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## FOREWORD

*But these rules of private international law are made for men and women—not the other way round—and a nice tidy logical perfection can never be achieved. Certain elementary considerations of decency and justice ought not to be sacrificed in the attempt to achieve it.\**

Dissatisfaction with the operation of mechanistic choice-of-law rules, so eloquently voiced by Donovan, L. J., is certainly not new. But at least in the United States, the time has hardly ever been more opportune for a radical re-evaluation of this most intricate and confused area of the law. Concepts of "judicial" jurisdiction have expanded<sup>1</sup> while notions of constitutional limitations on the choice of law have receded,<sup>2</sup> so that courts are not only faced much more frequently with choice-of-law problems than ever before, but also much less restrained in shaping appropriate rules than was thought to be the case in the past. Of course, attitudes of yesteryear linger on in some places,<sup>3</sup> but so many outstanding courts and judges have recently risen to meet the challenges of the day<sup>4</sup> that some basic changes in choice-of-law techniques now seem to be inescapable, and their realization merely a question of time.

Still, while the field is clear, the path is not. The old orthodoxy has been destroyed by the simultaneous onslaught of new theories that are at odds with each other, and sometimes violently so. Up to now, courts have managed to benefit from new thinking on the conflict of laws without clearly appearing to prefer one of the new theories over the others—so much so that all commentators on a recent

\* Donovan, L. J., in *Formosa v. Formosa*, [1962] 3 All E.R. 419, 423, at 424 (C.A.).

<sup>1</sup> See Symposium, *Transient Jurisdiction—Remnant of Pennoyer v. Neff*, 9 J. PUB. L. 281 (1960); *National Equipment Rental, Ltd. v. Szukhent*, 84 S. Ct. 411 (1964).

<sup>2</sup> See generally Leflar, *Constitutional Limits on Free Choice of Law*, *infra*, p. 706; and Richards v. United States, 369 U.S. 1, 12-13 (1963).

<sup>3</sup> See, e.g., *Shaw v. Lee*, 258 N.C. 609, 619, 129 S.E.2d 288, 293 (1963), for an automatic application of the *lex loci delicti* to the question of interspousal immunity, and an express refusal "to voyage into . . . an uncharted sea, leaving behind well charted conflict of laws rules." Cf., more generally, GEORGE W. STUMBERG, *PRINCIPLES OF CONFLICT OF LAWS* (3d ed. 1963).

<sup>4</sup> The four landmark cases are *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Bernkrant v. Fowler*, 55 Cal.2d 588, 360 P.2d 906 (1961); *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

landmark case have managed to find their views confirmed.<sup>5</sup> Nevertheless, the time for decision in favor of one of the theories currently contending for mastery draws inexorably closer.

The present symposium pursues two basic aims. First and foremost, it seeks to convey a well-rounded picture of current American thinking on the choice-of-law problem, with a view to delineating the main tendencies and the areas of agreement—and, of course, disagreement. An interchange of manuscripts or galleys, while for technical reasons somewhat limited, has contributed, it is hoped, to underline the main points of harmony and strife. Secondly, the symposium is intended to portray some significant modern European theories of private international law, with the hope that a comparison of approaches and solutions might produce new and useful insights on both sides of the Atlantic.

Despite the cosmopolitan nature of the subject, such insights have not been conspicuous in the past; and it has even been suggested by eminent authority that a “belated and often erroneous reliance on mostly obsolete continental learning” by American authors shares a good portion of the blame for the present crisis.<sup>6</sup> It would be a dismal thought, indeed, that half a millennium of learned comment and disputation has produced only chaos and confusion.<sup>7</sup> The following remarks, while not necessarily central to the theme of this symposium, are intended to sketch an area where the experience of other nations and the thoughts of other authors, however seemingly remote in point of time or place, may still have some vitality.

One basic realization, inescapable for analytical purposes, is that of a qualitative difference between rules delimiting the scope of the forum’s own law and choice-of-law rules calling into operation the law of another jurisdiction. A satisfactory choice-of-law system—one that maximizes both enlightenment in the assertion of indigenous interests and respect in the recognition of foreign interests—can only be developed on the basis of such a differentiation. This basic difference has been repeatedly recognized,<sup>8</sup> but for reasons to be guessed at below, has time and again been buried underneath a theoretical as well as a practical preoccupation with the attainment of a “perfect” multilateral system of choice-of-law rules, *i.e.*, one that selects foreign and domestic law alike by the same objective criteria.

Put in simple terms, the problem of delimiting the scope of the *lex fori* is primarily one of technique and only secondarily one of policy, while the problem of the application of foreign law by the forum is primarily one of policy and only secondarily one of technique. The explanation is simple: The “spatial” reach of the *lex fori* is, at base, an element of the forum’s *internal* law—and an indispensable element, at that. It is therefore entirely possible to determine the scope of the *lex fori* from case to case merely through the construction and interpretation of the relevant

<sup>5</sup> See the comments of Professors Cavers, Cheatham, Currie, Ehrenzweig, Leflar, and Reese on the *Babcock* case, 63 COLUM. L. REV. 1219, 1229, 1233, 1243, 1247, and 1251 (1963).

<sup>6</sup> ALBERT A. EHRENZWEIG, *CONFLICT OF LAWS* 307 (1962).

<sup>7</sup> This is not, of course, the view of Professor Ehrenzweig: see, *e.g.*, *id.* at 308.

<sup>8</sup> For a painstaking documentation, see Ehrenzweig, *The Lex Fori-Basic Rule of the Conflict of Laws*, 58 MICH. L. REV. 637 (1960).

*internal* law of the forum, as is now suggested by Currie and as has been argued, in almost identical terms, by Wächter more than a hundred years ago.<sup>9</sup> An obvious example in point is the method of the "spatial" application of public regulatory laws, e.g., labor, currency control, and tax legislation. It has been well documented that in the United States, federal labor legislation is applied to transnational situations merely through the construction and interpretation of the relevant enactments;<sup>10</sup> the same goes for tax and antitrust legislation.<sup>11</sup> On the Continent as well, there seems to be substantial agreement on this point.<sup>12</sup>

Of course, the legislature might enact more definite rules for the "spatial" scope of its various enactments, as is customarily done in workmen's compensation acts in the United States,<sup>13</sup> and as has recently been done by the new German antitrust act.<sup>14</sup> But this is merely a technical device to clarify legislative purpose. Even the enactment of a general catalogue of rules for the application of internal law is merely a generalized way of indicating the "spatial" reach of the *lex fori* which would otherwise have to be ascertained through construction and interpretation. And finally, the problem of what F. A. Mann has felicitously called "primary construction,"<sup>15</sup> i.e., the interpretation of general terms employed by local legislation (such as "marriage") whenever foreign contacts are present, is at base also one of construction and interpretation of the *lex fori*—although a particularly vexing one. (Parenthetically, it should be added here that "conflicts" cannot logically arise where a valid rule of the *lex fori* makes itself, or another rule of the *lex fori*, applicable to the case at hand. It is for this simple reason that this author and Professor Rheinstein considered conflicts between two foreign laws to be more important under German private international law than conflicts between German law and foreign law—the latter being apparent for the German courts only in the rare case

<sup>9</sup> See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, esp. 183-84 (1963); Carl Georg von Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten* (4 pts), 24 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 230 (1841); 25 *id.* 1, 161 and 361 (1842), esp. at 24 *id.* 236-40 and 261-70. The similarity between the views of Currie and Wächter has been observed before; see Baade, Book Review, 10 JAHRBUCH FÜR INTERNATIONALES RECHT 330, 331 (1962); Wengler, *The Significance of the Principle of Equality in the Conflict of Laws*, *infra* p. 822 at 829 n. 31. However, this similarity extends only to views as to the reach of the forum's own laws. Wächter was quite unconcerned with either foreign choice-of-law rules or the teleologically determined scope of foreign law. For him, the applicability of foreign law depended upon the existence of a choice-of-law rule of the forum that was sufficiently clear to overcome the basic presumption in favor of the *lex fori*; and he therefore devoted the major portion of his study to the search for what we might call "true rules" of Germano-Roman common law that called for the application of foreign law. As to the choice of foreign law, then, he is more properly classified as a spiritual ancestor of Professor Ehrenzweig. See Ehrenzweig, *Choice of Law: Current Doctrine and "True Rules"*, 49 CALIF. L. REV. 240, 250-52 (1961).

<sup>10</sup> See generally D. P. Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 SUP. CT. REV. 34.

<sup>11</sup> See, e.g., *United States v. First National City Bank*, 321 F.2d 14 (2d Cir. 1963) (tax); WILBUR L. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (1958).

<sup>12</sup> See RUDOLF WIETHÖLTER, *EINSEITIGE KOLLISIONSNORMEN ALS GRUNDLAGE DES INTERNATIONALEN PRIVATRECHTS* 103-04 (1956).

<sup>13</sup> See generally 2 ARTHUR LARSON, *WORKMEN'S COMPENSATION* 375-79 (1952).

<sup>14</sup> See Shapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects II*, 62 COLUM. L. REV. 201, 236-48 (1962).

<sup>15</sup> Mann, *The Primary Question of Construction and the Conflict of Laws*, 79 L. Q. REV. 525 (1963).

where German public policy excluded the applicability of a foreign law otherwise competent under the relevant German choice-of-law rule.<sup>16</sup>)

Every rule of domestic law has to have *some* spatial scope; delimiting it is a question of legislative technique, and finding it, a question of judicial method. But as public international law seldom, if indeed at all, dictates the application of foreign law, the application of foreign law must necessarily rest on a policy decision of the forum that is independent of the "spatial" scope of the foreign rule as determined by the *lex causae*. Yet, despite this fundamental difference between the reasons for the applicability of foreign and domestic law, history shows that the overwhelmingly predominant trend has been towards "multilateralism"—*i.e.*, towards the development of a choice-of-law system that employs the same criteria for choosing foreign and domestic law. (The examples given above to illustrate the direct "unilateral" technique of construction and interpretation are all taken from areas where foreign law, being "public" law, is ordinarily not applied at all.)

The examples are familiar enough. Rome and Byzantium had no private international law to speak of; and the medieval glossators based their analysis of the problem by analogizing from a constitution of the year 380 A.D. that made Christianity the state religion for "cunctos populos" subject to Imperial authority.<sup>17</sup> The statisticians proceeded from the interpretation of similarly unilateral ordinances of the Italian city states. The major article of the French Civil Code dealing with the choice of law merely circumscribes the scope of *French* law; and a "multilateral" draft law on German private international law was rejected, to be replaced by a predominantly unilateral system. Yet it took scholars and courts but little time to "multilateralize" unilateral systems by the creation of rules calling for the application of foreign law on the basis of the same criteria that governed the scope of domestic law.<sup>18</sup> And the newer enactments on private international law, as, *e.g.*, those of Greece<sup>19</sup> and Italy,<sup>20</sup> are predominantly multilateral, as is the French draft after the rejection of Niboyet's proposals.<sup>21</sup> International associations are on record in favor of "neutral" multilateralism, and so are the European contributors to this symposium.<sup>22</sup>

One explanation for this curious recurring pattern could be the basic civil law method of evolving new rules through analogy from statutory enactments.<sup>23</sup> But

<sup>16</sup> See Currie, *The Disinterested Third State*, *infra* p. 754, at 765.

<sup>17</sup> C.I., I, I (Gratianus Valerianus & Theodosius, 380 A.D.).

<sup>18</sup> See generally WIETHÖLTER, *op. cit. supra* note 12, for a comprehensive discussion of "unilateral" choice-of-law rules. Cf. Sohn, *New Bases for the Solution of Conflict of Laws Problems*, 55 HARV. L. REV. 978 (1942).

<sup>19</sup> See BILATERAL STUDIES IN AMERICAN-GREEK PRIVATE INTERNATIONAL LAW (Nussbaum ed. 1957).

<sup>20</sup> See McCusker, *The Italian Rules of Conflict of Laws*, 25 TUL. L. REV. 70 (1950).

<sup>21</sup> See WIETHÖLTER, *op. cit. supra* note 12, at 17-23.

<sup>22</sup> Neuhaus, *Legal Certainty versus Equity in the Conflict of Laws*, *infra* p. 795, at 805-07; Wengler, *The Significance of the Principle of Equality in the Conflict of Laws*, *infra* p. 822, at 827. De Nova, *New Trends in Italian Private International Law*, *infra* p. 808, expressly abstains from taking sides, *id.* at 821.

<sup>23</sup> See, *e.g.*, the materials translated in RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 275-77 (2d ed. 1959).

the same predominance of neutral multilateralism could be observed, at least until recently, in Anglo-American countries—even in areas (especially torts) where the law is, and probably will remain, judge-made to a large extent.<sup>24</sup> It has also been suggested that the basic unilateral technique that applies, wherever the *lex fori* does not assert an interest, any foreign law deeming itself competent, fails to work in the famous “positive” or “negative” conflicts cases where the forum asserts no interest and the potentially relevant foreign legal systems either make conflicting claims or are all disinterested. A familiar continental example is the capacity of a Belgian domiciled in England or of an Englishman domiciled in Belgium, to be decided by a French court (France and Belgium follow the nationality principle; England applies the law of the domicile to some status questions). But this problem is relatively insignificant in any event; and it can be reduced still further if, as Currie proposes, the scope of the foreign legal systems is also determined by construction and interpretation of the foreign *internal* law.<sup>25</sup> It has been argued that such a process is impracticable for technical reasons, as courts are not qualified to make the necessary determinations as to the spatial policy of the foreign law,<sup>26</sup> but this argument, if taken at face value, means that courts are not competent to interpret foreign law as conscientiously as they interpret domestic law.

It is submitted that the basic objection to unilateralism goes much deeper—that it has its psychological roots in the Kantian categorical imperative, the fear of parochialism, and the dread of chauvinism.<sup>27</sup> The “moderate and restrained interpretation” of domestic law when in seeming conflict with foreign law<sup>28</sup> is, of course, intended to be a reply to this charge—a reply, incidentally, that is overlooked with somewhat disturbing frequency.<sup>29</sup> Yet even if the charge of national or local egotism could be shown to be entirely groundless (or, as this author believes, as justified to approximately the same extent as similar complaints against existing multilateral systems), the instinctive reaction, the visceral “sense of injustice,”<sup>30</sup> will remain. Together with the lawyer’s habit to generalize, and in combination with

<sup>24</sup> The reasons for the predominance of judicial legislation in this area are well stated by Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963). Note, incidentally, that three of the four recent landmark choice-of-law decisions (*supra* note 4) are torts cases.

<sup>25</sup> Currie, *The Disinterested Third State*, *infra* p. 754, at 784-85. Still, this approach might give rise to two new objections that are to some extent interrelated. First, the need for distinguishing between the foreign choice-of-law rule and the spatial reach of the foreign internal law would seem to resurrect the problem of characterization. More importantly, however, the foreign state may persist in keeping its choice-of-law system and its substantive law separate and distinct; and its choice-of-law rules might give expression to governmental interests that cannot be translated into private law terms but nevertheless are just as meritorious as governmental interests that can.

<sup>26</sup> Rheinstein, *How to Review A Festschrift*, 11 AM. J. COMP. L. 632, 663 (1963).

<sup>27</sup> A good illustration of this reaction is Ailes, Book Review (of Ehrenzweig), 63 COLUM. L. REV. 1544, 1547-48 (1963).

<sup>28</sup> Currie, *The Disinterested Third State*, *infra* p. 754, at 757; for earlier illustrations, see *e.g.*, CURRIE, *op. cit. supra* note 9, at 116; 368; 592-93 (all references are to portions of articles originally published before 1962).

<sup>29</sup> See, *e.g.*, Leflar, *Constitutional Limits on Free Choice of Law*, *infra* p. 706, at 723-24; Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 8-9 (1963).

<sup>30</sup> See generally EDMOND N. CAHN, *THE SENSE OF INJUSTICE* (1949). Cf. Ailes, *supra* note 27.

another legal predilection: that of testing propositions by extreme hypotheses, this tendency might possibly again, as it invariably has in the past, multilateralize a promising unilateral system. And yet, there is hope that this time, the lessons of history will combine with the accumulated wisdom of the ages to guide us, if not to a permanent solution, then at least to a continuous attempt that is inspired by the words quoted at the beginning of this symposium.

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