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Currie: Selected Essays on the Conflict of Laws

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RECENT BOOKS

SELECTED ESSAYS ON THE CONFLICT OF LAWS. By *Brainerd Currie.* Durham: Duke University Press. 1963. Pp. x, 761. $15.00.

The revolution in conflict of laws is forty years old this spring. Stemming from a different way of looking at law and legal institutions, it attacked the vested rights theory in choice of law. In the law schools the overthrow of the old theory is complete. For practitioners the rejection is marked by the conflict-of-laws provisions of the *Uniform Commercial Code* and by the new *Restatement of Conflict of Laws* still in tentative form. With victory over the old system assured, another guide is needed.

This volume consists of fourteen essays published in six law reviews from 1958 to 1963. The essays, always acute and often brilliant, are the product of a keen mind directed to a formidable problem. In a particular case it is the choice of the law to be applied in reaching the decision. In a larger sense the problem is the coordination of the laws of fifty states with one another and with the laws of over a hundred diverse nations so as to help make our interstate and international systems work well. Most of the essays begin with the consideration of a particular case and reach outward. One essay traces the contributions of Mr. Justice Roger J. Traynor, whom "the evidence points to . . . as preeminent in the conflict of laws."[1] Another is an especially fine discussion of proof or failure of proof of foreign law. Two restate the author's views in general form.

The unity of the volume comes from pervasive characteristics. The most important is that the author asks fundamental questions and keeps seeking fuller understanding. Another characteristic is the insistence on the specific issue in a case unhampered by sweeping generalities. There is close and unrelenting analysis of the precise issue in each case with the court's decision often explained or illuminated by an examination of its background.

"Governmental interests" is the affirmative pervasive idea. The common name of the subject obscures, so the author would say, the real problem. The conflict to be resolved is not the conflict or difference of local laws. It is the conflict of governmental interests, that is, the conflict of the interests of governments in having their laws applied to the issue in the case. "False conflicts" is an illuminating and recurring expression. The conflict is false when the facts of a case are connected with two or more states, but only one state has a governmental interest in the decision of the issue. An illustration is *Emery v. Emery*,[2] where a California family was involved in an automobile accident in Idaho. The question was whether one injured member of the family could recover from another member whose negligence caused the accident. Idaho had an interest in the way automobiles are

1 P. 688.
2 45 Cal. 2d 421, 289 P.2d 218 (1955).

driven on its highways, but it had no interest in the issue of intra-family immunity of a California family. The court applied California law to the latter issue.

When the conflict is real the guide to decision is governmental interests of the states related to the case. In the earlier essays the author's view seemed to be that if the forum state has any interest at all, it should apply its own law. Later essays widen the range of factors considered, and in suggesting appropriate limitation on the use of the forum's law they employ such phrases as "restraint and enlightenment," and "rational altruism." Professor Currie restates his view in the last essay.

> "The principle is that . . . [the state of the forum] should apply its own laws to effectuate its own legitimate interests, defined with moderation and restraint in the light of the interests of other states. . . ."[3]
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> "Governmental-interest analysis is, of course, concerned with the ways in which the respective states are related to the parties, the events, and the litigation . . . . Governmental-interest analysis determines the relevance of the relationship by inquiring whether it furnishes a reasonable basis for the state's assertion of an interest in applying the policy embodied in its law."[4]

Governmental interests of a state in the application of its laws are determined and forwarded, so he urges, by the construction and interpretation of these laws. While the author grants that courts make law and says that in conflicts between state and national interests, as he learned from "a younger generation," they needs must weigh and choose, he concedes no such power in conflicts between state and state.

Another marked characteristic of the book is the modification and development of the author's ideas from essay to essay. The volume is no smoothly rounded discussion written all at one time. Rather it is a mirror of the history of conflicts ideas. No hobgoblin frightens Professor Currie into a claim of fixity and consistency throughout his five years of these published studies. The book avows inconsistency—the other face of development and advance. To put the reader on guard, later chapters admit earlier "limited vision" and "tactic" of attack. In addition the volume includes a complete and handsome retraction of a mistaken view. The author certainly desires in his readers what the book reveals in him—a capacity for continuing self-criticism and increasing insight. He asks as much of the law itself. "The common law is no less dynamic in conflict of laws cases than in domestic cases."

When a revolution is won the revolutionaries, freed from the unifying influence of a common enemy, fall out and attack one another. It is so with conflict of laws. Most students of the subject would agree with the author's fundamental policy quoted above. When the general policy is transformed into specific principles and rules, the former allies disagree with Professor

[3] P. 690.
[4] P. 727.

Currie and among themselves—and he with them—as later symposia abundantly illustrate.

My bias as an office lawyer rather than an advocate makes me believe that the emphasis through much of the book on the local law of the forum is misplaced. Most conflicts discussions concern court cases on torts and regulatory laws, yet most lawyers' work is directed to other matters. Law is applied to a far greater extent by lawyers in their offices than by courts. An indication of the fact is that the solicitors in England outnumber the barristers ten to one. Our family, property and business relationships rest on dependable laws. It would be disruptive to apply the local law of the forum into which astute counsel, choosing among liberal rules of judicial jurisdiction, brought the relationships into question. Mr. Justice Brandeis mentioned the evil done by the old doctrine of a federal court's common law: "It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court . . . ."[5] The evil would be compounded by use of the laws of fifty state forums. Although the vested rights theory of choice of law is unfounded, given a wise choice of law rule—a large concession—the vested rights policy of protection of acquired interests is essential in our federal system and is required by the Constitution including the full faith and credit clause.

In four chapters Professor Currie considers the present extent of federal control of state choice of law and emphasizes unused resources in the equal protection and privileges and immunities clauses of the Constitution. In some intriguing passages he indicates that choice of law is an appropriate field for federal statutory direction. The full faith and credit statute is now as explicit on sister state law as it is on sister state judgments, and as Mr. Justice Black has written, "it is for this [the Supreme] Court [of the United States] to choose in each case between the competing public policies involved."[6] In international conflicts treaties have an increasingly important part. The present Congress has authorized the participation of the United States in the Hague Conference on Private International Law and in the Rome Institute on the Unification of Private Law. Aside from these actions there is indication of some support for federal control of this part of our private international relations.[7] In a notable address this year Judge Henry Friendly vividly distinguished the old false federal common law of *Swift v. Tyson*, which was never more than a law for the federal courts, from the true and expanding federal common law which is a part of the law of the land.[8] With all these resources, perhaps the essentially national task of the coordination of the laws of our federation, both within and beyond the nation, will be taken over in increasing measure by federal law.

5 Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938).
6 Hughes v. Fetter, 341 U.S. 609, 611 (1951).
7 Justices Douglas and Black dissenting, in Ioannou v. New York, 371 U.S. 30 (1962).
8 Friendly, *In Praise of Erie—and of the New Federal Common Law*, 19 RECORD OF N.Y.C.B.A. 64 (1964).

"Rightly to be great is not to stir without great argument." These words of Hamlet are the first lines of one of the challenging and revealing books written between the wars by a young French officer not yet come to fame, Major Charles de Gaulle. They might serve as the foreword of this book. No one of this generation has stirred up or carried on so great an argument as Brainerd Currie. "The important thing is," as the book concludes, "that we have all been left free to work toward a better law of conflict of laws."[9]

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[9] P. 742.