of law is easy, or relatively easy, to make. This same tendency is now spreading to the courts. After the choice has been made, the decision is buttressed by stating that the conflict just resolved was a "false" one since the reasons which influenced the decision favored the choice that was made rather than the choice that was rejected. Courts are even beginning

3. Professors William F. Baxter, David F. Cavers, Robert A. Leflar, Arthur T. von Mehren, and Donald T. Trautman. See pp. 316-34.

4. *E.g.*, *Schneider v. Nichols*, 158 N.W.2d 254 (Sup. Ct. Minn. 1968); *Mitchell v. Craft*, 211 S.2d 509 (Sup. Ct. Miss. 1968); *Woodward v. Stewart*, 243 A.2d 917 (Sup. Ct. R.I. 1968).

to use the question-begging "false conflict" label in hard cases. Used in this manner, the concept does not help to decide cases, but furnishes only a sort of self-congratulatory approval appended to decisions independently arrived at. A court employing governmental interest analysis may conclude that State X's interest, based on the relation of its law to the facts, is more substantial than State Y's (it will seldom if ever happen that a state which has a real contact with the facts in dispute will have *no* interest at all in their legal effect); therefore X's law should govern. That describes a real conflict, now resolved, not a false one. To be useful, the term "false conflict" ought to be limited to those cases in which the laws of the concerned states, or some of them, are the same, so that there is no conflict between the laws themselves. This would be in keeping with the point—made more than a third of a century ago by David Cavers and now increasingly accepted—that the choice-of-law problem involves a choice between laws, not necessarily a choice between jurisdictions. The term "false conflict" can be a useful one, but not if it is merely an epithet. Since the term appears frequently in the casebook, students are entitled to be warned against its misuse.

This is the best modern casebook on conflict of laws. It is, in fact, the *only* modern one. An experienced law teacher can teach modern conflicts law from any casebook that contains the recent cases and the relevant current materials, whether or not it is organized—as this one is—in terms of modern conflicts law. For a beginning teacher who wants to start teaching conflicts in 1969 from a 1969 point of view, the Cramton-Currie book will afford maximum guidance. For the rest of us, it is another excellent casebook.

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