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NOTES ON METHODS AND OBJECTIVES IN THE CONFLICT OF LAWS*

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IN MAKING public some of my misgivings concerning our method of handling problems in the conflict of laws, I have heretofore been prudent enough to confine the discussion, in the main, to specific cases. The conclusions reached do, however, have broader implications, and on this occasion I propose to explore these to some extent although the more circumspect course would be to abstain from generalization until there has been adequate analysis of many more specific cases. My principal reason for venturing on this hazardous enterprise is that it provides a convenient way of pointing out problems which require further analysis.

Why does a court ever refer to foreign law? It may do so for various reasons, some of which have nothing whatever to do with conflict of laws.

Three residents of Chicago, on learning that their ancestor in a distant state has died, agree to dispose of the property in the estate and divide the proceeds on the assumption that they inherit equal shares. When one of them later sues the others for restitution in an Illinois court, on the ground that he was, in fact, entitled to a half rather than a third of the estate, there is no question of conflict of laws. The Illinois law of restitution applies. It is necessary, however, for the Illinois court to refer to foreign law in order to determine that a mistake was made.[1]

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[1] *Cf.* Haven v. Foster, 26 Mass. (9 Pick.) 112 (1829).

At the other extreme, a married woman residing in Massachusetts contracts with a merchant in Maine to guarantee a line of credit to her husband, the law of one of the states disabling married women to make such contracts, the other having emancipated them.[2] This may present the central problem of conflict of laws (to call it, as I am tempted to do, the "primordial" problem might be historically unsound).[3] The policies of the two states are different, and their interests may be in conflict. The court in which the action is tried will refer to foreign law, if at all, for the purpose of finding the *rule of decision.*

Between these extremes there are cases which are certainly conflict-of-laws cases, in the sense that they are treated in all the books on the subject; but in them, when the court refers to foreign law it is for a purpose other than that of finding the rule of decision. A proceeding is brought in New York for workmen's compensation against a New York employer on account of the death of a New York employee. A question is raised as to the plaintiff's status as widow. Although the couple had lived together as man and wife in New York for years, it develops that they were married in Italy, where they lived at the time. The court may refer to Italian law; but if so, it will be for a purpose other than that of finding the rule of decision. That is furnished by the New York workmen's compensation law. There can be no question in such a case of conflict with the interests of another state relating to legal consequences of industrial injuries.[4]

The distinction is difficult to formulate and difficult to apply, but it is substantial and important.[5] Conflict of laws, as we practice it, is concerned with references to foreign law for quite different purposes. Our failure to distinguish between them is to a considerable degree responsible for our troubles. The distinction needs to be clarified and better stated, so that it can be more easily applied; and we need to know more about the class of cases in which foreign law is referred to for some purpose other than that of finding the rule of decision. For the present, however, I divide all conflicts cases into (1) those in which

[2] *Cf.* Milliken v. Pratt, 125 Mass. 374 (1878).

[3] *Cf.* Sack, *Conflicts of Laws in the History of English Law*, in 3 LAW: A CENTURY OF PROGRESS 342 (1937), partially reprinted in ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON CONFLICT OF LAWS 1 (1956).

[4] *Cf.* Matter of Masocco v. Schaaf, 234 App. Div. 181, 254 N.Y.S. 439 (3d Dep't. 1931).

[5] See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1019 (1958).

the purpose of the reference to foreign law is to find the rule of decision, and (2) those in which the reference has some other purpose. *The following discussion is strictly confined to the first class.*

The central problem of conflict of laws may be defined, then, as that of determining the appropriate rule of decision when the interests of two or more states are in conflict—in other words, of determining which interest shall yield. The problem would not exist if this were one world, with an all-powerful central government. It would not exist (though other problems of "conflict of laws" would) if the independent sovereignties in the real world had identical laws. So long, however, as we have a diversity of laws, we shall have conflicts of interest among states. Hence, unless something is done, the administration of private law where more than one state is concerned will be affected with disuniformity and uncertainty. To avoid this result by all reasonable means is certainly a laudable objective; but how? Not by establishing a single government; even if such a thing were remotely thinkable as a practical possibility, we attribute positive values to the principle of self-determination for localities and groups. The attainment of uniformity of laws among diverse states is, to put it mildly, a long-range undertaking. Federations could be established wherein the central government, while not disturbing the autonomy of the states in their internal policies, would determine which of several interests must yield in case of conflict. Treaties might be useful in the accomplishment of the same purpose, but this approach to solution has certain inherent difficulties.[6] For various reasons, the political measures which would seem to be the only possible means of avoiding or adequately solving such problems have not done the job.

We do not, however, despair. We turn, instead, to the resources of jurisprudence, placing our faith primarily in the judges rather than the lawmakers. The judicial function is not narrowly confined; we indulge the hope that it may even be equal to the ambitious task of bringing uniformity and certainty into a world whose conflicts political action has failed to resolve. At first, of course, the judges will not be so bold (or so frank) as to avow that they are assuming the high political function of passing upon the relative merits of the conflicting policies, or interests, of sovereign states. They will address themselves to metaphysical questions concerning the nature of law and its abstract opera-

[6] See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 263-64 (1958).

tion in space—matters remote from mundane policies and conflicts of interest—and will evolve a set of rules for determining which state's law must, in the nature of things, control. If all states can be persuaded to adhere to these rules, the seemingly impossible will have been accomplished: there will be uniformity and certainty in the administration of private law from state to state. The fact that this goal will be achieved at the price of sacrificing state interests is not emphasized; rather, it is obscured by the metaphysical apparatus of the method.

The rules so evolved have not worked and cannot be made to work. In our times, we have suffered particularly from the jurisprudential theory which has been compounded in order to explain and justify the assumption by the courts of so extraordinary a function. The territorialist conception has been directly responsible for indefensible results[7] and, what is perhaps worse, has therefore driven some of our ablest scholars to consume their energies in purely defensive action against it.[8] But the root of the trouble goes deeper. In attempting to use the rules we encounter difficulties which do not stem from the fact that the particular rules are bad, nor from the fact that a particular theoretical explanation is unsound, but rather from the fact that we have such rules at all.

First, such rules create problems which did not exist before. Few will deny that the case of the married woman stated above poses a problem in the "conflict of laws" as we generally understand the scope of that subject; yet, the facts stated are insufficient to enable us to determine whether there is a conflict of interests between the states. If it is Massachusetts that has emancipated married women, there is no conflict, and no problem.[9]

Second, the false problems created by the rules may be solved in a quite irrational way—*e.g.*, by defeating the interest of one state without advancing the interest of another.[10] In at least some instances, this result could be avoided by contriving a different rule; but the substitute rule may be objectionable on other grounds. Thus, the irrational solu-

[7] See, *e.g.*, Cuba R.R. v. Crosby, 222 U.S. 473 (1912); Walton v. Arabian Amer. Oil Co., 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956); Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

[8] See COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942).

[9] See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 251 (1958).

[10] See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

tions given in the case of the married woman by the rule referring to the law of the place of contracting could be avoided by substituting a reference to the law of her domicile; but that rule would be commercially inconvenient and would consistently prefer the "obsolete" to the "progressive" policy.

Third, despite the camouflage of discourse, the rules do operate to nullify state interests. The fact that this is often done capriciously, without reference to the merits of the respective policies and even without recognition of their existence, is only incidental.[11] Trouble enough comes from the mere fact that interests are defeated. The courts simply will not remain always oblivious to the true operation of a system which, though speaking the language of metaphysics, strikes down the legitimate application of the policy of a state, especially when that state is the forum. Consequently, the system becomes complicated. It is loaded with escape devices: the concept of "'local public policy" as a basis for not applying the "applicable" law;[12] the concept of "fraud on the law";[13] the device of novel or disingenuous characterization;[14] the device of manipulating the connecting factor;[15] and, not least, the provision of sets of rules which are interchangeable at will.[16] The tensions which are induced by imposing such a system on a setting of conflict introduce a very serious element of uncertainty and unpredictability, even if there is fairly general agreement on the rules themselves. A sensitive and ingenious court can detect an absurd result and avoid it; I am inclined to think that this has been done more often than not and that therein lies a major reason why the system has managed to survive. At the same time, we constantly run the risk that the court may lack sensitivity and ingenuity; we are handicapped in even presenting the issue in its true light; and instances of mechanical application of the rules to produce indefensible results are by no means rare.[17] Whichever of these phe-

[11] This fault could be corrected, at least to a substantial degree, by the employment of "connecting factors" having significance for the interests involved, instead of significance only in terms of metaphysical theory.

[12] See Union Trust Co. v. Grosman, 245 U.S. 412 (1918).

[13] CHEATHAM, GOODRICH, GRISWOLD, AND REESE, CASES AND MATERIALS ON CONFLICT OF LAWS 519 (4th ed. 1957).

[14] See Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163 (1928); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953).

[15] *Compare* Mutual Life Ins. Co. v. Liebing, 259 U.S. 209 (1922), *with* New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).

[16] See Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y.S. 4 (Sup. Ct., App. T. 1936).

[17] See Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25

nomena is the more common, it is a poor defense of the system to say that the unacceptable results which it will inevitably produce can be averted by disingenuousness if the courts are sufficiently alert.

Fourth, where several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to "weigh" the competing interests, or evaluate their relative merits, and choose between them accordingly. This is especially evident when we consider two coordinate states, with such decisions being made by the courts of one or the other. A court need never hold the interest of the foreign state inferior; it can simply apply its own law as such. But when the court, in a true conflict situation, holds the foreign law applicable, it is assuming a great deal: it is holding the policy, or interest, of its own state inferior and preferring the policy or interest of the foreign state. Nor are we much better off if we vest this extraordinary power in a superior judicial establishment, such as our federal courts in the exercise of their diversity jurisdiction, or the Supreme Court in the exercise of its power to review state court decisions. True, such a superimposed tribunal escapes the embarrassment of having to nullify the interests of its own sovereign; but the difficulty remains that the task is not one to be performed by a court. I know that courts make law, and that in the process they "weigh conflicting interests" and draw upon all sorts of "norms" to inform and justify their action. I do not know where to draw the line between the judicial legislation which is "molecular," or permissible, and that which is "molar," or impermissible.[18] But assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources. Not even a very ponderous Brandeis brief could marshall the relevant considerations in choosing, for example, between the interest of the state of employment and that of the state of injury in matters concerning workmen's compensation.[19] This is a job

U. CHI. L. REV. 227, 245-46 (1958); *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 252 (1958).

[18] See the dissenting opinion of Holmes, J., in Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917).

[19] *Cf.* Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935). Even if such information were made available, the court could not candidly invoke it as the basis for its decision.

for a legislative committee, and determining the policy to be formulated on the basis of the information assembled is a job for a competent legislative body. We, of course, have such a competent legislative body in Congress; but it has not seen fit to exercise its powers under the full-faith-and-credit clause[20] in such a way as to contribute to the resolution of true conflicts of interest.

The Supreme Court, in deciding those choice-of-law questions which have come to it as questions of due process and full faith and credit, has, in the main, realized that "weighing" competing state policies is not a judicial function.[21] It has, therefore, interfered with a state's choice of law primarily when there is no real conflict of interests.[22] In cases of real conflict, it has usually allowed each state to apply its own law, and thus advance its own interest. To the extent that the Court has done otherwise, and has forced the interest of one state to yield to that of another, it has simply legislated. I do not rail against this, nor do I intend to crusade against the usurpation. No doubt the Court has been sorely tempted, seeing problems which it believes should be solved in a particular way, and frustrated by the failure of Congress to use its power to solve the problems. I simply want the record kept straight. I want it understood that such action by the Supreme Court must find its justification in politics, not in jurisprudence, and that its decisions in this field are to be evaluated accordingly. I do not want to be charged with responsibility for understanding or even inquiring why, as a matter of law, a fraternal benefit society is an "indivisible unity,"[23] whereas a building and loan society[24] or a mutual insurance company[25] is not.

We would be better off without choice-of-law rules. We would be better off if Congress were to give some attention to problems of private law, and were to legislate concerning the choice between conflicting state interests in some of the specific areas in which the need for solutions is serious. In the meantime, we would be better off if we would admit the teachings of sociological jurisprudence into the conceptualistic

[20] U.S. CONST. art. IV, § 1. See Cook, *op. cit. supra* note 8, c. IV.

[21] See, *e.g.*, Watson v. Employers Liab. Assur. Corp., 348 U.S. 66 (1954). This matter is considered in a paper entitled "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function," to be published in a forthcoming issue of the *University of Chicago Law Review.*

[22] As in Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

[23] *Cf.* Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915).

[24] *Cf.* National Mutual Bldg. and Loan Soc. v. Brahan, 193 U.S. 635 (1904).

[25] *Cf.* New York Life Ins. Co. v. Cravens, 178 U.S. 389 (1900).

precincts of conflict of laws. This would imply a basic method along the following lines:

1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.

2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.

3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.

4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

A probable by-product of such a method is the elimination of certain classical problems which are wholly artificial, being raised merely by the form of choice-of-law rules. The problem of characterization is ubiquitous in the law and can never be wholly avoided. Without choice-of-law rules, however, there would be no occasion for the specialized function of characterization as the mode of discriminating among the available prefabricated solutions of a problem; juridical gymanstics of the sort displayed in *Levy v. Daniels' U-Drive Auto Renting Co.*[26] would be beside the point. And, though I make this suggestion with some trepidation, it seems clear that the problem of the renvoi would have no place at all in the analysis that has been suggested. Foreign law would be applied only when the court has determined that the

[26] 108 Conn. 333, 143 Atl. 163 (1928).

foreign state has a legitimate interest in the application of its law and policy to the case at bar and that the forum has none. Hence, there can be no question of applying anything other than the internal law of the foreign state. The closest approximation to the renvoi problem which will be encountered under the suggested method is the case in which neither state has an interest in the application of its law and policy; in that event, the forum would apply its own law simply on the ground that that is the more convenient disposition.[27] Is it possible that this is, in fact, all that is involved in the typical renvoi situation?[28]

It will be said that it is no great trick to dispose of the characteristic problems of a system by destroying the system itself. But my basic point is that the system itself is at fault. We have invented an apparatus for the solution of problems of conflicting interests which obscures the real problems, deals with them blindly and badly, and creates problems of its own which, in their way, are as troublesome as the ones we originally set out to solve. Professor Yntema has suggested that Walter Wheeler Cook, instead of attempting to eliminate the weeds of dogma from the garden of conflict of laws, might have been well advised to reduce the whole garden to ashes, from which a phoenix might in time arise.[29] If I may vary this classic metaphor, we would indeed do well to scrap the system of choice-of-law rules for determining the rule of decision, though without entertaining vain hopes that a new "system" will arise to take its place. We shall have to go back to the original problems, and to the hard task of dealing with them realistically by ordinary judicial methods, such as construction and interpretation, and by neglected political methods.

The suggested analysis does not imply the ruthless pursuit of self-interest by the states.

In the first place, the states of the Union are significantly restrained in the pursuit of their respective interests by the privileges-and-immunities clause of article four[30] and by the equal-protection clause.[31] Incidentally, employment of this method would give a new importance

[27] See Currie, *Survival of Actions: Adjudications versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 229 *et seq.* (1958).

[28] *Cf. In re* Annesley, [1926] Ch. 692.

[29] Yntema, *The Historic Bases of Private International Law*, 2 J. AM. COMP. L. 297 (1953), reprinted in ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON CONFLICT OF LAWS 30 (1956).

[30] U.S. CONST. art. IV, § 2, cl. 1.

[31] *Id.*, Amend. XIV, § 1.

to those clauses as they affect conflict-of-laws problems. Ironically, and precisely because of their fault of operating mechanically and impersonally, without regard to the real problem of conflicting interests, choice-of-law rules have the virtue that they rarely discriminate in such a way as to raise problems as to the constitutional restraints upon discrimination.[32]

In the second place, there is no need to exclude the possibility of rational altruism: for example, when a state has determined upon the policy of placing upon local industry all the social costs of the enterprise, it may well decide to adhere to this policy regardless of where the harm occurs and who the victim is.[33]

In the third place, there is room for restraint and enlightenment in the determination of what state policy is and where state interests lie. An excellent example is furnished by Nebraska's experience with small-loan contracts. After first taking a position consistent with a rather rigid interpretation of its policy, denying effect to a foreign contract providing for somewhat higher interest rates than were permitted by local law, Nebraska reversed itself and conceded validity to such contracts where the law of the foreign state was "similar in principle" to the Nebraska small-loan act.[34] The policy of Nebraska was not to protect its residents against any exaction of interest in excess of a particular rate, but to protect them against exactions in excess of a reasonable range of rates, based upon the common principle underlying such acts. This sensible approach to the delineation of policy could find wide application, especially to laws relating to formalities. It is, in fact, this kind of thinking which supports such legislation as section seven of the Model Execution of Wills Act.[35] This is not so much a rule of alternative reference to the law of the state of execution, or of domicile, as it is a recognition that the policies of all the states are substantially the same and may be fulfilled by compliance with any—not just a particular one—of the formal requirements. Similar analysis may be

[32] *Cf.* Quong Ham Wah Co. v. Industrial Acc. Comm'n, 184 Cal. 26, 192 Pac. 1021 (1920), *writ of error dismissed*, 255 U.S. 445 (1921). This kind of analysis also tends to bring to the fore problems, not heretofore stressed, in the restrospective application of laws. *Cf.* Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924); see Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 230 n. 12, 257 n. 55 (1958).

[33] *Cf.* Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957).

[34] See Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N.W.2d 240 (1954).

[35] 9 A.U.L.A. 347 (1957).

expected to yield satisfactory results in the handling of the problem of consideration in the conflict of laws concerning contracts.[36]

I have been told that I give insufficient recognition to governmental policies other than those which are expressed in specific statutes and rules: the policy of promoting a general legal order, that of fostering amicable relations with other states, that of vindicating reasonable expectations, and so on.[37] If this is so, it is not, I hope, because of a provincial lack of appreciation of the worth of those ideals, but because of a felt necessity to emphasize the obstacles which the present system interposes to any intelligent approach to the problem. Let us first clear away the apparatus which creates false problems and obscures the nature of the real ones. Only then can we effectively set about ameliorating the ills which arise from a diversity of laws by bringing to bear all the resources of jurisprudence, politics, and humanism—each in its appropriate way.

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[36] See Pritchard v. Norton, 106 U.S. 124 (1882); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

[37] *Cf.* Hancock, *Choice-of-Law Policies in Multiple-Contact Cases*, 5 U. TORONTO L.J. 133 (1943); Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721 (1957); Cheatham and Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).