

FOREIGN FACTS AND LOCAL FANCIES

A LAW suit is brought in a Pennsylvania court. The pleadings allege and the evidence proves that the operative facts, that is, the acts or events which constitute the basis of the claim, took place in another state. To add a touch of artistic verisimilitude to a professional narrative, suppose the other state to be New Jersey. Here then is a typical problem to be solved by the application of Conflict of Laws rules. Every third year law student knows the problem, and so does every practicing lawyer who has had occasion to handle a matter which was not localized within the borders of one state.

The general outline which will be followed in solving the legal problem is pretty clear. The first distinction is that between matters of procedure and matters of substance. Procedural matters are to be determined by the internal law of the forum. One may safely admit that there is nothing inherent in this distinction. In the development of the common law the right and the process for enforcing the right have been inextricably intertwined, often with chief emphasis upon the latter. Furthermore, the end served by the system as a whole is the protection of interests of human beings, and the final result is the only thing that counts. From a claimant's point of view, there is no interest in a distinction between what he is entitled to get and the operation of the legal machinery in getting it. Nevertheless the division of questions in Conflict of Laws into those of substance and those of procedure is too well settled to make it profitable to spend much time disapproving it. It has practical justification to support it. Courts have many litigants to hear. In many urban communities cases are pending far too long before they are reached for trial. There would be still more delay if New Jersey procedure had to be learned and followed for every Pennsylvania trial of New Jersey facts. Psychologists tell us that a person increases his efficiency by reducing certain routine matters to habit, so they no longer require conscious effort. As an instance note the difference between the

quick and almost unconscious knotting of the familiar four-in-hand when dressing for a business day and the struggle with an obstinate piece of white lawn which completes the conventional male evening attire. Perhaps the analogy holds true for the legal process, and we can do better with the main problems if we can reduce much of procedure to habit patterns simple in application. The danger in this is that of the decision by habit routine of an individual problem which should be thought through and decided on its merits. The danger in Conflict of Laws cases is that courts may insist on applying local rules under the description of procedure in too wide a range of instances with resulting unfairness to persons concerned. This has been a greater danger in the past than at present. Without letting what he hopes greatly blur what he sees, one may say that the present tendency is toward a reasonable limitation of what is treated as a matter of procedure in Conflict of Laws cases.

Let it be assumed that our Pennsylvania judge, reasonable as we may expect a Pennsylvania judge to be, quite understands that matters of procedure are limited in scope. Since he is not automatically to apply the internal rules of the forum to any but that which we all agree is procedural routine, he is ready to listen to argument upon the question of settling what is agreed to be the substantive problem in the case. Again the third year law student can give him much information, armed with the American Law Institute's *Restatement of Conflict of Laws* and several modern text books in addition to the ever present list of judicial precedents. Conflict of Laws is a comparatively new subject in the common law. Cases with foreign facts in them do not arise often until communication back and forth across boundary lines becomes frequent. So there is in this field of learning no Glanville, no Littleton, no Coke. Perhaps we are no worse off. If there is no ancient learning on which to build, at least there is no ancient dogma to explain away.

In spite of absence of hoary precedent couched in Tudor English or Norman French, there is a good sized and rapidly growing body of modern judicial precedent and excellent commentary thereon in legal magazines and texts. Our judge will learn, even if he does not know already, that if his case involves a question

of a claim to New Jersey land, that his reference should be to the real property law of New Jersey. If his question is that of recovery of damages for a tort, the rule of reference to New Jersey law is pretty clear, although some puzzling problems can arise in both professor's imagination and lawyer's practice. If a contract is involved the rules of reference become more contradictory and confusing. But differences of judicial opinion on points of law, and even occasional inconsistencies are not new phenomena. They will exist so long as disputes between people which culminate in lawsuits have to be settled by imperfect human judgment.

Through the now rapid multiplication of instances courts are building up a consistent and fairly uniform body of rules of reference to the rule of law which is to be applied where operative facts have occurred in a state other than where the case is tried. The rights of the plaintiff and the liability of the defendant will, in most instances, be settled regardless of the often fortuitous choice of the forum. It seems to me desirable that the rules of reference should become settled, and it seems to me also that the rules which have been worked out by the courts are, on the whole, good.

These are matters of opinion, and not capable of mathematical demonstration. The first has been disputed,¹ but not in a way which shows me that rules of reference in Conflict of Laws should be any less definite than rules in any other branch of the law. If one wants to maintain the general proposition that there should be no rules of law, but that each case should be decided as the judge thinks the relative merits of the litigants require, and without reference to cases that have been or are to come, that position is open to him. It is a large order, either for defense or attack, and much broader than anything appropriate to this modest paper. With regard to the rules themselves, the desirability of any one of them can be disputed in this field, as elsewhere in the law.

We are frequently admonished, and rightly, that social and economic considerations should be kept in mind as elements in determining what rule of reference a court should make in a

¹ Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173, 193: "The choice of * * * law * * * (should) not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case."

given situation. These considerations should affect results in Conflict of Laws cases. So should they in contracts, in property, in tort, even where not expressly adverted to in a judicial opinion. It appears to me that courts have done pretty well with Conflict of Laws problems in the light of such social and economic considerations as I have been able to think of and apply. It would be helpful if the suggestions about social and economic policy could be made more definite if, in given instances, commentators feel that they have been overlooked. Courts are entitled to be told what policies they should emphasize, and why; and how such consideration would affect a given set of facts upon which a judge must make a decision.

Suppose we assume that our hypothetical Pennsylvania lawsuit, with its New Jersey facts, is one in which the rule of reference is clearly established by the authorities, and that according to the rule the reference is to New Jersey law. Is there anything which will stand in the way of settlement of the controversy in accordance with the New Jersey law to which reference is thus made?

The *Restatement of Conflict of Laws*, Sections 608 to 616, under the topic heading "Access to Courts" lists several instances where the policy is not to exercise jurisdiction in a general class of cases. If our case falls within the rule stated in these sections, the present suit will be unsuccessful. The sections will not be discussed in detail here. Section 610, stating that "No action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests", must now be considered as modified, so far as its application to judgments for taxes is concerned, by the decision of the Supreme Court in *Milwaukee County v. M. E. White Company*.² A Wisconsin judgment for taxes came within the protection of the full faith and credit clause, it was declared, and recovery thereon could be had in Illinois. To the instances listed in the sections of the Restatement referred to should be added the limitations imposed by the Supreme Court in such cases as *Davis v. Farmers' Co-op. Equity*

² 296 U. S. 268 (1935), (1936) 84 U. OF PA. L. REV. 526, (1936) 4 GEO. WASH. L. REV. 281, (1936) 49 HARV. L. REV. 490, (1936) 10 U. OF CIN. L. REV. 111.

Co.,³ where suit against a foreign corporation, under some circumstances, is held to be an undue burden upon interstate commerce. The Restatement expressly disclaimed intent to cover these instances, but whether they are called Conflict of Laws or Constitutional Law or something else, they may impose an insuperable obstacle to a local suit based on foreign facts against a foreign corporate defendant.

One of the sections, however, invites discussion. Section 612 states: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum". No dispute is raised concerning the propriety of stating the public policy limitation in a Restatement which purports to reflect existing law. The public policy theme has appeared too many times in judicial compositions to permit of its being ignored. It should be noted, however, that the *Restatement* section does not cover all the situations where the public policy point may appear. It refers to maintaining an action where the claim of the plaintiff, established by reference to foreign law, is contrary to the strong public policy of the forum. But the public policy point may arise also with regard to a matter of defense. Thus, suppose plaintiff sues for personal injury. Defendant sets up an agreement between himself and plaintiff, executed in another state and lawful there, by which plaintiff exempted defendant from any claim for personal injuries. The forum declares such agreements unlawful. Should that policy apply to strike down the defense in this instance? Again the point may arise where the claim itself may be inoffensive to local notions, but where local policy may be urged against the person advancing it. For instance, suppose two persons of different races, living in a state where marriage between them is lawful, are married. The man dies, leaving property in another state where such marriages are forbidden. Does the fact that such a union is forbidden by the law of the forum show local policy that will prevent the woman from securing a widow's share of the decedent's estate?

The initial difficulty is that public policy is such a general term that one can get from it almost anything he pleases. It is even

³ 262 U. S. 312 (1923).

broader than due process of law. In one sense it is, as courts have said, "The manifested will of the state."⁴ The sovereign people of a state establish local public policy when they adopt a Constitution. Legislators make a state's policy in passing regulatory statutes. Judges manifest their views of public policy in the opinions they write. It is right, in one sense of the term, to say that "when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes, or judicial records."⁵

Taking this concept of public policy and applying it in Conflict of Laws cases will secure a result which is simple and easy to apply. A court, having a Conflict of Laws case before it, makes its reference to the internal law of that state whose law is considered to constitute the appropriate rule of reference. But, before so doing, it finds that the law of the state referred to differs from the internal law of the forum on this point. The internal law of the forum expresses the local public policy. To apply another and different rule would necessarily be contrary to that policy, ergo, it will not be applied. Our simple rule of Conflict of Laws then becomes a proposition to the effect that the rule of another state will not be applied in a given situation if it differs from that of the forum.

This, in turn, can mean one of two things. The forum, under such circumstances, may refuse to give a judgment on the merits, dismiss the suit, and leave the parties to another action in another forum, or it can apply its own internal rule, giving judgment according to its own notions of policy following its Constitution, statutes and decisions on which that policy is based. The second alternative is, obviously, worse than the first. But either is bad enough.

No court is going to accept the *reductio ad absurdum* of course. To do so would destroy practically all of our modern rules of Conflict of Laws. The only occasions on which reference would be made to the law of another state as determinative of the facts in a particular controversy would be when that state's law on the

⁴ *Jacoway v. Denton*, 25 Ark. 625, 634 (1869); *Chaffee v. Farmers' Co-op. Elev. Co.*, 39 N. D. 585, 593, 169 N. W. 616, 618 (1918).

⁵ *People v. Hawkins*, 157 N. Y. 1, 12, 51 N. E. 257, 260 (1898), and quoted in *Mertz v. Mertz*, 271 N. Y. 466, 472, 3 N. E. (2d) 597, 599 (1936).

point was the same as that of the forum. In such an instance it obviously makes no difference by what rule a court reaches a result which is bound to be the same in either case. If this all inclusive view of the effect of local public policy were to be adopted, then all the thousands of decisions which have worked out the doctrines of rules for reference in the different types of situations are to be relegated to the limbo of forgotten things. No one believes this is going to happen: in fact the whole tendency is the other way, and upon less insistence upon local rules, not more, when cases involve foreign facts. Yet the public policy statement in its broadest form, like Banquo's ghost, slips in when least expected. I think one may properly call the New York courts distinguished for excellence in their development of Conflict of Laws. They probably have more occasion to deal with such questions than any court in the country. But this reiteration of local public policy has appeared from the pen of a very distinguished judge during the past year.⁶

Part of our difficulty about public policy would disappear if we sharpened our thinking in the use of the term. It is desirable to distinguish between public policy when used in the internal sense and when used in Conflict of Laws. In the internal sense it may well be described as it was in the quotation given above, or if you like, as it has been in Ohio, as "the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like."⁷ In making that policy applicable to its internal affairs a state may impose any notions it pleases, however whimsical, to things happening within its borders, so long as it does not run afoul of the Federal Constitution. But New York surely has no interest in regulating according to its notions of policy, what we do over here in Pennsylvania. When it has a Conflict of Laws case in its courts in which the operative facts occurred in Pennsylvania, if the Pennsylvania rule is applied to those facts in the New York trial, it does not mean a displacement of good New York law, by what, according to New

⁶ Judge Lehman, in *Mertz v. Mertz*, 271 N. Y. 466, 3 N. E. (2d) 597, (1936).

⁷ *Kintz v. Harriger*, 99 Ohio St. 240, 246, 124 N. E. 168, 170 (1919).

York hypothesis, is inferior Pennsylvania law. The old word comity was perhaps in part responsible for this misunderstanding. It somehow carried with it the idea that out of politeness to Pennsylvania New York stood aside and allowed Pennsylvania to impose its rules in a New York lawsuit. Certainly that would be a process to be viewed with suspicion. But it is clear now in the minds of practically everybody who has thought about the matter that no such abdication takes place. New York, by its doctrines of Conflict of Laws, refers to Pennsylvania (or whatever state's rules are deemed to be the appropriate reference) because that is considered the fair way to settle local controversies with foreign operative facts. It does not, by such reference, flaunt its local policy with an implied recognition of the other state's as better; it does not make an appraisal one way or the other, but simply applies the foreign rule as the appropriate one to determine this transaction.

There used to be great confusion about the concept of what is penal in these interstate cases. A state will not, in a suit in its courts, apply the penal laws of another state. That rule is easily stated, but penal is a term used in a number of ways, as everyone knows. The United States Supreme Court in *Huntington v. Attrill*,⁸ and Judge Cardozo's happy clarification in *Loucks v. Standard Oil Co.*⁹ have together removed most of the confusion. We have no trouble now in distinguishing a penal law, in the internal sense, and a penal law in the Conflict of Laws sense. The orderly administration of the law has profited thereby.

Suppose the distinction suggested is to be made. How can we describe a situation in which local public policy will deflect the usual reference to the other state's rule? The difference between policy as a rule for guidance of local affairs and as a rule of Conflict of Laws is something like the difference between a judge as trier of facts and the judge who is asked to set aside a jury's verdict. In the latter case, he will not set aside the jury finding unless it is arbitrary, capricious and one which a reasonable man could not reach. So true, in our Conflict of Laws case, it is not that the foreign law does not seem so reasonable to the judge as

⁸ 146 U. S. 657 (1892).

⁹ 224 N. Y. 99, 120 N. E. 198 (1918).

his own good home-made precedent, but it must appear "pernicious and detestable"¹⁰ or, to borrow Mr. Justice Cardozo's always effective language, "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."¹¹

It is to be kept in mind that the party litigant who asks that a court make reference to the foreign rule for the law of his case, is not seeking to do in the forum acts not permitted because of local policy there. He is only asking the court to give legal effect to acts done elsewhere in accordance with the law there prevailing. Usually he asks for a money judgment; occasionally he may seek equitable aid or some extraordinary legal remedy. No breaking down of local control of local transactions is involved.

Furthermore, while on the subject of public policy, there are some countervailing considerations to be noticed. There is a strong policy for the enforcement of rights of plaintiffs and performance of duties by defendants in accordance with the rules of law which have been worked out to govern. To give either party an advantage because the particular judge who hears the case does not like the particular rule of law to which reference is made gives one party an advantage to which he is not entitled.

Another consideration is especially applicable among the States of the United States. Many people view with alarm the trend away from local regulation and responsibility and the vesting of authority in the federal branch of our government. Regardless of either alarm or regret, the trend may be expected to continue so long as it aids in securing a more effective means of getting done what the people want accomplished. The trend toward centralization will be accelerated if our system of separate states can not be made to work in a civilization where state boundaries no longer mean separate business, separate culture, separate ways of looking at things. It seems to me clear that a smooth working and dependable system of Conflict of Laws is of vital importance if, in the long run, each state is to be left, to make its own rules as it now does. Conflict of Laws rules become less workable, because less dependable, if the sinister spectre of local public policy

¹⁰ *Veytia v. Alvarez*, 30 Ariz. 316, 318, 247 Pac. 117, 118 (1926).

¹¹ *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 111, 120 N. E. 198, 202 (1918).

may deflect the otherwise appropriate reference to the law of a sister state.

As among our states, the sight of the courts of one state refusing to apply the law of another because the second state's rule shocks the morals of the forum, is one to make the judicious grieve. Judge Beach called it "an intolerable affectation of superior virtue,"¹² and it is hard to improve on his phrase. A mutual tolerance for each other's little idiosyncracies does not seem a great deal to ask from members of a family of states which have so much in common as we have. Such mutual tolerance is all that is necessary in order to get rid of the public policy argument altogether in Conflict of Laws among the states of this country. It would not be a revolutionary step. If a claim has been reduced to judgment, a state's public policy will not be effective to excuse it from the obligatory requirements of the full faith and credit clause.¹³ It would be, in the writer's opinion, an advancement of a wider public policy if we would go the rest of the way and cast it out altogether. As among ourselves and foreign nations, the case is not so strong. With English speaking countries, the similarity in law and point of view is a pretty powerful argument that the same rule should apply as between our own States. As to some of the others, there is room for difference of opinion. Perhaps the point of view is so far from ours that sometimes we could not bring ourselves to apply the foreign rule in a case in our courts. The presumption should surely be the other way.

Will the law grow in the direction indicated? The trend to a more ready acceptance of the reference to foreign rules has already been mentioned and is easy to show. The development in the death by wrongful act cases is as conspicuous an instance as any and is easy to trace. Our Supreme Court has been a help, not only in the full faith and credit cases but others. We have now a good sized collection of instances where the substitution by the forum of its local rule, instead of the proper choice of law, has been reversed on the ground of lack of due process, or some other clause.¹⁴ To extend this salutary effect to the public policy dogma

¹² Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 37 YALE L. J. 656, 662.

¹³ *Fauntleroy v. Lum*, 210 U. S. 230 (1908).

¹⁴ *Western Union Tel. Co. v. Chiles*, 214 U. S. 274 (1909); *Western Un-*

might bring to its final burial a doctrine which has a doubtful usefulness and has already lived too long.¹⁵

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ion Tel. Co. v. Brown, 234 U. S. 542 (1913); New York Life Ins. Co. v. Dodge, 246 U. S. 357 (1918); Aetna Life Ins. Co. v. Dunken, 266 U. S. 389 (1924); Home Ins. Co. v. Dick, 281 U. S. 397 (1930); Bradford Elec. Light Co. v. Clapper, 286 U. S. 145 (1932); Hartford Acc. & Ind. Co. v. Delta & Pine Land Co., 292 U. S. 143 (1934); John Hancock Mut. Life Ins. Co. v. Yates, 299 U. S. 178 (1936).

¹⁵ For other discussions of the public policy doctrine in Conflict of Laws, see 3 BEALE, CONFLICT OF LAWS (1935) § 612. 1; GOODRICH, CONFLICT OF LAWS (1927) 197-200, 216-17; RESTATEMENT, CONFLICT OF LAWS (1934) § 612 and comment; Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 37 YALE L. J. 656, 661 *et seq.*; Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173, 183-4; Goodrich, *Public Policy in the Law of Conflicts* (1930) 36 W. VA. L. Q. 156; Kusters, *Public Policy in Private International Law* (1920) 29 YALE L. J. 745; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736, 746; Nutting, *Suggested Limitations of the Public Policy Doctrine* (1935) 19 MINN. L. REV. 196; Note (1933) 33 COL. L. REV. 508; Note (1936) 10 U. OF CIN. L. REV. 473; Note (1937) 23 VA. L. REV. 288.