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A SYMPOSIUM ON CONFLICT OF LAWS

FOREWORD

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The use of the symposium for enlightenment on current problems in the Law is most effective. However thorough the work of a single author may be, the result is the conclusion of one mind. Recognizing that the treatises of the great writers on Conflict of Laws show the main structure for that field, there is still need for the special articles of a symposium. In the great domains of the profession, one man's research and understanding cannot give to his reader the breadth of view attainable from the combined work of a group of scholars. This comment is applicable to Conflict of Laws.

The choice of this topic by the Vanderbilt Law Review for its annual special contribution to the profession is admirable. Not only is it a live subject in many fields, such as torts, domestic relations, sales, negotiable instruments, federal venue and judgments, but its importance has been emphasized by the changes wrought through the decision of *Erie Railroad Co. v. Tompkins.*

Although all the world's jurisdictions must deal with Conflicts problems, none have the same constant, pressing need for a grasp of its essentials as do the jurisdictions of the United States. In this country, a lack of foreknowledge concerning the law governing or that may govern transactions or litigation may have unfortunate effect. The possibility of unexpected complications is multiplied by our separate sovereignties, the unification of our trade territory, the shifting character of our population and now by our increased international contacts.

That the *lex loci* governs many private rights wherever such rights come to be examined is a rule filled with complexities and uncertainties. The line between procedural and substantive law is blurred. The power of the sovereign may have been exercised to affect the authority of the courts of the forum. The Full Faith and Credit or the Supremacy Clauses may have a bearing on the litigation. Although Justice Story established the constitutionality of the 25th section of the Judiciary Act in *Martin v. Hunter's Lessee,* problems under the 34th section continue as an aftermath of *Swift v. Tyson* and *Erie.*

We lawyers should be grateful to the distinguished and able jurists who have contributed to this Symposium to aid our understanding of the complexities of Conflicts.

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DIRECTIVE OR DIALECTIC?

HERBERT F. GOODRICH*

"The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."

The above statement is not a smoking room utterance of a baffled law student nor a patter song from the Gilbert and Sullivan opera. It comes from a formal paper from the dean of a great law school who is himself an outstanding authority in the field of tort law.[1] Karl Llewellyn has used language almost as strong, although he has not put it in writing. From counsel's brief in a current case comes this: "No field of law lends itself to so much casuistry and doubletalk as conflict of laws."

The first comment is that one should not be stampeded by talk like this. Torts has its spots of darkness both in expression and ideas, as its leading expositor above quoted well knows. Professor Llewellyn would admit the same for commercial law, at least for the time prior to the writing of the Uniform Commercial Code. Tax law develops concepts and word usage which sound like a foreign tongue to the uninitiated and the same is true of that part of property law known as future interests. The tendency of any group to develop its own ways of expressing or concealing thought is a general one and need not cause undue alarm for those whose field of interest is conflict of laws.

Second comment. Nevertheless, and despite what has just been said, when people working in other fields of the law speak as quoted of both the subject matter and the professors in the conflict of laws area, some of us had better take another inventory of our stock of ideas and our method of expressing them. To such an inventory this paper contributes but one idea, if indeed it contributes anything at all. In any event, it will have the merit of brevity.

The world would not come to an end if we did not have any rules of conflict of laws, speaking now of the "choice of law" part of the subject. If we did not, a court before whom a piece of litigation was brought would decide the legal question in accordance with the inter-

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1. William L. Prosser in *Interstate Publications*, part of the Cook lectures in the current year at the University of Michigan.

nal law of the forum. This could be justified on the basis that the plaintiff had brought his case to this court and had no complaint if the court applied the rules of law with which it was most familiar. A somewhat different explanation would have to be given for the treatment of the defendant, who obviously did not bring the case to this court. But, the answer could be, he is being given the best law there is because, of course, one's domestic rule is always superior to any differing foreign notions on a given question. The defendant therefore has nothing to complain about, any more than the plaintiff.

It is too late now to talk of any such easy solution to two-state problems. We have too many thousands of precedents for foreign law reference of some sort. Furthermore, the Supreme Court knows there is a built-up body of law here, and too wide a departure from it by a state may involve an offense against due process or full faith and credit.[2]

As is said about art, we could get along without conflict of laws, but not so well. We think it fair that, when people come into court with litigation involving operative facts which have occurred elsewhere, we make reference to the law of other states to determine rights and liabilities.[3] That response to the feeling of fairness is a strong and sufficiently adequate reason for making reference to foreign law in these cases instead of applying our internal rules every time. Interestingly enough, no judicial opinion ever seems to have talked about this point in so many words, at least no judicial opinion which this writer has ever found. Perhaps it is so clear that it can be safely assumed as a premise without labored explanation.

In addition to the consideration of fairness to the litigating parties, some system of reference to another state's rules is necessary to make an international and, *a fortiori,* an interstate system work. The protection to rights in chattels acquired elsewhere than in the state of forum, the effectiveness of the judgment of a foreign court, the obligation of foreign agreements — what an unhappy confusion we should have were we to disregard all of such as these. But the point need not be labored; there is such a thing as a set of rules for two-state transactions and nobody doubts it.

The judge makes what he considers the appropriate reference to foreign law when he has before him a case with foreign elements in order that he may examine that law to answer his legal problem. But note the important though obvious fact that his reference is preliminary to the determination of the dispute on the merits.

2. See Home Ins. Co. v. Dick, 281 U.S. 397, 50 Sup. Ct. 338, 50 L. Ed. 338 (1930); Hartford Accident and Indemnity Co. v. Delta and Pine Land Co., 292 U.S. 143, 54 Sup. Ct. 634, 78 L. Ed. 1178 (1934) (due process). See also Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 67 Sup. Ct. 1355, 91 L. Ed. 1687 (1947); John Hancock Mutual Life Ins. Co. v. Yates, 299 U.S. 178, 57 Sup. Ct. 129, 81 L. Ed. 106 (1936) (full faith and credit).

3. This point is well developed by Max Rheinstein in *The Place of Wrong: A Study in the Method of Case Law,* 19 TULANE L. REV. 4 & 165 (1944).

It follows from this, it is submitted, that the reference question, like other preliminary questions in litigation, should be one which can be settled as simply and quickly as the nature of the case permits. There is back of this need for simplicity the same urge that makes desirable simplified pleading and simplified procedure of all sorts preliminary to getting down to the main question in any piece of litigation. Conflict of laws rules should serve as a directive for the judge, not as entertaining dialectic for law professors.

It is commonplace but true that the purpose of litigation is to settle a dispute, not to ascertain absolute truth. That is the basis for such a generalization as that found in a once famous case. "But as the law is a practical science, having to do with the affairs of life, any rule is unwise if, in its general application, it will not, as a usual result, serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases fail to meet what would be desirable if the single case were alone to be considered."[4] The general statement, though not the particular application, was good in 1897, and is just as good in 1953.

This suggestion immediately calls forth the accusation that it produces a misleading simplicity.[5] It must be conceded, of course, that present-day problems in law as in life have a way of becoming complicated. Life does not consist of the four elements as Sir Toby Belch suggested, nor merely of eating and drinking as Sir Andrew Aguecheek replied.[6] Rules of law to determine rights inevitably become involved with "ifs" and "buts," "provided that" and so on. This shows itself whenever one tackles a legal question growing out of today's life and times. For instance, the American Law Institute is endeavoring to do a piece of technical work in the field of federal taxation. People constantly express the desire to have a tax law that is simple. One could write a simple tax law by imposing without deduction a tax on everyone's gross income. Even then there can arise most difficult and puzzling questions as to what is income out of a corporate transaction which involves a split-up, a split-off, a spin-off or a half dozen other things in tax lawyers' jargon. And when one moves from a simple tax on gross receipts to a tax on net income and endeavors to provide fair rules for determining what net income is to be, those rules get complicated, try as one may to make them simple.

In like manner, the rule of reference for torts cases, no matter how simple one attempts to make it, inescapably produces snarls when a court is confronted with the type of thing the Third Circuit met in

4. Allen, J., in Spade v. Lynn & B.R.R., 168 Mass. 285, 288, 47 N.E. 88, 89 (1897).

5. See review of *Goodrich, Conflict of Laws,* by Professor Monrad G. Paulsen, 2 J. LEGAL EDUC. 541 (1950).

6. Twelfth-Night, Act II, Scene 3.

Hartmann v. Time.[7] But this does not mean that simplicity of reference is to be dropped as a great desideratum. It does mean that it does not pay to get too excited about the possible economic, psychological, sociological and a half dozen other long adjectival considerations underlying the reference to be made in a tort case. Whether the reference is to the law where the alleged interference with a legally protected interest occurred or whether it is to the law where the alleged liability-creating act occurred is a matter which may be interesting argument in a classroom or in a moot court case. If it has been settled by enough judicial decisions so that one can say that such and such is the rule, it certainly should require very persuasive considerations to break in and endeavor to start changing it to something else. The same goes for many other references which, were the question without strong precedent, might well come out in a way different from the way they have been settled.

Conflict of laws is a new subject. It does not have the collection of literature which property and contracts, for instance, have. It needs discussion, argument. Lawyers have got to become conscious that two-state situations may make a difference and help the courts to determine what difference they make. But in the discussion and the argument it is to be remembered that conflict of laws references are only preliminary to examination of the merits of the case. Simplicity is a cardinal virtue.

The development of conflict of laws in England and America has been an indigenous one, a poor, ill-favored thing, perhaps, like Touchstone's Audry, but our own. Its history on the continent of Europe goes back much further and has been affected by considerations which are foreign to our problems and experiences. It is very doubtful whether our continental friends can help us much. Our problems are mostly interstate and interstate in a country bound together by a written constitution and a reviewing tribunal which binds all. Professor Cheatham has put this point most effectively in his scholarly paper, *American Theories of Conflict of Laws: Their Role and Utility.* He says:

> "It has become increasingly obvious that there may be important differences between the interstate and the international field. With the growing centralization of the country the Supreme Court has declared it will exercise its power over the interstate area in the light of the needs of our own federal union. With the breakdown internationally of the liberal capitalistic system and the appearance of sharply diverse economic and political systems, a host of novel and complex questions have appeared."[8]

7. 166 F.2d 127 (3d Cir. 1948).
8. 58 HARV. L. REV. 361, 394 (1944).

Our indigenous system is growing satisfactorily to meet its own particular needs. Grafting from a different species is not at present indicated. Maybe this is parochialism. But that is not important if it is right.