

UNDERSTANDING CONFLICT OF LAWS

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Chapter 1

INTRODUCTION

§ 1 The Nature of the Subject

The study of conflict of laws centers on disputes and transactions that have legal implications involving more than one sovereign.¹ Conflicts problems, therefore, can involve questions that go to the very heart of relations between governments. The proper adjustment and balance of those relations requires a high degree of sensitivity on the part of decision-makers. Because conflicts questions generally arise in the context of litigation, because they pose a vast array of different fact patterns, and because many of the problems resist the application of inflexible rules, the solutions to conflict of laws questions in American law generally, although not always, have been the province of the judiciary.

This treatise examines the common questions raised in multi-state disputes and transactions. The focus is almost exclusively on relations among the sovereigns in the American federal system: the national and state governments. Within that category, the focus is generally directed to horizontal relations among the states.

Two major areas of concern touched upon only briefly in this book are international conflicts problems and problems created when state law conflicts with federal law. Because the Federal Constitution limits in many ways the exercise of state power, we also discuss the impact of the Constitution on conflicts problems. That impact is sometimes quite significant (*e.g.*, jurisdiction and judgments) and sometimes hardly evident at all (*e.g.*, choice of law).²

Conflicts, like Caesar's Gaul, is generally said to be divided into three parts: jurisdiction, choice of law, and judgments. In addition to these subjects, this book examines at the start the problem of domicile and concludes with an analysis of conflicts problems in domestic relations, an area where specialized treatment is necessary. Each of these five Chapters is discussed briefly below.

[a] Domicile

The question of a person's "domicile" (something close to, but not identical with, "residence") is a recurrent problem in the field of conflicts. Domicile, in particular, has significant implications in jurisdiction and choice of law.

¹ This definition is circular; it is not possible, after all, to know the legal implications of a problem until you know the rules that will be applied to it.

² There is also a short discussion of the *Erie* decision and its impact on choice of law.

Because of this, we have broken domicile out as a separate chapter, using it to begin our discussion of the whole subject of conflicts.

[b] Jurisdiction

“Jurisdiction” concerns the power of courts to adjudicate with respect to a person or thing.³ If a court has jurisdiction over a person, for example, it can exercise power over her, and adjust her legal relations with others. A court, for example, might order that a defendant pay money to a plaintiff for a breach of contract; the court must have personal jurisdiction for that order to be valid. In contrast, a court might exercise jurisdiction over a piece of property (real or personal), adjudicating the rights of the whole world in it (in rem jurisdiction), or adjudicating the rights in it of certain named individuals only (quasi-in rem jurisdiction). Examples of the former include Torrens land registration systems and decrees of probate and admiralty courts; quasi-in rem jurisdiction is typified by a suit to quiet title or an attachment action by a creditor against a piece of a debtor’s property.

To exercise jurisdiction properly, a court must have enough connection with a problem to satisfy both constitutional and statutory requirements. There must be a sufficient nexus between the defendant or the res on the one hand and the state on the other to justify the exercise of power. This does not mean that the defendant, for example, necessarily must be present in the jurisdiction; it may be that her activities (such as selling goods in the state) will make it reasonable for the state to exercise jurisdiction over her even though she is not within the state’s territory. When that happens, the state’s “long-arm” jurisdiction can bring the defendant before the court. The chapter on jurisdiction examines the development of modern jurisdictional concepts, problems involving specific types of jurisdiction, and conceptual difficulties with modern doctrine, particularly with regard to new developments in electronic communication and commerce.

[c] Choice of Law

Whenever a legal problem involves incidents or issues concerning more than one state, a court must determine which state’s legal rules should control. The development of current approaches to choice of law has been revolutionary. The story begins with the vested rights/territorial approach, which dominated thinking until well past mid-century. Then, under the guidance of the American Law Institute and of a brilliant band of judges and professors led by Brainerd Currie, conflicts analysis began to examine the “interests” involved in any particular legal problem. The chapter on choice of law explores the development of modern theories, as well as the counter-revolution in vogue in some quarters. The chapter also includes a unit on the restraints imposed by the Constitution on choice-of-law analysis, and concludes with a discussion of the impact of the Supreme Court’s decision in *Erie R.R. v. Tompkins* on choice-of-law questions.

³ This is known as “jurisdiction to adjudicate,” in contrast to “legislative jurisdiction” discussed in § 94, *infra*.

[d] The Effect of a Judgment

A defendant who prevails in a case may find that her troubles are not over; the losing plaintiff, for example, may sue again in another jurisdiction, and the victor in the first case will seek to interpose that judgment as a defense to the second claim. Or, to illustrate from the other perspective, if the plaintiff wins the first time around, she may try to satisfy her judgment by levying on assets of the loser located in another state. In each case, what effect must the second court give to the decision by the first court? These problems are examined in Chapter Five of this book. The focus of the chapter is the Full Faith and Credit Clause of the Constitution of the United States, one device used by the Framers to unify the nation.

[e] Domestic Relations

The last chapter in the book deals with the special case of domestic relations. Family problems receive special treatment because of their unique features. Judgments in family matters, for example, often can be reopened time after time in contrast to the rule of finality that prevails in other litigation. And although choice-of-law questions are virtually non-existent in this area, jurisdictional questions can become quite complex because a judgment may affect both personal rights (alimony) as well as status (divorce).

Because general conflicts rules do not apply neatly, domestic relations typically is treated as a discrete subject in conflicts analysis. Because it is both like and unlike other problems in this book, a concluding chapter on family issues provides a good summary and review.

§ 2 Bibliography

Conflicts scholarship is enormous and varied in scope, content, and quality. Many of these articles and books will be cited in the text. Some of the works are referred to often enough, however, to warrant a shorthand citation form. The list below gives the full citation for each work, followed by the manner in which we cite it in footnote references:

1. Treatises

Robert Casad and William Richman, *Jurisdiction in Civil Actions* (3d ed. 1998) — Casad & Richman.

Brainerd Currie, *Selected Essays on the Conflict of Laws* (1963) — Currie, *Essays*.

Robert Leflar, Luther McDougal, and Robert Felix, *American Conflicts Law* (4th ed. 1986) — Leflar, McDougal & Felix.

Eugene Scoles, Peter Hay, Patrick Borchers, and Symeon Symeonides, *Conflict of Laws* (3d ed. 2000)
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Gene R. Shreve & Peter Raven-Hansen, *Understanding Civil Procedure* (3d ed. 2002) — Shreve & Raven-Hansen.

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2. The Restatements

Restatement (First) of Conflict of Laws
(1934) — Restatement (First) of Conflict of Laws.

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(1971) — Restatement (Second) of Conflict of Laws.

Restatement (Second) of Judgments (1982) —
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3. Casebook

David Vernon, Louise Weinberg, William Reynolds,
and William Richman, *Conflict of Laws: Cases,
Materials and Problems* (2d ed 2002) — Vernon, Weinberg,
Reynolds & Richman