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Some Developments in Conflict of Laws

*Elliott E. Cheatham**

The economy and the social systems of our country are national in character. From Maine to California, and now on to Hawaii and Alaska, goods and people move freely. The legal systems, in contrast, make a checkerboard, with each of the fifty states having its own laws and courts. In the international area, there is a distant parallel. South and west of the iron curtain there is increasing movement of goods and people across national frontiers, but the nations continue to cherish their legal differences. It is the responsibility of conflict of laws to deal with the interaction of the two sets of systems: one the economic and social systems and ready movement across legal frontiers, the other the diverse legal systems each one firmly anchored in the territory of its state or nation. The descriptive name of the subject and its task would be Coordination (not Conflict) of Laws.

In its work of coordination, conflict of laws has changed greatly in the past generation under the impact of several factors. One of these factors is the extraordinary development in ease and speed of transportation which has increased the mobility of our people and strengthened the national character of our society. A second is the alteration in the international area, with in one aspect the same developments in transportation increasing commercial relations among the nations, yet in another aspect with the rise of totalitarian nations splitting asunder what had promised to be a harmonious international scene. A third is the rejection of hampering theories of analytical jurisprudence and a consequent freedom in the wise development of the law.

The last and least obvious of the three sets of factors is a part of a change in our whole attitude toward law. The decades following World War I saw great stirrings in the law, with reaction against an old view well described in a notable article by Dean Erwin Griswold:

The nineteenth century was the century of analytical jurisprudence. . . . It was under the influence of Austin's purely logical approach that Dean Langdell developed the case method of instruction eighty-five years ago. To him "the law" was to be found in books. . . . And the method of study was analytical, virtually mechanical, with each step being deduced by a purely logical process from the materials in the authoritative cases.¹

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1. Griswold, *Law Schools and Human Relations*, 1955 WASH. U.L.Q. 217, 219.

In no area of law was the reaction more vigorous than in conflict of laws, which had been narrowly confined by assumptions on the scope of operation of a state's laws. Freeing itself from these conceptions, conflict of laws is now able to give effect to the dominant social policies in the coordination of laws.

This article, sketching some recent developments, follows the traditional division into jurisdiction of courts, foreign judgments, and choice of law. It ends with mention of the role of federal law and of federal courts law in the coordination of laws, and with a bare reminder of some aspects of international conflict of laws.

JURISDICTION OF COURTS

When a plaintiff wished to bring an action on his claim, the old common-law view was that he must seek out the defendant and file the action where the defendant could be found and served with process. The law has moved far from that starting point. The most important development is the expansion of jurisdiction based on activities of the defendant within the state of the forum. Its beginnings go back to an action in Ohio on a life insurance policy issued there by an agent of the defendant, an Indiana corporation. In a later action in Indiana on the Ohio judgment against the defendant the objection was raised that the Indiana corporation, a creation of Indiana law, "could have no existence out of that State and, consequently, could not be sued in Ohio." The court overrode the objection by the fiction of consent, stating that the Indiana corporation by doing business in Ohio had consented to the conditions of suit imposed by an Ohio statute.² Over the years, the courts "accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations."³

Then came one of those leading cases which pull together tentative or fragmentary doctrine into a coherent whole and lay down a broad principle as a firm basis for future development, *International Shoe Co. v. Washington*.⁴ International Shoe Company, a Delaware corporation with a principal place of business in Missouri, followed a plan under which the company would sell its products to retailers in the state of Washington and yet would be insulated, so it hoped, from the tax laws and the courts of the state. The plan called for about a dozen salesmen of the company to call on merchants in Washington and solicit orders, but for the orders to be sent to Mis-

2. *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856).

3. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

4. 326 U.S. 310 (1945).

souri for acceptance or rejection there and for the goods to be shipped f.o.b. Missouri. Despite the formal insulation, the Supreme Court of the United States held that the foreign corporation was subject to tax by the State of Washington and to the jurisdiction of its courts. Chief Justice Stone laid down as the general test for judicial jurisdiction "such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."⁵ In a later case, which held the making of a single contract of insurance with a resident of a state a sufficient basis for jurisdiction in an action on the contract, there was a more explicit statement of the economic and social changes which justify the expansion of state jurisdiction over foreign corporations and other non-residents, as, "the fundamental transformation of our national economy over the years," "increasing nationalization of commerce," and "modern transportation and communication" which make it "less burdensome for a party sued to defend himself in a State where he engages in economic activity."⁶

The broadening of jurisdiction under the United States Constitution has shifted the principal questions for lawyers from constitutional law to state law; does the law of the state of the forum authorize its courts to take jurisdiction under these circumstances? Here, too, there has been notable expansion. The supreme court of at least one state has reinterpreted its statute of competence over foreign corporations to make it reach as far as the Constitution permits.⁷ In most states, the readjustment has been by statute. A good example is a statute of Wisconsin which sets out in great detail the kinds of activity in the state on which the authority of its courts may rest.⁸ Other states, such as Illinois and New York, have employed short and sweeping statutes.⁹

The use of activity as a basis of judicial jurisdiction over an individual defendant began, as with the corporate defendant, through the fiction of consent to be sued, in a non-resident motorist case.¹⁰ On economic activity generally as a basis of jurisdiction over the individual defendant, the Supreme Court of the United States has not yet spoken. Many of the states assume there is jurisdiction under the Constitution in such a situation and by their statutes authorize the exercise of jurisdiction over non-resident individuals as to causes

5. *Id.* at 317.

6. *McGee v. International Life Ins. Co.*, *supra* note 3, at 222-23.

7. *Henry R. Jahn & Son, Inc. v. Superior Court*, 49 Cal. 2d 855, 323 P.2d 437 (1958).

8. WIS. STAT. ANN. § 262.05 (Supp. 1963).

9. ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956); N.Y. CIV. PRAC. ACT § 302.

10. *Hess v. Pawloski*, 274 U.S. 352 (1927).

of action arising out of the doing of business or even out of single acts within the state. The question remains whether the reasons of policy mentioned above justify the same broad jurisdiction over the little individual defendant as over the large foreign corporation, and what the lines of distinction between the two kinds of defendants shall be.¹¹

JUDGMENTS

Judgments of sister states are protected by the full faith and credit clause of the United States Constitution and the implementing statute, so that in this matter interstate conflict of laws is principally federal law. The high political purpose of the full faith and credit clause is that of "a nationally unifying force . . . making each [state] an integral part of a single nation."¹² Once there is jurisdiction and a judgment is secured, the Constitution precludes any inquiry into the facts or the law.¹³ A lawyer had better use all his ammunition in the first state and not nurse the hope his case and he will live to fight in a second state.

The most striking recent development concerns divorce, in the aspects of both jurisdiction to grant a divorce and protection of a divorce decree once granted. In response to the mobile habits of our people and to a changing social attitude toward divorce, the law on foreign divorce is being made over, beginning in 1942 with the first *Williams* case.¹⁴ The legal principles employed to this end are that the domicile of one spouse alone is sufficient basis for jurisdiction in a divorce proceeding, and that conclusiveness can be given to an allegation and finding of domicile in the state of the divorce forum provided the other spouse was a party to the case. A troubling aspect is the economic rights of an abandoned wife, that is, her right to continued support by the husband who has obtained at his new domicile a divorce and, probably, a new wife. The difficulty has been dealt with by the doctrine of divisible divorce. Such a divorce may be good in ending the personal relationship but not in terminating the economic duty; the husband who has remarried after the divorce has one wife as to bed, but two wives as to board.¹⁵ The economic right of the first wife to support is protected, provided her lawyer is careful to keep her from being subjected to the jurisdiction of the divorce forum. Does her economic right against her former husband extend beyond support during his life, to a share as widow in his

11. See *Allied Fin. Co. v. Prosser*, 103 Ga. App. 538, 119 S.E.2d 813 (1961).

12. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943).

13. *Milliken v. Meyer*, 311 U.S. 457 (1940).

14. *Williams v. North Carolina*, 317 U.S. 287 (1942).

15. *Estin v. Estin*, 334 U.S. 541 (1948).

estate on his death? The question has not yet been answered.

The judgments of courts of foreign nations are not within the constitutional protection of full faith and credit. Nonetheless they are ordinarily respected and enforced, if in the foreign forum there were the essentials of jurisdiction and a fair hearing.¹⁶ To give this protection a firmer basis in these days of expanding international commerce, the Commissioners on Uniform State Laws have recently drafted a proposed uniform state law on the subject.¹⁷ An old decision by a closely divided Supreme Court of the United States held that reciprocity in protection of American judgments was an essential to protection of the judgment of a foreign nation.¹⁸ The state courts, however, have imposed no such requirement.¹⁹

There is one important caution throughout the preceding discussion of jurisdiction and judgments—there must be notice to the opposing party. While the bases of jurisdiction have been liberalized, there has been increasing insistence on fair notice as an essential to an effective judicial proceeding and to the validity of a judgment.²⁰

CHOICE OF LAW

Common lawyers are traditionally averse to general theories and even pride themselves on their supposed freedom from them. Lord Birkenhead was introduced at a dinner as "a great jurist." "I have never been so insulted in my life," the Lord Chancellor is reported to have said when he rose to speak. "I am not a jurist at all. I am an English lawyer and judge." Yet general ideas, even theories of jurisprudence, rule us and all the more so when we take them unexamined and for granted. Certainly, it has been so in conflict of laws. The recent development of the subject began with the struggle against an old hampering theory and then a search for a freer and wiser basis of choice of law.

The theory of vested rights long dominated the language of the American courts and the writings on conflict of laws. The conception of law on which the theory rested was that the law of the place of the last element of an occurrence necessarily governs the rights of the parties to the occurrence. From this conception there were deduced such rules of choice of law as that the law of the place of acceptance of an offer necessarily determines whether there was a

16. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950).

17. UNIFORM FOREIGN MONEY-JUDGMENT RECOGNITION ACT.

18. *Hilton v. Guyot*, 159 U.S. 113 (1895).

19. Reese, *supra* note 14.

20. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

contract. The theory has been devastatingly attacked. As a perceptive judge concluded:

the vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act.²¹

The consequent heavier burden cast on judges has been stated by another who has been in the lead in both the overthrow and the rebuilding: "The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage; but it leaves him free to weigh competing policies without preconceptions that purport to compel the decision, but in fact do not."²² The competing policies, which these two judges emphasize as guides, are numerous and varied, and their points of reconciliation are difficult to state. The tentative drafts of *Restatement (Second), Conflict of Laws*, employ the general test of "most significant relationship" for choice of law in both torts and contracts, with more specific statements as to some matters where definiteness is possible.²³

The most dramatic development in choice of law has been by statute, in section 1-105 of the *Uniform Commercial Code*. The Code permits the parties to a transaction to choose the law when the transaction bears a reasonable relation to the chosen state, and failing such a choice the Code applies to "transactions bearing an appropriate relation to this state." The influence of the Code goes beyond its immediate range of application. It is a legislative rejection of the vested rights theory and a statement of a broad, affirmative principle. The courts, the legislatures, and the commentators together are remaking choice of law rules so as to advance the policies believed dominant.

FEDERAL LAW

In the Preamble the Constitution of the United States proclaims as its first purpose "to form a more perfect Union," and in Article VI it makes federal law "the supreme Law of the Land." Three kinds of effects of the Law of the Land on different areas of conflict of laws call for mention.

One effect is to supplant all state laws on a subject and by substituting a single federal law for the old state variety to obliterate

21. *Babcock v. Jackson*, 12 N.Y.2d 473, 478, 191 N.E.2d, 279, 281 (1963) (Fuld, J.).

22. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 234.

23. See *RESTATEMENT (SECOND), CONFLICT OF LAWS* § 379(1) (Tent. Draft No. 8, 1963).

interstate conflict of laws as to that subject. An obvious example is the Federal Employer's Liability Act.²⁴ When there is a wreck in interstate commerce, the rights of the railroad trainmen against the railroad company are determined by federal law, even though the rights of injured passengers are left to the conflict of laws among the states.

A second effect is to leave the state local laws untouched, but to supplant the state rules of conflict of laws with a federal law. This is the effect of the full faith and credit clause and the implementing statute in the protection of sister state judgments.

A third effect of federal law is to restrain state conflict of laws within the range of reasonableness, but not to supplant it. This is what federal law now does as to jurisdiction of state courts and the requirement of notice. As to choice of law, the effect has varied. At one time, the Supreme Court of the United States seemed ready to write the vested rights theory into the Constitution and thus to prescribe the exact choice of law the state courts should make. Quickly, however, the Court retreated from that position and now, in "appraising the governmental interests of each jurisdiction," it leaves wide latitude of choice to the states.²⁵ More recently, it has begun guardedly to require the enforcement of sister state causes of action under the full faith and credit clause.²⁶

FEDERAL COURTS LAW

The role of federal courts in conflict of laws was long obscured by the doctrine of *Swift v. Tyson*²⁷ that there was a special federal courts common law in matters of commercial or general law. The overruling of that case by *Erie R.R. Co. v. Tompkins*²⁸ wiped out the separate law of the federal courts in diversity of citizenship cases. The *Erie* principle applies to conflict of laws, so the federal courts follow the conflict of laws rules of the states in which they sit.²⁹ The wise policy underlying this result was well stated in a circuit court of appeals case: "it is unfair and unseemly to have the outcome of litigation substantially affected by the fortuitous existence of diversity of citizenship."³⁰ If, however, the cause of action is one under federal law and the question involves the range of application of the law of

24. 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1958).

25. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547 (1935).

26. *Hughes v. Fetter*, 341 U.S. 609 (1951).

27. 41 U.S. (16 Pet.) 1 (1842).

28. 304 U.S. 64 (1938).

29. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

30. *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940).

the United States in the international area, then the answer is given by federal law.³¹

INTERNATIONAL CONFLICT OF LAWS

In this country, the principles of conflict of laws developed primarily in interstate matters, so there was lacking the aura of suspicion and hostility that may exist in international matters.³² When international cases came up, the principles developed in the *intranational* cases were transferred almost unquestioningly to the *international* matters. This is fortunate in these days of expanding international relations. Three cautions, however, are in order. First, the great increase of commercial activities by foreign nations and national agencies requires modification of the old principle that a foreign nation is immune from judicial jurisdiction.³³ Second, the hostility and aggressiveness of totalitarian regimes calls for more careful scrutiny of their laws and decrees. Lastly and in quite a different tone, the social arrangements in foreign societies must be viewed and treated with understanding and without provincialism, if fairness is to be done. Fairness was done in a California case, which held two contemporaneous wives under a valid foreign polygamous marriage were entitled to share equally in the estate in this country of their deceased husband, even though he could not have kept the two of them in his household here.³⁴ The distinction reached as to the contemporaneous wives is similar to the difference between economic claims and personal relations of successive wives under the doctrine of divisible divorce in this country.

There remains the question whether international conflict of laws is governed by state law or by federal law. It has been widely assumed that except for treaties and federal statutes it is governed by state law, thus varying from state to state.³⁵ Yet inevitably international private law bears on foreign relations. In a case involving a bank deposit in New York and a later executive agreement, the Supreme Court of the United States used sweeping language on the range of federal law:

Governmental power over external affairs is not distributed, but is vested exclusively in the national government. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally,

31. *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

32. Du Bois, *The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions*, 17 MINN. L. REV. 361 (1932).

33. See RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 72 (1962).

34. *In re Dalip Singh Bir's Estate*, 83 Cal. App. 2d 256, 188 P.2d 499 (1948).

35. See *Clark v. Allen*, 331 U.S. 503 (1947); UNIFORM FOREIGN MONEY-JUDGMENT RECOGNITION ACT.

state lines disappear. As to such purposes the State of New York does not exist.³⁶

In a case at this term of the Court two justices in a dissenting opinion revived the question of control by federal law, saying that "even in absence of a treaty, a State's policy may disturb foreign relations."³⁷ The question cannot yet be answered.

36. *United States v. Belmont*, 301 U.S. 324, 330, 331 (1937).

37. *Ioannou v. New York*, 371 U.S. 30, 32 (1962).

