No doubt many of these criticisms are of a minor nature. On matters of judgment and opinion it is rare to find any semblance of agreement. My last and most serious criticism of this casebook is that there is too little to stretch the student's mind. Usually the cases are so severely edited that the student is unable to see the conflicting arguments that produced the litigation. Rarely is the student faced with apparently contradictory decisions — and in all of these cases Hall, in his brief introduction to the case, has explained the inconsistency. The result is that this collection of materials resembles, more than anything else, a sophisticated and superior "nutshell". Such books have a useful purpose and this book can be recommended at that level. But as a collection of materials for a university course in family law it is inadequate.

D. J. MACDOUGALL*

The Choice of Law Process, by David F. Cavers. Ann Arbor, University of Michigan Press, 1965. 336 pp. ($8.50).

Over the last decade or so American conflicts law has been in the throes of a Great Cultural Revolution. The unfortunate Joseph H. Beale is cast in the role of President Liu. The scholarly Red Guards join in reviling him, but cannot agree on what, if anything, should be substituted for the vested-rights framework he so carefully construed in the First American Restatement of the Conflicts of Law.

The adherents of the vested-rights theory assumed that a proper solution to conflictual problems lay in the due apportionment of legislative jurisdiction. The rules which they devised were therefore directed to determining the governing law without regard to the contents of the laws ostensibly in conflict. Cavers was one of the first writers to protest against such jurisdiction-selecting rules and to argue that any solution of the conflict should proceed from an examination of the contents of the laws ostensibly in conflict.[1]

This reviewer had the privilege of attending the Thomas M. Cooley Lectures at the University of Michigan Law School in January, 1964, when Professor Cavers delivered the lectures now embodied in this book. At that time I was unfamiliar with American writings on the conflict of laws and I went away deeply shocked at his willingness to sacrifice the apparent security of existing rules to the will-o'-the-wisp of "justice in the particular case". He appeared to share with the Red Guards in China a desire to destroy the inherited framework in the hope that on the ruins a new and better structure could be built. In all fairness to him he did give us some guidelines as to how the new structure should be built.

Cavers proposes that a conflicts problem should be approached in two stages. At the first stage the court should examine the laws ostensibly in conflict in order to determine whether they are really in conflict. Obviously there is no conflict if all the laws which claim to be applicable to the situation are identical, if not in wording then in effect. An Australian example of such a situation is found in *Koop* v. *Bebb*[2] where a claim for wrongful death would have succeeded whether one applied the law of the forum,

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[1] D. F. Cavers, "A Critique of the Choice-of-Law Problem" (1933) 47 *Harv. L.R.* 173.

[2] (1951) 81 C.L.R. 629.

the Victorian Wrongs Act, or the *lex loci delicti,* the identical Compensation of Relatives Act of New South Wales.

Even where the laws in content are diametrically opposed the conflict may still be a false one because only one law really purports to apply. The other law has no interest in the situation. Assume that a married couple domiciled in New South Wales drive their car which is registered and insured in New South Wales for a short trip into a neighbouring jurisdiction where marital immunity still prevails. In that jurisdiction the husband injures his wife through his careless driving.

Ostensibly there is a conflict between the law of New South Wales which permits the wife to sue her husband in such a case and the *lex loci delicti* which would prevent the suit. But Cavers would argue that the conflict is false. The *lex loci delicti* has no interest in maintaining domestic peace between couples resident in other states or in protecting New South Wales insurers from collusive claims between spouses. No interest of the *locus delicti* would be advanced by applying its law.

Conversely in some cases the forum may not be interested. In construing the law of the forum the court may find that it does not purport to apply extra-territorially. This, of course, has occurred in Australia, the recent decision of the High Court in *Kay's Leasing Pty. Ltd.* v. *Fletcher*[3] being a prime example.

The above examples are relatively straightforward. But there are cases where a determination that a false conflict exists will depend very much on how the interests involved are analysed by the court. Thus it could be argued that *Anderson* v. *Eric Anderson Pty. Ltd.*[4] presents a case of false conflict, namely a collision between two New South Welshmen in the Australian Capital Territory. What interest does the Territory have in ensuring that a New South Wales plaintiff receives some of his damages from a defendant insured in New South Wales rather than lose his entire claim by reason of his contributory negligence?

However a different emphasis may discern some interest on the part of the Territory. Thus it could be argued that the absolute bar of contributory negligence was modified to encourage greater care in driving in the Territory. The local driver now knows that he will not be relieved of liability because the plaintiff himself was careless for his own safety. A court impressed with the compensation aspect may hold the conflict to be false, whilst a court impressed with the deterrence aspect may hold it to be real. Except in a clear-cut case the discernment of an interest will often be arbitrary.

If the conflict is false there is no need to choose between them. But if the conflict is true a choice must be made. Whilst Cavers maintains the need to do justice in the particular case he does not mean thereby that each decision to prefer one law over the other should be made *ad hoc*. The court should resolve such conflicts by formulating a "principle of preference" which would be of use not only in the particular instance but also in future cases of a similar type.

An example of the process he advocates is given at pages 124 to 130 of his book. The hypothetical case there discussed bears some likeness to *Kay's Leasing Pty. Ltd.* v. *Fletcher* and may well be discussed in its terms. New South Wales, the forum, has enacted in its hire purchase legislation certain provisions to protect hirers from undue exploitation. An agreement is entered into in Victoria between a vendor who is resident in Victoria and New South Wales hirers which contravenes the New South Wales provisions. Victoria does not follow a policy of protection.

Clearly there is a true conflict since Victoria has an interest in allowing

[3] (1964) 116 C.L.R. 124.
[4] (1965) 114 C.L.R. 20.

its residents to dictate hire-purchase terms to their advantage. New South Wales also has a legitimate concern in protecting its residents. But how far should its protection extend? Cavers would suggest that the policy which is fairest, not only in this individual case but in future like cases, is to restrict the protective New South Wales rule to transactions where the protected person had a home in that state and the transaction had its centre there (see his Principle of Preference No. 6, at p. 181).

This policy, he considers, is fair to all parties. On the one hand it protects the Victorian vendor from undue surprise, which might await him if the protection adhered to all residents of New South Wales. On the other hand it extends the protection of New South Wales law to transactions wholly centered in New South Wales but formally entered into outside that State. In that case the Victorian seeking profit from New South Wales transactions can be expected to conform to the laws of that State.

In Cavers' view the court sets itself up as determining, in the absence of a clear statutory direction by the legislature, what is the proper ambit of the local rule (and for that matter of the foreign rule as well). This the courts have done for years, as Cavers points out. But hitherto they have pretended that they merely discover and carry out the intention of the legislature. Cavers would wish them to take on an openly arbitral role and decide for and on behalf of the state legislatures what would be the best accommodation between their conflicting laws. Again this cannot be objectionable. The supremacy of the legislature is not challenged; it can, at any time, give express directions as to how the process of accommodation is to be carried out; more wisely, perhaps, it may leave it to the courts.

However, before we scrap our existing rules and go framing new "principles of preference" we should stop to consider whether this will really bring about that brave new world of perfect individual justice combined with certainty of the law. Discontent with existing rules has been caused not by their general inappropriateness to modern circumstances but by their inflexibility in extraordinary situations. Generally speaking the rule that torts are governed by the *lex loci delicti* is sensible; and Cavers' five "principles of preference" dealing with torts (Ch. 6) do not really depart from the basic principle. Problems only arise when two New Yorkers go on a jaunt in Ontario and fall foul of its guest-passenger statute[5] or when a New Yorker buys a 'plane ticket in New York and then happens to crash to his death in one of the few jurisdictions which still limit the amount recoverable on wrongful death claims.[6] But these are not typical situations.

It is unfortunately the atypical situations which make hard law. The validity of Cavers' "principles of preference" will also be tested not by the straightforward situations but by the borderline puzzles, where the choice is hard and may ultimately have to be made by rule of thumb. Cavers, of course, appreciates this. He does not put forward his rules of preference as cast-iron rules to be followed in all circumstances, but more as guidelines to be applied if this would produce a just result, and to be abandoned for a different "principle of preference", or even an *ad hoc* decision, if it would not. But in that case the Holy Grail recedes forever in the distance.

This reviewer is more cautious. He would not wish to cast away the received wisdom of our forefathers, provided it is received with the appreciation that they dealt with more limited situations than their rules purport to legislate for. Thus rules which lay down the circumstances in which English courts will deal with foreign torts were framed with torts such as trespass, defamation and negligence causing collisions at sea in mind. They were not

[5] *Babcock* v. *Jackson*, 12 N.Y. 2d 473; 191 N.E. 2d 279 (1963).
[6] *Kilberg* v. *Northeast Airlines* 9 N.Y. 2d 34; 172 N.E. 2d 526 (1961).

framed to deal with international aviation, third-party motor insurance or manufacturers' liability. Instead of extending the limited rule to unlimited situations we should be more ready to devise new rules to apply to new situations. In devising the new rules the methods advocated by Cavers will be helpful. When framing a conflictual rule dealing with manufacturers' liability or consumer protection, the courts should consider the aims of such legislation and how such local aims can best be advanced without losing sight of the interests of the jurisdictions which do not consider such rules necessary or have adopted different solutions. If Cavers' writings can convince the courts that their function is the accommodation of conflicting laws rather than the mechanical extension by dubious analogy of old inherited rules, he will have done us all a great service.

P. E. NYGH*

Conflict of Laws — Cases, Notes and Materials, by J. G. Castel. Butterworth & Co. (Canada) Ltd., 1968. xxvi and 1104 pp. ($19.50).

The first thing which struck this reviewer is the wealth of Canadian conflicts material. In this country conflicts cases are few and far between, though their rate has been increasing of late. If conflictual problems do arise, counsel often shirk them and even if they are bold enough to argue a matter of conflicts law, the judiciary will find some way to ignore it. In Canada apparently it is otherwise, due undoubtedly to the fact that the civil law province of Quebec must be accommodated to the other common law provinces.

However, though Canadian courts have often illuminated relatively obscure corners of the law of conflicts such as the rules dealing with negotiable interests, title to movables (particularly motor cars) and actions relating to foreign land, the basic principles have been imported from England. Thus we meet most of the familiar English cases in this book. Strangely enough the United States is not as well represented. Their case law is apparently not of great relevance to Canadian jurisprudence except in the areas, such as torts, where American cases have also recently attracted the attention of English writers and judges. American textwriter opinion, on the other hand, is well represented and deservedly so.

Most compilers of students' casebooks have to agonize in deciding what to leave out. Professor Castel has not omitted anything. Indeed this book of over 1,100 pages in relatively close print is a teacher's delight. There is so much to choose from. Each chapter is introduced by a short editorial. Professor Castel, as any good compiler of casebooks should, refrains from seeking to impose any views on the reader. The main cases are followed by notes which include not only extracts from other decisions, including the most important Australian cases, but also extracts from critical comments in the leading English, American and Canadian journals. A welcome innovation is the printing of extracts from foreign statutory material where this is necessary to understand a decision involving such statutes.

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