

POLICY BASES OF THE CONFLICT OF LAWS: REFLECTIONS ON REREADING PROFESSOR LORENZEN'S ESSAYS

FOWLER V. HARPER†

THE publication by Ernest G. Lorenzen of a selection of his essays on the Conflict of Laws¹ makes appropriate a fresh consideration of the philosophic bases of a field of American law whose growth from a barren formalism to a fruitful discipline is in large measure attributable to Professor Lorenzen's penetrating analysis and reflection. For a third of a century, as these essays eloquently testify, little has happened in this area of legal activity which has failed to attract Professor Lorenzen's interest and attention. His own contributions vary from intensive studies in highly technical segments of the Conflict of Laws to those broader considerations of policy and method which give great impetus and direction to scholarly activity.

A good deal of twentieth century water has gone over the Conflicts dam. Not only has scholarship in the United States reached a level never theretofore attained, but revolutionary ideas have been born, the ultimate effect of which it is still difficult to predict. In the vanguard of all such activities has ever been found the patient, meticulous and searching mind which Professor Lorenzen brings to bear upon the problems with which he grapples. On any showing, his must be included in the slender volume which contains the names of great American legal scholars.

Few have done so much to bring within the range of American legal vision the purposes and objectives of the Conflict of Laws and certainly no one has contributed more to the increasing awareness of the American bar of the basic technical difficulties involved. Professor Lorenzen's familiarity with foreign systems of law has made it possible for him to enrich his own work by utilizing the studies of continental jurists whose insight into many problems far exceeded that of most American writers of the era. For practical purposes, it was Professor Lorenzen who first introduced into American legal thinking the subtle problems involved in the renvoi and the theory of qualification. Almost forty years ago his first article on renvoi appeared in the *Columbia Law Review*.² A decade later this was followed by his first discussion of the problem of qualification.³ It is an amazing fact that problems so basic had re-

† Visiting Professor of Law, Yale School of Law.

1. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947).

2. Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 *COL. L. REV.* 190, 327 (1910), followed in 1918 by *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country,"* 27 *YALE L. J.* 509 (1918).

3. Lorenzen, *The Theory of Qualifications and the Conflict of Laws* 20 *COL. L.*

ceived substantially no attention from American writers on the Conflict of Laws, although the renvoi had been dealt with in English law more than a half century before.⁴

Professor Lorenzen's analytical mind has enabled him to grasp fully the fundamental character of the difficulties involved in the renvoi and in qualification and their far-reaching significance in connection with the attainment of the uniformity of legal consequence which is assumed to be the primary objective of this branch of the law. The extension of knowledge about these problems and the relative degree of sophistication of the present generation of law students and writers⁵ are results largely of the momentum given by Professor Lorenzen to the investigation of such matters. His interest in every aspect of foreign systems of the Conflict of Laws together with his intensive work in connection with the renvoi and qualification entitle Professor Lorenzen to credit for laying the basis of an American comparative law of Conflict of Laws,⁶ a field which will certainly attract the attention of many able scholars of the future.

Perhaps his greatest contribution to the subject of which he is a master is the work which Professor Lorenzen shared with his distinguished colleague, Walter Wheeler Cook.⁷ These two were pioneers

REV. 247 (1920), followed by *The Qualification, Classification or Characterization Problem in the Conflict of Laws*, 50 YALE L. J. 743 (1941).

4. *Collier v. Rivaz*, 2 Curt. Ecc. 855 (1841), discussed by Lorenzen, *The Renvoi Theory and the Application of Foreign Law*, 10 COL. L. REV. 327 (1910).

5. Since Professor Lorenzen's first article on renvoi, a considerable number of learned articles have appeared in the legal periodicals, including: COOK, *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* c. IX (1942); Bates, *Remission and Transmission in American Conflict of Laws*, 16 CORN. L. Q. 311 (1931); Bentwich, *Recent Application of the Renvoi in Matters of Personal Status*, 14 CAN. B. REV. 379 (1936); Cheatham, *International Law Distinctions in the Conflict of Laws*, 21 CORN. L. Q. 570 (1936); Cook, "Characterization" in the Conflict of Laws, 51 YALE L. J. 191 (1941); Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws*, 14 SO. CALIF. L. REV. 221, 387 (1942); Cowan, *Renvoi Does not Involve a Logical Fallacy*, 87 U. OF PA. L. REV. 34 (1938); Falconbridge, *Renvoi and the Law of The Domicile*, 19 CAN. B. REV. 311 (1941); Falconbridge, *Bills of Lading: Proper Law and Renvoi*, 18 CAN. B. REV. 77 (1940); Falconbridge, *Characterization and Acquired Rights*, 17 CAN. B. REV. 369 (1939); Falconbridge, *Conflict of Laws: Examples of Characterization*, 15 CAN. B. REV. 215 (1937); Falconbridge, *Renvoi and Succession to Movables*, 46 L. Q. REV. 465 (1930), 47 L. Q. REV. 271 (1931); Griswold, *In Reply to Mr. Cowan's Views on Renvoi*, 87 U. OF PA. L. REV. 257 (1939); Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938); Meriggi, *Conflicts of Law—A Theoretical Application*, 14 B. U. L. REV. 319 (1934); Pascal, *Characterization as an Approach to the Conflict of Laws*, 2 LA. L. REV. 715 (1940); Robertson, *Survey of the Characterization Problem in the Conflict of Laws*, 52 HARV. L. REV. 747 (1939); Schreiber, *The Doctrine of the Renvoi in Anglo-American Law*, 31 HARV. L. REV. 523 (1918).

6. See Rheinstein, *Comparative Law and Conflict of Laws in Germany*, 2 U. OF CHI. L. REV. 232, 257 ff. (1932).

7. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L. J.

in outlining an approach to the baffling mysteries of the Conflict of Laws which has proved to be of the greatest significance. It was here that they played such an important part in the growing maturity of American Conflict of Laws thinking during the last quarter of a century. Their work hastened the evolution of the Conflict of Laws from a mechanical, over-simplified machine to a body of legal principles incorporating some of the most profound of our notions of social policy.

A striking example of this new maturity of thought is to be found in the current technique of the Supreme Court in dealing with the problems of jurisdiction over foreign corporations, as compared with the formulary method formerly employed. "It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations.

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of it or are connected with the activities within a state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."⁸

Occasional references, from time to time, are made to the various policies reflected in the rules of Conflict of Laws and the values underlying those policies, but all too little is done about it. Policy analysis is a science as yet in its infancy in our jurisprudence. It is submitted that American Conflict of Laws has now attained that stage of development which constantly demands critical consideration and analysis of the policy factors involved.

In the first place, it should be observed that the modern approach to the Conflict of Laws is not a chaotic, anti-rational method as some have appeared to think.⁹ The alternative to a hard and fast system of

736 (1924); Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L. J.* 457 (1924).

8. Stone, C. J., in *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

9. de Sloovere, *The Local Law Theory and Its Implications in the Conflict of Laws*, 41 *HARV. L. REV.* 421 (1928).

doctrinal formulae is not anarchy. The difference is not between a system and no system, but between two systems; between a system which purports to have, but lacks, complete logical symmetry and one which affords latitude for the interplay and clash of conflicting policy factors.

It is unnecessary to demonstrate again the many particulars in which the orthodox system of Conflict of Laws causes trouble. The anomalies are many and outstanding and inconsistencies in attitude of the best jurists not uncommon.¹⁰ So keen a mind as that of Holmes, for all of his juristic iconoclasm, conceived of an omnipresence brooding over Mexico¹¹ which he denied elsewhere. This repudiation, however, in more than one instance was more verbal than real. He presumably accepted the "place of making" rule for determining the validity of contracts¹² without consideration of the Herculean efforts necessary to lift oneself by the boot-straps of one's major premise.¹³ Both Professor Lorenzen and Professor Cook have sharply pointed up some of the major fallacies involved in classic American thought as applied to the problems of the Conflict of Laws.¹⁴

10. Note the inconsistent inarticulate premises involved in the following: "New York will not recognize as a model for any liability which she will impose, a liability imposed by another state upon an absentee non-resident. This is another question from whether the result would be too violent a departure from New York mores for New York to tolerate. Moreover, it is basic in the whole subject that legislative jurisdiction, of which this is an instance, is territorial, and that no state can create personal obligations against those who are neither physically present within its boundaries, nor resident there, nor bound to it by allegiance." L. Hand, J. in *Siegmann v. Meyer*, 100 F. 2d 367, 368 (C.C.A.2d 1938).

11. *Slater v. Mexican N.R. Co.* 194 U. S. 120 (1904).

12. See *Union Trust Co. v. Grosman*, 245 U. S. 412 (1917), and *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737 (1897).

13. The notion that the "place of contracting" is the proper point of reference to govern the contract is patently a question-begging one when applied to problems of the "validity" of the contract. The determination whether a contract is valid is a determination whether there is or is not a contract. The rule that the validity of the contract is determined by the law of the place of making is actually a rule that validity is determined by the law of the place where, if there turns out to be a contract, it is made. This chasing oneself around a circle results from a failure to recognize that the question of determining where a contract is made is a legal problem upon which the laws of the various states may differ to an extent quite as great as in respect to any other problem. The problem, therefore, is itself a problem of the Conflict of Laws although one which is logically preliminary to other problems which may arise in a dispute over such a transaction. If the law of some particular state is to be adopted, a question of qualification is raised. The Restatement of Conflict of Laws purports to solve the matter by reference to the "general law" of contracts (see Section 311, Comment d). Thus the "general law" of contracts is employed to determine where a particular contract is "made" after which the law of the place of "making" is employed to determine whether there is any contract at all. All this has been exposed by Professor Cook, *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS*, 365 (1942).

14. See the articles cited in note 7, *supra*.

In considering the policies involved in Conflict of Laws disputes, one is immediately confronted with what is perhaps the major assumption of the entire subject. The objective of the rules of Conflict of Laws is to attain uniformity in legal relations regardless of the forum in which litigation occurs. It is thought to be intolerable that legal rights, powers, privileges, immunities and their correlatives should vary from state to state.¹⁵ It is not immediately apparent, however, why it should necessarily be so and very little critical examination of the proposition has been made.

One may concede certain inconveniences and embarrassments in connection with a situation where legal results depend upon the choice of forum. It does not follow, however, that such a situation necessarily produces shocking injustices or an outraged sense of public morality in all cases. Had Mr. and Mrs. Williams remained in Nevada to enjoy the marital bliss with which that state had endowed them, few would have been shocked at the contemplation of what the prosecuting attorney and judge in Caldwell County, North Carolina, could or might do to them in the event they should make the mistake of returning there to live. There must have been many thousands of spouses in the interval between *Haddock*¹⁶ and *Williams*¹⁷ who avoided a criminal record only by the intelligent generosity of prosecuting attorneys or by their own good sense in the selection of a home. After all, it is not easy to perceive why a man should not select the state whose domestic law favors his family enterprise just as he selects the site of his business with a view to the tax laws which are most favorable thereto. Moreover, as against the advantages of uniformity must be balanced the desirability of latitude for states with divergent ideas to establish their own patterns of community life and standards of domestic behavior. "Granted that . . . there are cogent reasons for having a divorce decree equally good or equally bad everywhere," says Professor Powell,¹⁸ "this is but one side of the shield. There is a question whether two score and more of states not wholly devoid of civilized ideals should be deprived of power to determine for themselves the marital status of persons who by any common-sense human criterion are undeniably their own people." So too it may be supposed that the states should have the power to fix the grounds upon which the marital status may be altered by divorce and the length of residence necessary to qualify as litigant under such laws.¹⁹

15. See Goodrich, *Public Policy in the Law of Conflicts*, 36 W. VA. L. Q. 155 (1931).

16. *Haddock v. Haddock*, 201 U. S. 562 (1906).

17. *Williams v. North Carolina*, 325 U. S. 226 (1945).

18. Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930, 936 (1945).

19. "In the absence of a uniform law on the subject of divorce, this Court is not so limited in its application of the Full Faith and Credit Clause that it must force Nevada's policy upon North Carolina, any more than it must compel Nevada to accept North

It is at this point, too, that one is confronted with the perplexing problems of renvoi and qualification. Attainment of uniformity in legal relations requires uniformity in Conflict of Laws rules, a common system of classification of legal rules and uniform characterization of legal ideas. Obviously we have none of these requirements, even in the United States, nor are we likely to approach any of them in the foreseeable future.

It may be that a crazy-quilt pattern for handling renvoi in some situations and an *ad hoc* treatment in other situations will produce what appears to be uniformity. Illustrative of the first technique are certain problems in connection with marriage and property.²⁰ Illustrative of the second technique is the manipulation by the English court of the renvoi application.²¹ This could in no sense be accepted as a universal principle since obviously the reverse of the usual renvoi result would follow. Instead of perpetual motion to and fro between the two competing laws, there would be no motion whatever from one to the other since neither law could be applied until the application of the other law were known.²² In general, it must be admitted that the logic of the renvoi as a super Conflict of Laws rule to eliminate the conflicts of ordinary Conflict of Laws rules does not hold water.

Notwithstanding these considerations, there are many cases in which

Carolina's requirements. The fair result is to leave each free to regulate within its own area the rights of its own citizens." Mr. Justice Murphy, dissenting in *Williams v. North Carolina*, 317 U.S. 287, 311 (1942).

20. See Lorenzen, *The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country,"* 27 YALE L. J. 509, 530 (1918). See RESTATEMENT, CONFLICT OF LAWS §§ 7-8 (1934).

21. Compare the manipulation of the doctrine by the English court in *In re Annesley* [1926] 1 Ch. Div. 692 with the handling of it in *In re Ross* [1930] 1 Ch. Div. 377.

The *Annesley* case involved the validity of a bequest of personalty made by an English testatrix whose domicile at death, according to English law, was in France. An English court applied the renvoi doctrine and looked to the totality of French law. It found that the French Conflict of Laws rule also applied the doctrine of renvoi, accepting the remission in cases like the present one and applying the internal law of France. The English court followed the peregrinations of the French law and likewise applied the internal law of France. Thus by three references the English court caught up with the French law and arrived at the same result which presumably would have been reached by a French court on the facts of the case.

In the *Ross* case, the English court was presented with a similar problem involving a testamentary disposition of movable property of an English testatrix who died domiciled in Italy. Here again the English court so adapted its version of the renvoi as to come out at the same place which an Italian court would presumably reach. The English court looked to the entire Italian law and finding that the Italian law rejected the doctrine of renvoi and looked only to the internal national law of the decedent, it accepted the remission and applied English law to the problem.

22. Not dissimilar is the statutory provision which required that when two trains approached an intersection, each was to come to a stop and neither proceed until the other had crossed the intersection.

at least formal uniformity is attainable. Many states do have the same Conflict of Laws rules for particular problems. So too, many states have sufficiently similar systems of classification and sufficiently broad methods of characterization to embrace large numbers of situations from which legal disputes arise and thus make formally possible their uniform treatment. Although many cases cannot be solved in terms of the principal objective of the Conflict of Laws, there are many others which can be so solved. As a policy consideration, therefore, uniformity cannot be ignored.

It is suggested that a permissible initial step in a Conflict of Laws case would be a consideration of the extent to which uniformity is possible in the particular dispute.²³ If, for any reason, the problem turns out to be one incapable of solution in these terms, the court might properly accommodate its decision to other policy considerations. It is not easy to understand why a court should regard itself as limited to a particular Conflict of Laws rule in a situation where uniformity as the principal end and objective of Conflict of Laws cannot be attained. This is particularly true, of course, where other social policies press hard for recognition.

Perhaps next in order of generality, is the policy of selecting the most significant contact or contacts as a guide to the governing law. This is important both as a matter of fairness to the litigants themselves and to the communities involved. Every society develops standards of fairness and justice which in many respects are peculiarly local. So too, each community works out criteria for the administration of its internal social and economic problems which differ in many important particulars from the criteria evolved in other communities. When two or more communities are touched or affected by a factual sequence, the nexus should be considered with a view to the respective interests of the societies affected by the *particular fact situation*. The particular situation should be stressed because not always are communities affected equally although connected with a problem by a nexus characterized in the same way. It is obvious that there are domiciles and domiciles. A middle western community may have a negligible interest in the domestic affairs of a citizen who spends practically all of his time in New York although he votes and pays taxes and even becomes a candidate for the presidency of the United States as a citizen of the former community. Indeed, there is little which could be said for a state in such a case imposing its ideas of family life upon the community in which the parties in fact live. On the other hand, a state may have a very profound concern in the compensation of a local worker, notwithstanding the fact that its connection with the employment and

23. Compare Cook's discussion of *In re Ross*, *supra* note 21, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 242 (1942).

with the injury is otherwise slight. Once we are emancipated from the restrictions of notions of territoriality and take proper account of this important policy factor, it ceases to be disturbing that California law should be applied to compensate a workman for injuries received in Alaska where the entire employment took place.²⁴

If the interest of states connected with the problems is taken thoroughly into account, it might conceivably lead to a completely different analysis and solution of difficult Conflict of Laws problems involving torts. Most tort problems are relatively easy of solution because all the facts which give rise to the dispute occur in one state although the litigation may occur in a different state. The difficult question is present when the relevant operative facts occur in more than one state.

When the acts of the defendant take place in State *X* and the plaintiff is hurt in State *Y*, it has been generally assumed that a choice must be made between the laws of *X* and *Y* to govern the rights and liabilities of the parties. But on reflection it appears that there is little if any logical or policy basis upon which such a choice can be made. The usual analysis is by no means persuasive. It is argued that negligent conduct does not create liability until injury proximately results therefrom. The result is supposed to follow that the law of the state of injury where the last event necessary to liability occurred must govern the problem.²⁵ But this solution is obviously superficial. It does not readily appear why the chronological order of events should have legal significance. In the very nature of things, of course, a man must act before he can hurt anyone, or if the question involves liability for non-action, the significant nonaction must necessarily precede the injury. But conduct as well as injury is a condition to liability. And while it is true, as is sometimes argued,²⁶ that no liability can arise unless an injury occurs, it is equally true that there can be no liability for injuries sustained unless there is tortious conduct on the part of the defendant. The question still remains, what law shall determine the issue of tort or no tort.

From the point of view of factual happenings, it would appear that if one and only one law must be selected, there is little basis for choice. Take a hypothetical case. Defendant engages in conduct in State *X* which is prohibited by statute for the purpose of protecting other per-

24. *Alaska Packers Ass'n v. Industrial Accident Commission*, 294 U.S. 532 (1935).

25. *Alabama G.S.R.R. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892); *Cameron v. Vandergriff*, 53 Ark. 381, 13 S.W. 1092 (1890); *Otey v. Midland Valley R.R.*, 108 Kan. 755, 197 Pac. 203 (1921); *Le Forest v. Tolman*, 117 Mass. 109 (1875); *Chicago, St. Louis & New Orleans R.R. v. Doyle*, 60 Miss. 977 (1883); *Connecticut Valley Lumber Co. v. Maine C.R. Co.*, 78 N.H. 553, 103 Atl. 263 (1918); *Thayer v. Brooks*, 17 Ohio 489 (1848); *Centofanti v. Pennsylvania R.R.*, 244 Pa. 255, 90 Atl. 558 (1914); *Dallas v. Whitney*, 118 W. Va. 106, 188 S.E. 766 (1936).

26. GOODRICH, *CONFLICT OF LAWS* 222 (1938).

sons. Defendant's conduct causes emotional shock and consequent physical injury—not actionable in *X*—to plaintiff in State *Y*, where such injury is actionable but where conduct like the defendant's is not illegal. It is clear that State *X* has a paramount interest in controlling and regulating the conduct of persons within its borders.²⁷ It is equally clear that State *Y* has a paramount interest in protecting persons within its borders and affording them redress in the event of their legal injury. If we are not restricted by orthodox notions, a sensible solution of this problem might be somewhat as follows: State *X*'s concern with behavior might very properly be recognized by a finding of negligence *per se* under *X* law, notwithstanding the fact that such conduct would be lawful under *Y* law. Similarly, *Y*'s policy of protecting individuals against invasion of this type of interest in personality might very well be recognized, notwithstanding the fact that under *X* law emotional shock with consequent physical injury does not receive legal protection. To be sure, this would subject an actor to liability in the case supposed, whereas had the entire matter been exclusively an *X* or a *Y* episode, there would have been no liability at all. But this is merely saying that in certain circumstances there may be an "interstate tort" under circumstances which would involve no liability as an "intrastate" tort. Although the result might appear anomalous on first thought, there should be nothing surprising in the suggestion that the combination of the relevant policies of two states might bring about a legal result which would not be obtained under the policy of either one of them alone.

Nor is there any patent reason why a defendant in such circumstances should complain. If, contrary to law, he creates in one state an unreasonable risk of hurting people in another state in such a way as to be contrary to the law of that state, he might very well expect liability to be imposed upon him by a court of either state or of a third state. So long as his conduct causes no extrastate results, he may properly expect to be subjected only to the law of the state involved. But when he involves himself in a situation affecting two states which have legitimate concern therewith, he should not be surprised if liability is imposed under the law of both states.

The importance of the factual contacts is heightened in proportion to their accumulation in one of two or more states involved in the problem. If one such contact is sufficiently significant to give a state an appropriate interest in the legal result, additional contacts increase the state's concern as compared to that which other states may have in the outcome of the situation. The classical technique, therefore, of employ-

27. Not only does the state of action have an interest in the prophylactic function of tort law, but it may be presumed to have an interest in determining the character of conduct which will subject the actor to liability to others, without as well as within the state, so long as the acts take place within its borders.

ing a single contact as the point of reference for the governing law would seem to be of dubious validity. The number as well as the character of the contacts might well be considered in making the choice of law.

It is worth observing what many courts have for years in fact done in situations where several contacts converge in one locality, particularly in cases involving the validity, construction and effect of contracts. A very good case indeed can be made both argumentatively and precedent-wise against identical treatment of the case where nothing happened in a state except the execution and mailing of a document and the case where everything concerning the contract happened in the state except the litigation. The accumulation of contact points in one state argues mightily for the application of the law of that state. Frequently and traditionally courts have disguised what they do by the language employed. The fictitious "intent of the parties" has often concealed a choice dictated by a policy which calls for the law of that state having the most intimate connections with the factual context of the legal problem.²⁸ But courts are becoming increasingly aware of

28. See *Caldwell v. Gore*, 175 La. 501, 143 So. 387 (1932). "The circumstances under which contracts of this kind [affreightment] are usually made preclude a careful consideration by the shipper of their language and effect.' And for this reason, as was suggested upon the argument, the question of intent can hardly be said to involve the actual mental operations of the parties," Adams, J. in *Grand v. Livingston*, 38 N.Y. Supp. 490, 493-4, 4 App. Div. 589, 595 (4th Dep't 1896).

The "intention" theory has long been recognized as a treacherous formula and it is difficult to explain its tenacity and popularity otherwise than by the general policy of the law to allow the parties the maximum latitude in effecting their mutual intention. The Supreme Court of the United States undoubtedly gave extensive currency to the doctrine that the validity of a contract, as Chief Justice Marshall put it, "is governed by the law with a view to which it was made." *Wayman v. Southard*, 10 Wheat. 1, 48 (U.S. 1825). The principal weakness of the rule, aside from those raised by Professor Lorenzen concerning the delegation of the law-making power to the citizen [See LORENZEN, *Validity and Effect of Contracts in the Conflict of Laws* in *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 282 (1947)], is revealed by the various "presumptions" to which courts have been compelled to resort and the vagueness of the terms in which the rule is so frequently cast. [See, e.g., STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 376 (8th ed. 1883) and Mathews, J. in *Prichard v. Norton*, 106 U. S. 124 (1882).] Moreover, the general policy is defeated in situations where the parties' expressed "intention" is disregarded because they selected the law of some state which had no factual connection whatever with the transaction or the parties. See *Owens v. Hagenbeck-Wallace Shows*, 58 R. I. 162, 192 Atl. 158 (1937). As a logical matter, it would seem that such a limitation on the "intention" rule is indefensible. If the courts are willing to allow the parties to select their own law, why should it be necessary that they select the law of a state which has some factual connection with their bargain or bargaining? Actually, the limitation of the rule argues for its abandonment. If it be important that the state whose law is to govern the contract have some factual connection with it, why should the contract not be governed by the law of the state which has the most significant factual connection therewith?

Dicey, who, in general, supports the "intention" theory, finds it necessary to deal

this device and it is not surprising, therefore, to find a judge removing the mask and exposing the actual operations of the juristic mind. *Barber Company v. Hughes*²⁹ is worthy of attention as an interesting treatment of a Conflicts problem.

An Indiana partnership was indebted to a Delaware corporation licensed to do business in Illinois with its principal office and place of business in Chicago. The indebtedness had been incurred by the purchase of petroleum products practically all of which had been delivered in Illinois. One of the partners made several trips to Chicago to negotiate a settlement of the account. An agreement was finally reached for part payment in cash, the balance by a negotiable note. A few days later the corporation prepared a note payable to itself, or order, in Chicago and mailed it to the partners. The partners signed the note, mailed it to the obligee who upon receipt thereof applied it to the settlement of the claim. Subsequently a default judgment was taken in Illinois by confession pursuant to a cognovit provision in the note. Action was then brought on the judgment in Indiana. By Indiana law, it is unlawful to execute a cognovit note although such instruments are valid in Illinois. Under Indiana law, cognovit clauses are unenforceable but the law is otherwise in Illinois. The court discussed the several rules and contrariety of opinion concerning the law governing the validity of a contract. It concluded that "if the place of execution and the place of performance and the place whose law was intended by the parties to control were one and the same, there is no problem." The place of performance was indisputably Illinois. The trial court had found, as a fact, that the parties intended the transaction should be governed by the law of Illinois. The place of making, however, was troublesome. After discussion of the place-where-the-last-act-necessary-to-make-a-binding-agreement-takes-place formula, and a somewhat dubious analysis,³⁰ the court concluded, that the "place of mak-

with this aspect of the problem although his disposition of it is hardly satisfactory. "No one can maintain that persons who really contract under one law can by pretending that they are contracting under another law render valid an agreement which that law treats as void or voidable. What is contended for is that the *bona fide* intention of the parties is the main element in determining what is the law under which they contract." DICEY, CONFLICT OF LAWS 965 (5th Ed. 1932). Aside from the vagueness of the expressions "law under which they contract" and "bona fide intention," the statement is open to the objection that it is not apparent *why* the parties may not "pretend they are contracting under another law" and thus "render valid an agreement" if, as he states, the intention of the parties is "the main element" in determining what law is to govern the transaction.

29. 223 Ind. 570, 63 N.E. 2d 417 (1945).

30. The court took the position that the contract was "made" in Illinois because the "last act" consisted of the payee "applying" the note in "settlement" of the preexisting indebtedness. "The findings compel the conclusion," it was said, "that the account was to be closed and satisfied by acceptance of the note in Illinois, which thus became the place of execution. This accords with the theory of the Negotiable Instruments Law that there is more to delivery than parting with possession. The delivery must be 'for the

ing" was Illinois and so reached the conclusion, "there is no problem".

For reasons which do not appear in the opinion, however, the matter was not thus concluded to the satisfaction of the court. It embarked upon a still further analytic enterprise. "In view of the unsatisfactory state of the decisions, both in Indiana and other jurisdictions, and as a test of the correctness of our conclusion that the validity of the note and its *cognovit* clause must be determined by the law of Illinois, we resort to a method used by modern teachers of the Conflict of Laws in rationalizing the result obtained by the courts in decided cases. So far as we know it has not been formulated by any court into a rule, but if one were attempted it might be stated as follows: The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction, the law of that State with which the facts are in most intimate contact. . . . Looking for the contact points in the present case we observe first that the parties were at all times engaged in purely business transactions. They transacted this business almost exclusively in Illinois. The place of their conferences to arrive at a settlement was in Illinois. The note was payable in Illinois. It was on an Illinois form. It was prepared in Illinois. It was valid in that State and was there to be performed. It was actually intended that Illinois law control, as expressly found by the court. On the other hand the only contact points with Indiana were the residence of the debtors, their signing of the note in Indiana and their placing it in the mail in Indiana. Considering all of these circumstances it is impossible to escape the conclusion that the transaction centered in Illinois and that its law should be applied to the note and the judgment taken thereon in the Municipal Court of Chicago."³¹

It must be admitted that the selection of the law of the state which represents the conflux of many contact points harmonizes with a certain sense of appropriateness to a far greater degree than the selection of a state merely because of the quasi-localization there of a legal conception. It is this propriety in selecting the state having the most significant connections with the significant acts of the parties which satisfies the sense of fairness to the individual parties. It seems hardly fair to any one to apply the law of Illinois to a transaction between two New Yorkers, every aspect of which took place in New York, including the litigation, merely because one party forgot to mail the letter of acceptance until he arrived in Chicago to attend a convention.³² Moreover,

purpose of giving effect' to the instrument. That purpose under the facts found herein would not be satisfied by the mere mailing in Indiana." 223 Ind. 570, 585, 63 N.E. 2d 417, 423.

31. *Id.* at 585-7, 63 N.E. 2d at 423-4.

32. On the frequently accidental character of the place of contracting, see Lorenzen and Heilman, *The Restatement of the Conflict of Laws*, 83 U. OF PA. L. REV. 555, 573 (1935).

the use of the law of the state which has the important fact contacts avoids many perplexing questions with respect to the identification of the place of contracting or the place of performance, including the problem of qualification,³³ to say nothing of the artificial presumptions necessary to manipulate the "intention of the parties" rule.

Perhaps in cases involving workmens' compensation, the grouping of several contact factors as pointing to the appropriate law to govern the problem is most evident. Thus, we find frequent consideration given the residence of the employee, the place of entering the employment, the place where the workman was injured, and the general area of his activities.³⁴ A wider use of this technique would undoubtedly result were more stress placed upon the legitimate interests of the several states involved and their policies with respect to the particular problem in question.

That sensitiveness to a state's connection with a situation and interest in it is a fundamental consideration is indicated by the fact that frequently on this basis judicial action is restricted on the one hand³⁵

33. The complexities involved here are illustrated by the whimsical handling of the problem in *Dater v. University of Chicago*, 277 Mich. 658, 270 N. W. 175 (1936). The Michigan court was confronted with the case of a married woman who had executed a promissory note in Michigan together with a trust deed for Illinois land to secure it. The instruments were mailed to the plaintiff in Chicago who paid the money thereon in Chicago. Under Illinois law a married woman could contract such an obligation but not under Michigan law. The court assumed that the Michigan Conflict of Laws rule referred to Illinois as the place of contracting. But under Illinois law, in circumstances like those at hand, the contract would have been regarded as a Michigan contract, governed by Michigan law. The court thereupon applied the Michigan law and held the note void.

Analysis of this performance suggests that the court applied its own law to solve the preliminary problem of qualification and thus looked to the law of the state where, under Michigan law, the contract was made. It then tried to handle the case just as an Illinois court would handle the very case in hand. It applied the doctrine of *renvoi*. But in thus applying the law of Illinois in its totality, it included the Illinois qualification of the legal concept of "place of making" and by a circuitous route ended up precisely where it started. The anomalous aspect of the case consists of first applying its own law to solve the problem of qualification and thereafter applying the opposite rule of the foreign law to the same problem. The case is discussed by Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938) and by COOK, *op. cit. supra* note 13, at 246.

34. See *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932); *United States Fidelity & Guaranty Co. v. Industrial Comm'n*, 99 Colo. 280, 61 P.2d 1033 (1936); *Cameron v. Ellis Const'n Co.*, 252 N.Y. 394, 169 N.E. 622 (1930); *Chambers v. District Court*, 139 Minn. 205, 166 N.W. 185 (1918); *McKesson-Fuller-Morrison Co. v. Industrial Comm'n*, 212 Wis. 507, 250 N.W. 396 (1933); *Val Blatz Brewing Co. v. Gerrard*, 201 Wis. 474, 230 N.W. 622 (1930).

35. For example, the *forum non conveniens* cases: *Koster v. Lumbermens Mutual Casualty Co.*, 67 Sup. Ct. 828 (1947); *Gulf Oil Corp. v. Gilbert*, 67 Sup. Ct. 839 (1947); *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933). And consider the cases prohibiting injunctions against actions in the courts of a sister state under the Federal

or compelled on the other.³⁶ Constitutional mandate may limit choice of law to states with a legitimate connection with the problem and sometimes, indeed, to the single state which has an overriding interest in the outcome.³⁷ A court may not escape its constitutional obligations by an exaggeration of what it regards as the policy of its own state nor by the application of an automatic rule which assigns a fictitious situs to a legal conception.³⁸ The "place of making" may reflect a limited state interest in one case or, when considered with other connections, a constitutionally compelling one in another. On the other hand, a state may, if its own policy requires and its connections with the transaction justify, decline to enforce or respect rights acquired under the law of another state.³⁹ In fashioning its techniques for determining choice of law, one state must appraise its own interests and those of other states within the margin of error allowed by the Supreme Court. Indeed, to insure against the subversion by one state of the policies of others is one of the important duties of the highest court in the land.

Another policy not to be ignored is that which requires an affirmative decision in the maximum number of cases of certain classes. This is notably true as a commercial policy where the validity of negotiable documents is involved. The policy is an institutional one throughout the field of commercial law. Innumerable technical rules reflect such a policy. Thus, protection of the interest of the holder in due course of a negotiable document is called for in all but the most extravagant cases. The financial structure of the nation is founded upon the assumption of the validity of such documents. Countless transactions every hour of the business day testify to this assumption. The performance of many courts in searching for a state whose law will uphold the instrument is an adaptation of this policy to Conflict of Laws problems.⁴⁰

Employers Liability Act. *Baltimore and Ohio R.R. v. Kepner*, 137 Ohio St. 409, 30 N.E. 2d 982 (1940), affirmed 314 U.S. 44 (1941) (power of state court to enjoin prosecution of suit in the Federal court of another state); *Miles v. Illinois Centr. R.R.*, 315 U.S. 698 (1942) (power of state court to enjoin suit in state courts of another state).

36. See the *forum non conveniens* case: *Williams v. Greene Bay & W.R.R.* 326 U.S. 549 (1946).

37. *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Hartford Accident & Ins. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1931); *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925).

38. *John Hancock Mutual Life Ins. Co. v. Yates*, *supra*, note 37; *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

39. *Pink v. A.A.A. Highway Express*, 314 U.S. 201 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941).

40. "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance and if the interest allowed by the law of the place of performance is

Equally strong is society's interest in upholding the validity of conduct on the part of its members which they treat as establishing the marital relation. It is frequently desirable to give legal sanction to the existence of a family notwithstanding the unconventional tactics employed by the principals in creating it. For a century the tendency in the field of family law has been to reduce the area of illegal conduct and its unhappy socio-biological results.⁴¹ Indeed in a few states bastardy has been abolished except by the magic of Conflict of Laws rules.⁴² Logic has been sacrificed in the interest of an enlightened notion of justice and a more liberal social policy. It was disappointing, therefore, when the Commissioners on Uniform State Laws recommended legislation which placed a higher premium on geographical uniformity than on the elimination of meritricious relations.⁴³ It was encouraging, however, that so few communities accepted the recommendation.⁴⁴ The Uniform Marriage Evasion Act represented a pecu-

higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate of interest be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." *Miller v. Tiffany*, 1 Wall. 298, 310 (U.S. 1864). With this rule, compare the cases in which the rate of interest at the residence of the debtor has been used to uphold the validity of the instrument. *Scott v. Perlee*, 39 Ohio St. 63 (1883); *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024 (1891). And consider *Arnold v. Potter*, 22 Iowa 194 (1867), in which the rate at the situs of land mortgaged to secure the note saved it from invalidity. For a further statement of the policy of the Supreme Court in upholding negotiable instruments wherever a plausible Conflict of Laws formula is available, see *Seeman v. Philadelphia Warehouse Co.*, 274 U. S. 403 (1927).

41. Illustrative is the spread of legislation saving the legitimacy of the issue of technically bigamous marriages and other void or voidable marriages after a decree of nullity. More than three-fourths of the states have legislation thus mitigating the harsh logic of the common law. The statutes are collected and discussed in 1 *VERNIER, AMERICAN FAMILY LAWS* § 48 (1931). See also 4 *id.* § 247. A number of states have legislation legitimating the issue of slave and Indian marriages. *Id.* § 248.

42. An Arizona statute provides that "every child is the legitimate child of its natural parents." *ARIZ. REV. CODE* 1928, § 273. See also *N. D. Comp. Laws* 1913, § 5745.

43. The Uniform Marriage Evasion Act, as approved and adopted by the National Conference of Commissioners On Uniform State Laws in 1912, provided: "If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state." A reciprocal provision declared: "No marriage shall be contracted in this state by a party residing and intending to reside in another state or jurisdiction if such marriage would be void if contracted in such other state or jurisdiction and every marriage celebrated in this state in violation of this provision shall be null and void."

44. The Act was enacted only in five states: Illinois, Louisiana, Massachusetts, Vermont and Wisconsin. It was withdrawn from the active list of Uniform Acts recom-

liar insulation to modern developments in the field of family law. It reflected over-emphasis upon uniformity and an under-evaluation of current social values. It is difficult to appreciate the advantage in a rule of law which makes children illegitimate in all states because they are illegitimate in one.⁴⁵ The symmetry of the law is thus maintained but the lives of children badly hurt. It must have been a source of some comfort to Mr. Williams and Mrs. Hendrix while they were serving their jail sentence in North Carolina that there was at least one state where they could subsequently live and rear a family, if they so desired, as respectable members of the community.⁴⁶

Perhaps one of the most significant criteria to be recognized in the development of Conflict of Laws is the respect to be accorded to the particular policies embodied in the domestic rules of law involved. The Conflict of Laws is in a sense secondary law. It exists solely because of a divergence of domestic laws which have some claim to application. Although in some classes of cases, the Conflicts rule may be regarded as primary in the sense that the Conflicts policy involved is paramount, there are countless cases in which the Conflicts policy may be of less importance than that involved in the possibly applicable domestic rules. This is probably true, generally, within the area in which a state has a constitutionally free choice of law. Rules of contract law reflect community policies concerning the acquisition of wealth and future economic protection. Rules of tort law reflect community policies for salvage, the administration of economic losses and the protection of other social values. Rules of property law embody social policies with

mended for adoption by the states at the National Conference of Commissioners on Uniform State Laws in 1943.

45. The National Commissioners on Uniform State Laws sought to avoid some of the evils which would have resulted from widespread adoption of the Uniform Marriage Evasion Act by recommending in 1922 a Uniform Illegitimacy Act which obtained only seven adoptions (Nevada, New Mexico, North Dakota, South Dakota, Iowa, New York and Wyoming), none of which was a state which had adopted the Uniform Marriage Evasion Act. It is to be observed that although but five states adopted the Uniform Marriage Evasion Act, a number of other states have legislation on the subject of one sort or another.

46. The majority opinions in *Williams v. North Carolina*, 325 U.S. 226 (1945), leave it uncertain whether Nevada is permitted to regard the couple as man and wife although at least one of the dissenting justices appears to think that Nevada is left free by the decision to do so. "The Nevada decree," says Mr. Justice Rutledge (*Id.* at 247), "was valid and remains valid within her borders." See the discussion of this phase of the decision by Powell, *supra* note 18, at 937 ff. On the whole, it seems more rather than less probable that she who was imprisoned in North Carolina as Mrs. Hendrix could continue to be regarded by Nevada (and presumably by third states) as Mrs. Williams.

47. As for example, the rule of *res judicata* of jurisdictional issues, backed by the full faith and credit clause [*American Surety Co. v. Baldwin*, 287 U.S. 156 (1933)] where the policy of putting an end to litigation takes precedence over all other policies].

respect to the retention, transmission and distribution of wealth. These and other branches of the law disclose community values and a way of life. When a court is confronted with a Conflict of Laws case embodying such legal problems, it may, along with other policy considerations, properly evaluate the policies reflected in the competing rules. Indeed, it may be urged that any permissible approach to such a problem inescapably requires such an appraisal. In other and in blunt words, the court's responsibility embraces a consideration of the relative societal value of the rule which it is asked by a litigant to apply. To be sure, this makes the role of the tribunal in a Conflict of Laws situation more difficult, but it may be proper to attribute the added difficulty to the complexity of the problem rather than the method for solving it. It is always easier to apply a rule of thumb than to exercise a judgment, but slot-machine law frequently produces bad results.

Limitations of the traditional analysis are nowhere more dramatically emphasized than in a situation where it results in defeating the policy of the internal law of both of two states involved. Suppose a child is born illegitimate, domiciled with his father in State *X*. The father dies leaving land in State *Y*. An *X* statute provides that illegitimate children shall inherit from the father whenever they have been recognized in writing by him as his children. A *Y* statute provides for the legitimation of children who have been recognized in writing by their father. The *X* child is recognized in writing by his father. Nevertheless the *X* statute is inapplicable because it is a statute of inheritance rather than legitimation and the law of the situs of the land governs inheritance.⁴⁸ Similarly, the *Y* statute is inapplicable because it is a statute of legitimation and the law of the domicile governs legitimation.⁴⁹ Thus the child is unable to inherit and the policy of both *X* and *Y* is defeated. It seems clear that an appropriate regard for the policy of the competing laws as distinguished from their technical characterization and selection should have been made and the opposite result reached.⁵⁰

48. Pfeifer v. Wright, 41 F.2d 464 (C.C.A. 10th 1930).

49. Eddie v. Eddie, 8 N.D. 376, 79 N.W. 856 (1899).

50. Compare McCausland's Estate, 213 Pa. 189, 62 Atl. 780 (1906) where the court regarded as "of similar import" a statute at the domicile that "illegitimate children shall inherit the same as those born in wedlock, if the parents subsequently intermarry" and a statute at the situs, that "where the father and mother of an illegitimate child shall enter into the bonds of lawful wedlock and cohabit, the children shall thereby become legitimated and enjoy all the rights and privileges as if they had been born during the wedlock of their parents." Compare also Estate of Lund, 26 Cal. 2d 472, 159 P. 2d 643 (1945) where a California statute of legitimation was applied to permit a child to share in his father's estate in California, although the legitimating acts had occurred while the child and father had been domiciled in another state. Compare also *In re Wehr's Estate*, 96 Mont. 245, 29 P. 2d 836 (1934) in which an illegitimate child was permitted to inherit in Montana regardless of where or when the legitimating acts occurred.

On the nature and character of the policy of the internal rule of law will often depend its applicability to an interstate situation and thus the key to the solution of a Conflict of Laws problems. A New Hampshire case illustrates the point.⁵¹ The court of that state had before it an action to foreclose a mortgage on New Hampshire land. The mortgage had been executed in Massachusetts by a Massachusetts married woman to secure her husband's debt. Such a transaction was valid by "Massachusetts law" but not by the "law of New Hampshire." The trial court ruled that "the validity of the mortgage should be determined by the laws of New Hampshire" and ordered the bill dismissed.

On appeal, the Supreme Court of New Hampshire also held that the law of the situs of the land governed the problem but held the ruling below to be in error. What was "the law of New Hampshire" as applied to the situation before the court? "What the law is," observed Judge Branch, "with reference to a conveyance of New Hampshire real estate executed in another jurisdiction by a married woman there domiciled, as surety for her husband, has never been specifically decided."⁵² The court thereupon examined the pertinent statute, searched for the purpose sought to be achieved and the policy promoted and concluded that the rule of law had no relation to conveyances by Massachusetts wives or indeed by wives of any state other than New Hampshire. "The primary purpose of the statute," it was said, "was not to regulate the transfer of New Hampshire real estate, but to protect married women in New Hampshire from the consequences of their efforts, presumably ill-advised, to reinforce the credit of embarrassed husbands." As soon as it was perceived that the New Hampshire law reflected a policy of "protective incapacity" for married women rather than a land policy, the problem was solved. No one would suppose that New Hampshire had embarked upon a crusade of knight-errantry to protect all the married women in the country from improvident husbands. The object of legislative concern obviously was limited to the ladies of New Hampshire.

A similar approach might very well be made, as has been suggested,⁵³ to the problem of whether a married woman can qualify as a plaintiff in a tort action against her husband, as where a New Hampshire wife was hurt in an automobile accident in Maine resulting from the alleged negligence of her husband who was driving the car at the time.⁵⁴ If the Maine domestic relations law prevents such an action but the internal law of New Hampshire permits it, which law should

51. *Proctor v. Frost*, 89 N.H. 304, 197 Atl. 813 (1938).

52. *Id.* at 306, 197 Atl. at 814.

53. Griswold, *Revoi Revisited*, 51 HARV. L. REV. 1165 (1938), as to which see Professor Cook's criticism, *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* 248 ff. (1942).

54. *Gray v. Gray*, 87 N. H. 82, 174 Atl. 508 (1934).

be controlling? Under the rule that the place of injury governs, the Maine law is applicable, wherever the forum. But what is the Maine law, as applied to suits in New Hampshire between New Hampshire spouses? If, as may be assumed, the policy of the Maine law is to prevent domestic discord,⁵⁵ it seems clear that Maine's concern with New Hampshire families is negligible. Maine, presumably, would be entirely content to allow married couples from other states to be governed, even in the Maine courts, by the law of the state which does have a justifiable interest in their domestic welfare. The same result may be reached, for the same reasons, by following Professor Cook's "short cut" to the solution. "If . . . we take notice of the fact that the problem of whether a wife shall be allowed to sue her husband is a question of policy falling in the field of domestic relations, it seems reasonably clear that the question of policy is one for the law of the domicile rather than that of the 'place of wrong'."⁵⁶ What appears to be a fallacious appraisal of the policy factors involved in such a case, led the New York Court of Appeals to the opposite conclusion in an action in New York by a New York wife against her husband for injuries received in a Massachusetts automobile accident.⁵⁷ Under the family law of Massachusetts, she could not sue her husband although the New York law was otherwise. Recovery was not allowed. After invoking the Conflict of Laws rubric that the law of the 'place of wrong' governs, the court observed merely, "We cannot determine what the public policy of the Commonwealth of Massachusetts should be."⁵⁸ It is submitted that the only public policy of the Commonwealth of Massachusetts as to whether tort actions between New York spouses will adversely affect domestic tranquility is merely to leave the issue to New York law.

Perhaps a more common instance of the local policy of the internal law affording a guide to its applicability to a Conflict of Laws problem is the treatment of legislation limiting the activities of corporations. Is the policy of the statute one to protect the owners of corporations against fraudulent or ill-advised conduct by the management or some similar hazard? Or is the policy one to protect the economy or other interest of the community against the economic activities of corporations? If it is the former, presumably the policy does not extend to policing foreign corporations for the benefit and protection of their owners⁵⁹ whereas if it is the latter, protection of the local community

55. See *Thompson v. Thompson*, 218 U.S. 611 (1910).

56. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS*, 243 ff. (1942).

57. *Coster v. Coster*, 289 N. Y. 438, 46 N.E. 2d 509 (1943).

58. *Id.* at 443, 46 N.E. 2d at 512.

59. Thus in *Rumbough v. Southern Improvement Co.*, 106 N.C. 461, 11 S.E. 523 (1890), a local statute requiring corporate contracts involving liability in excess of a stated amount to comply with certain formalities was held inapplicable to foreign cor-

may be needed quite as much against foreign as against domestic corporations.⁶⁰ Similarly, in determining whether a statute of the state of incorporation should limit the activities of the corporation in other states, the policy of the act needs to be examined. If it is to regulate the corporation, as such, it will be enforced regardless of where the activities took place.⁶¹ But if the policy is to protect local interest against the conduct of the corporation, it will be inapplicable to activities in other states which in no way threaten such local interests.⁶²

Justice is always administered in particular situations which involve particular litigants. Adjudication is concrete rather than abstract. It is the business of courts therefore to administer the law in such a way as to reach fair and just results between the particular litigants except in situations where some paramount policy may require an undesirable disposition of the immediate controversy. But by the very nature of law, rules of conduct are formulated in terms of generalities. It may be, therefore, that no body of law capable of tolerably accurate prediction could treat every particular case exclusively upon its individual merits. In Conflict of Laws cases, situations are more than ordinarily likely to arise in which the results in the particular cases may deviate from the exact measure of justice which the tribunal would otherwise administer.

On the other hand, there are many interstate situations in which the tribunal will have a wider latitude in its search for a legal formula which will meet the demands of justice in the problem before it. Subject to other policy considerations, a court may with complete propriety, exploit the flexibility of the legal situation to produce a result in conformity with the merits of the case.

To the extent to which this policy is pursued, to that extent will the "confusion of authority" and "contrariety of opinion" be continued if not, indeed, extended. But once it is determined that uniformity of legal relations, in the sense that the choice of forum will not formally affect the result, is not attainable in the particular case or, if attainable, is less desirable than the attainment of other policy objectives, the

porations entering into contracts in New York. *See* *Vanderpoel v. Gorman*, 140 N.Y. 563, 35 N.E. 932 (1894).

60. In *Bishop v. American Preservers Co.*, 157 Ill. 284, 41 N.E. 765 (1895), a local statute forbidding corporations from entering partnership contracts in the state was held applicable to foreign as well as domestic corporations.

61. In *Metropolitan Bank v. Godfrey*, 23 Ill. 579 (1860), a New York statute regulating banks was held applicable to a New York bank's activities in Illinois.

62. In *White v. Howard*, 38 Conn. 342 (1871), a New York statute reflecting local land policy was held inapplicable to prevent a New York corporation from acquiring land by devise in Connecticut. In *Warren v. First Nat. Bank of Columbus*, 149 Ill. 9, 38 N.E. 122 (1893), a New York statute forbidding an assignment in contemplation of insolvency by a corporation was held inapplicable to an assignment by a New York corporation in Ohio.

"confusion of authority" need not bother us. Indeed, it has not bothered courts for many years in dealing with a rule of foreign law which was regarded as coming within the magic phrase "repugnant to the public policy" of the forum.

The "public policy" formula is a striking instance of how courts have thrown off the judicial inhibitions of the jurisdictional or territorial approach to the Conflict of Laws. Without a judicial scruple, a "foreign created right" may be disregarded, sometimes with the most startling results,⁶³ by the use of this technique. This escape from what would be regarded as an improper or undesirable result has, perhaps, become palatable because it is treated as an "exception" to the usual treatment. Ordinarily, the "foreign created right" will be enforced. Such is the general rule. If to do so, however, offends too greatly the local sense of justice as reflected in the domestic law, the case will come within the "exception" rather than the "rule." As everyone who is familiar with the Conflict of Laws knows, this sort of treatment is so common that it is, even with the courts which follow most faithfully the territorial approach, almost fatal to that certainty and uniformity which the traditional theory is supposed to insure.

But the limitations of the "public policy" doctrine for obtaining justice in a Conflicts case are striking. In the first place, the policy of the foreign law, as measured by the local law, is appraised in the abstract. "The courts are not free to refuse to enforce a foreign right at the pleas-

63. *Griffin v. McCoach*, 313 U.S. 498 (1941) is a case in point. In this case the Supreme Court held that under the rule of *Erie v. Tompkins*, 304 U.S. 64 (1933), a federal district court sitting in Texas must apply a Texas rule that a beneficiary under an insurance policy could not receive the proceeds thereon if he had no "insurable interest" in the life of the insured. The case involved the rights of assignees of certain beneficiaries who had been creditors of the insured. Practically the entire transaction occurred in New York, under the law of which the assignees' claim was valid. The deceased insured had been domiciled in Texas. The personal representatives of the decedent sued the insurance company to collect the portion of the proceeds of the policy to which the estate of the decedent was entitled as beneficiary, and in addition, the portions which had been assigned by the original beneficiaries, on the theory that under Texas law the assignees had no insurable interest and that in consequence, the personal representative of the insured was entitled to their share. The district court had declined to apply the alleged Texas rule and had upheld the rights of the assignees who had been interpleaded by the insurance company. The personal representatives of the decedent appealed and the Supreme Court reversed. It is to be noted that if, as the administrator insisted, the Texas rule denied recovery to the assignees and awarded their portions of the proceeds of the policy to the administrator, the former have been denied rights perfectly valid under New York law, which under Conflict of Laws rules should govern the transaction, although they in no way voluntarily subjected themselves to the Texas law or to the jurisdiction of the Texas courts. They were summoned into court solely by reason of the Federal Interpleader Act. Presumably if they had sued first in a federal court sitting in New York the opposite result would have been reached. The situation is apparently one which turns on the outcome of a race to the court house.

ure of the judges, to suit the individual notion of expediency or fairness." 64 The results of application of the foreign rule in the particular case are unimportant. It is the supposed vice of the generalization which justifies rejection.

The "public policy" doctrine would, it is submitted, be a more effective hand-maiden of justice if it were applied in the light of the facts of the case before the court as an instrument to avoid an improper disposition of the particular dispute.

Again, it is to be observed that the principle can ordinarily be applied only negatively. It may be employed as a device *not* to decide the case on its merits but seldom as a means of obtaining an affirmative adjudication. The parties are merely denied access to the local courts. If the plaintiff can find a forum elsewhere, he may obtain enforcement of his admittedly valid, though unjust "right." If, however, he is unable to obtain jurisdiction over the defendant in a state which is willing to make its judicial machinery available to him, his "right" will forever be unenforceable. This is hardly a satisfactory situation. There is something inadequate about a legal system which tolerates such negative results. In a civilized nation, a plaintiff ought not be sent from pillar to post to get a hearing on the merits of his claim. The policy, regarded so highly, of ending litigation 65 is offended, the plaintiff rather than the defendant being the victim. 66

The question may be raised why the appraisal of different policies, as a technique in the solution of Conflict of Laws cases, should be confined to the policy of the forum and that of some state which has a particular connection with the problem? Why should not the court consider the respective policies of the law of every state which is connected with the situation in the light of each factual contact and the interest that the state may have in the outcome of the case? Such a method would lead to a search for that law of those potentially applicable which would best meet the needs of the court in arriving at a just solution of the individual controversy. 67

One may agree with Justice Cardozo that Conflict of Laws is a "field

64. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918).

65. It is litigation, and litigation of the most fruitless kind, when a dispute is carried to the highest court of a state only to be dismissed on the grounds that, although the plaintiff has or may have a perfectly "valid" right, it offends the public policy of the forum and therefore will not be enforced. All the arguments against the doctrine of "forum non conveniens" are applicable here with few or none of the factors present which justify that doctrine.

66. The doctrine of *res judicata* protects the defendant against repeated and vexatious litigation. The "public policy" doctrine in the Conflict of Laws may require repeated actions by the plaintiff to obtain enforcement of his "valid" right, which is certainly "vexatious" to him and, if the statute of limitations expires, may prove fatal.

67. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 83-4 (1933).

in the domain of the law where fundamental conceptions have been developed to their uttermost conclusions by the organon of logic," and that here "the finality of the rule is in itself a jural end."⁶⁸ This, however, need not mean that the law should hesitate to free itself from the limitations of logic nor does it imply that finality is the only jural end. There are other intellectual tools besides logic and other jural ends besides finality. All jural ends are but means to some further end in society and logic is not enough if it serves the intermediate but not the ultimate end.

The truth is, however, that the deficiencies in Conflict of Laws are not to be attributed so much to the use of logic as applied to "fundamental conceptions" as in the choice and limitations of the conceptions to which it is applied. Indeed some that have been regarded as "fundamental" turn out to be nothing of the sort. What is needed is an expansion of the "fundamental conceptions" to include consideration of the various policies pertinent to the problems dealt with.

Indication of a few of the policy factors which are, or may be, involved in Conflict of Laws cases is meant only to suggest some of the avenues which are made available when the fetters of territoriality, the "jurisdictional" approach and the Conflict of Laws mechanism based thereon, are broken. It is clear that the legal horizon is vastly extended. Human relations have become highly complicated and involved. The administration of justice requires increasingly expanded paraphernalia and continued refinement of equipment. What is more important, it requires a deeper insight into the values which our social institutions seek to attain. The appropriate decision of cases arising out of the Conflict of Laws requires, ultimately, the conscious resolution of the real or imagined underlying conflict of social institutions. "The general problem," as Professor Lorenzen observed many years ago, "is, therefore, always the same: What are the demands of justice in the particular situation; what is the controlling policy?"⁶⁹

68. CARDOZO, *PARADOXES OF LEGAL SCIENCE* 67 (1928).

69. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L. J.* 736, 748 (1924).