February 1930

Public Policy in the Law of Conflicts

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Every lawyer realizes the delicate accuracy of Maitland's description of the law as a seamless web. At the same time all who follow the profession know the practical necessity of division and subdivision, of classification, of the use of the mental tools called concepts. In every day use of its rules and principles as applied to concrete sets of facts, we must treat the law as though it were made up of separate parts. Much is being said today about a new grouping of legal problems for study by law students. The comparative merits of the present orthodox classification and possible rearrangements of legal problems into some other scheme is not in issue here. I want rather to present some observations concerning that branch of legal principles commonly known as Conflict of Laws, or, less commonly in this country, Private International Law. Their correctness or incorrectness will be the same whether the problems are treated under a general heading called Conflict of Laws, or are distributed about the various branches of the law under some other scheme of classification.

A new name might be an improvement, for the present term suggests misleading conceptions. There is no echo of the clang of resounding arms in the Conflict of Laws section of a law library. On the contrary it is a product of the piping times of peace. A Conflict of Laws situation is presented whenever a legal situation arises in which there is a foreign element. By foreign is meant either another country, or another State of the United States. As described in the opening section of the American Law Institute's Restatement: "The Conflict of Laws deals with the extent to which the law of a State operates, and determines whether the law of one or of another State governs a legal situation."

Conflict of Laws is of the younger generation in the family of common law subjects. Its students find little material in the old cases in which strong, tough-minded judges were laying down the rule in Shelly's case or applying the Statute of Quia Emptores. Almost nothing appears of

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cases involving foreign claims or foreign claimants. Scholars in the Year Books have brought to light one interesting decision from the reign of Edward the Second, in 1305. John brought his writ against William and in testimony of the debt put forward a deed made at Berwich. Defendant's counsel objected: "You cannot take cognizance of this deed which was made outside the realm". This objection was sustained. "And because it was made at Berwich", so the report runs, "where this court has not cognizance, it was awarded that John taken nothing by his writ". With this terse but conclusive statement the curtain falls. It was not until three hundred years later, after the union with Scotland, that Conflict of Laws decisions began to appear in the English reports.

One wonders what went on with regard to these cases in those three hundred years. Did no English merchant fail to keep his agreement with a foreign trader? Did no foreign heir claim an English inheritance? Both of these things must have happened, even in those dark days of difficult and dangerous travel. Could it have been that the disputes which we know must have arisen in the course of trade were settled by the merchants in their own courts which we now know were a part of every great fair? The law of these courts was not the common law of England, nor the civil law of the Holy Roman Empire. It was the "law merchant" and was applied, presumably, regardless of domicile or nationality of the disputants or the place of their transactions. The court of Chancery too, during part of this period, was assuming authority in some of the merchants' causes. The Chancellor's method, however, was to refer the dispute to arbitrators, and enforce their award. No body of substantive law, therefore, was built up by this method.

Our common law of Conflict of Laws is of very modern development. Mr. Justice Story's book did not appear until 1834 and it was for years thereafter the only book much cited by common law courts in Conflict of Laws cases on either side of the Atlantic. There was little case material for Story to cite at the time his book appeared. He raised many hypothetical problems, discussed what had been said
on the subject by various continental writers, and frequently hypothetical problems, discussed what had been said quently followed the discussion with a guess of his own as to what course might be followed by common law courts. Story's book has had great influence upon the courts. Much of it has been good; some of it unfortunate, as when an off hand guess by the author has been made the basis of decision of rights of litigants without further examination of principle or authority. Still more unfortunate has been the citation of a passage which the judge has paraphrased from some continental author as the opinion of Judge Story himself. Such careless use has been too frequent.

It is easy to understand why this branch of the law has been late in growth. For the development of principles of conflict of laws there must, I take it, be a concurrence of three conditions. First, there must be the existence of different states governed by different rules of law. If the earth were all a part of the Holy Roman Empire, with the same rules of law applicable in all parts, a possible difference in legal rights depending on a choice of law could never be presented. Second, there must be full and peaceful intercourse between the people of these different states. Third, lawyers and judges must have acquired enough of an acquaintance with this branch of legal learning to sense a conflict of laws problem when the facts of a given situation present it.

Let us examine briefly, the second of these statements. A man who lives his whole life in one spot from birth until death, conducts his business and social affairs and has his family about him, all in the same community, obviously presents no problem where his lawyer must struggle with the foreign element of a case. It is the modern age of steam and electricity out of which the law of Conflict of Laws can grow, not the era of stage coach and sailing vessel. This branch of our law is as much a product of the revolution in transportation as the Gothic filling station or the New York Stock Exchange.

That the growth of easy means of communication has created new problems in law is an obvious truism. But its application to Conflict of Laws is worth emphasizing, because it is the thing that turns this part of the law from
the hands of a few specialists, as for instance is the case in the practice in Admiralty, to a matter of concern to every lawyer, whether his community be large or small. A few homely instances will prove the point. Suppose, for instance, that a farmer from a hill county in West Virginia orders a new tire for his Ford car from a Chicago mail order house, sending a money order along with his letter. The tire comes, but proves to be defective. Was the sale made in Illinois? Does the Illinois law or the West Virginia law as to warranty of quality apply? Would it change the case any, if the tire had been shipped to the farmer direct from the maker in Akron, Ohio, on order to the maker by the Chicago merchant? Suppose a man from Marietta, Ohio, drives across the boundary river on an errand to Parkersburg, West Virginia. His automobile is struck by an interurban at one of those death trap crossings between the two towns, and the victim is killed. Where may suit be brought against the railroad for the damages suffered from this death? Who may bring the action? What state's law will determine the measure of damages? If West Virginia decisions have established the point that to avoid the charge of contributory negligence one must stop, listen, and if necessary get out and look at a grade crossing, will this rule be applicable if the suit is brought in Ohio? If a judgment is recovered against the railroad company, what persons will be entitled to share in the proceeds? What law is to determine whether the stockholders are liable if the company cannot pay?

Take another instance from every day life. A husband and wife who live in Virginia made a trip to Chicago. Assume that by Virginia law a married woman has not capacity to contract; assume that in Illinois a married woman may make contracts as though she were single. This wife goes shopping, buys on credit a new set of china for the family table. Does Illinois or Virginia law determine whether she may be held liable for the purchase price of the dishes? Is it possible that she might be held liable if sued in Illinois and not held liable if sued in Virginia? Illinois has a statute making the spouses both liable for purchases by either for family expenses. Could the Virginia husband be held liable for the price of the dishes under this statute?
The problems just stated have all arisen for settlement in recent American cases. Dozens of others might be given. They would be but cumulative evidence on the general point. That point is that the business and personal lives of Americans, even those in the humblest circumstances, have transcended artificial state boundary lines. The answer to the legal problems thus created is of importance to every member of the legal profession, whether he represents clients as counsel or sits as a judge to determine legal rights and liabilities.

The third element necessary for the development of Conflict of Laws principles is a recognition on the part of the courts and counsel that the foreign element in a question which has arisen for adjudication presents any different problem than that which is presented when all the operative facts have a domestic setting. It is highly probable that more mistakes have been made by overlooking the foreign element of a case altogether than in deciding what effect is to be given it when counsel and court have it in mind. The ignoring of the Conflict of Laws problem is shown in a recent decision from the Supreme Court of Minnesota. Suit was brought in Minnesota for injuries sustained in an accident which took place during an automobile race at the North Dakota state fair. One of the racing automobiles left the track and plunged into the crowd of spectators, killing one and injuring several others. The North Dakota statute, giving the widow a right of action, was mentioned by the court in discussing the question of liability. This is the only significance given the foreign setting of the case. The question of the responsibility of joint adventurers, contributory negligence, and personal liability of corporate officers were all well discussed but without a single reference to North Dakota law, and this by an able judge of a strong court whose decisions upon Conflict of Laws questions have been conspicuously excellent. The decision may have, and probably did, reach an entirely just result. But the absence of significance given to its North Dakota factual setting is left unanswered.

Such omissions are less frequent than they used to be;

1Ellingson v. World Amusement Service Assn., 222 N. W. 335 (Min. 1928).
we may expect them to become less and less so as our lawyers and judges grow more familiar with the facts and the law of two state transactions. While in many states Conflict of Laws is still not listed as a separate branch in which an applicant for admission to the bar is to be examined, almost all of our law schools offer fairly complete courses in the field. Few men come to the bar today without at least some knowledge of Conflict of Laws.

In spite of increased interest and increased knowledge, even today we do not have an abundance of secondary material on the Anglo-American treatment of this interesting field of law. In this country Story has been followed by Wharton's book in three editions, the last of which is very helpful. The late Professor Minor's book has been much used. Fortunately it is to be kept up to date by a new edition now in course of preparation by Dean William Van Vleck of the George Washington University Law School. Westlake's Private International Law is a good English book, although it is over-shadowed by that of Professor Dicey. Dicey on Conflict of Laws has gone through four editions. It is clear, well written, reliable and scholarly. Like many English authors he seldom if ever ventures beyond either decision or dicta of the ruling English cases, but for a quick and dependable reference to the law of Great Britain, Dicey can hardly be improved upon. Our American digest system has no topic heading "Conflict of Laws", although the publishers are working upon plans for its inclusion. Without such heading, ready access to decisions in the larger topics can be had by examination of the sub-heading under the title "What Law Governs". The newer encyclopedias such as Ruling Case Law, and Corpus Juris, have a treatment of Conflict of Laws, with appropriate cross references to discussions of Conflict of Laws questions in other parts of the work. The various annotated series of case reports are highly useful in work upon Conflict of Laws problems, both for the selection of important new decisions, and the exhaustive notes upon the cases reported. The law reviews, especially those published by our American law schools, are a mine of valuable material on all phases of the subject. The wealth of new decisions upon im-
important points makes easy the problem of selection of interesting material for comment. In the Michigan Law Review for 1926-1927 there appeared twenty-eight comments on recent decisions which seemed important enough for discussion; in the following year (1927-1928) twenty-six. This was in addition to leading articles on wider phases of the various problems than could be covered in a short comment. The comments for one year covered a wide range. Jurisdiction over foreign corporations, annulment of marriages, suits against absent non-resident motorists, foreign marriages, custody of children in divorce suits, enforcement of foreign judgments, survival of claims for tort—these are a few interesting samples from the list. The Law Library Journal Index to Legal Periodicals for 1927, which covers the principal law journals printed in English contains sixty-nine paragraph headings under Conflict of Laws. This, of course, is in addition to such problems in that subject as may have been treated and indexed under some other heading. The lack of attention to questions of Conflict of Laws in the sixteenth century is amply compensated for by the activity of the student of the law three hundred years later.

II.

One who talks about this phase of learning may well be called upon to show any reason for its existence. Why do we need rules for these cases with something foreign in them, in addition to all the trouble courts and lawyers are compelled to take in settling purely domestic disputes? One might ask further, why bother with foreign cases at all? Presumably no one would want to go so far as to make a general rule along the line of the English decision in 1818, already mentioned, and say that if the particular case has a foreign setting we shall have nothing whatever to do with it. That would be too obviously inconvenient for too many people. One against whom a claim is made could escape liability altogether by remaining away from the place where his obligation was imposed. Many cases, too, involve events which have taken place in two or more states, and have therefore a foreign element in them no matter where presented for settlement. The very inter-state and interna-
tional movements of Americans makes such a parochial limitation of enforcement of legal rights an impossible one. It is surprising to find though how frequently there appears legislative expressions of hostility to the local trial of foreign claims, or litigation by foreign claimants. This hostility appears in statutes closing the local courts to the trial of certain types of foreign claims, of which that for death by wrongful act is a common example. Such statutes probably have no general significance in view of the well established and almost universally accepted doctrine permitting suit on a claim regardless of its place of origin wherever personal jurisdiction over the defendant may be obtained.

A more searching question may be put. Why should there be any special rules made for foreign cases? For example, take the situation supposed above, where the Ohio man driving from Marietta to Parkersburg was killed at the railway crossing on the West Virginia side of the river. If a plaintiff chooses to sue in Ohio to recover the damages resulting from this distressing accident, why should the Ohio court be asked to apply any different rules of law to the case than if it had occurred between Marietta and Zanesville, Ohio, assuming the other facts to be identical?

The answer to this fundamental question is seldom found stated in reading the decisions. But it is nevertheless a major premise, even if an unarticulated major premise, upon which many elaborate doctrines are based. The premise, spelled out, must be that fairness to these parties requires a different treatment of a West Virginia set of facts in an Ohio law suit than is given an Ohio set of facts which is just the same except for the fact of a state boundary between them. To that series of events which took place in West Virginia and culminated in the collision and the death of the driver of the motor car, the law of West Virginia attached certain consequences. Assume one of such consequences to be that the widow of the victim was given a claim against the railway company for $5,000. If it were not paid, she was entitled to go to court and secure an order, in the form of a judgment, that she was entitled to this amount from the company. Her rights thus acquired should not be changed by the fact that for one reason or another enforcement of them by legal action is presented
somewhere else than at the scene of the accident. Nor should the defendant's obligation to her, as thus fixed, be changed, either by being increased or diminished by this fact. Fairness to the parties requires that the obligations created between them remain unchanged by fortuitous changes in the geographical locations of either until such obligations are settled or otherwise discharged.

Other instances may properly be given, since the point is a fundamental one. Two people in Massachusetts made an agreement, whereby one promises to do certain things for the other. They reduce their terms to writing, each signs his name and follows his signature by a seal. By the rules prevailing in Massachusetts the agreement is legally binding upon both parties. A question concerning the contract comes up in Minnesota, where the legislature has passed a statute abolishing the common law significance of the seal. Shall this Massachusetts agreement be denied effect in Minnesota because, in that state, a different method must be followed to make a promise binding at law? Or is it the fairer thing to recognize and give effect to the consequences that Massachusetts law attributed to this Massachusetts transaction. The latter answer appears the only fair one, either upon a first and non-technical reaction, or upon further reflection and study. Both a sense of fairness and a consideration of general commercial convenience require that when a matter has been settled, in conformity with the law then and there controlling the actions of the parties, the settlement should not be disturbed because the point arises for litigation somewhere else.

In instances involving personal relations the appeal for uniform treatment becomes, emotionally, at least, even stronger. A child born prior to the marriage of its parents is legitimated under the law where they all live, by the subsequent marriage of its father and mother. Is the child to be tainted with the stain of bastardy if it comes into some other state where no legitimating effect is given to local marriages subsequent to the birth of a child? Again, should a man and woman be treated as divorced in one state as still married to each other in a second? Of course the answer ought to be no, but such scandal unfortunately is not unknown to the law. We have too many instances
where a spouse has secured a divorce and remarried only to find that in some other state the second marriage will not be recognized and the relations of the parties are considered meretricious. In some instances the situation has arisen because of the fraud and perjury of the individuals concerned. In others the unfortunate situation is due to differences among courts as to the law. With the first class, we can give little help. The way of the transgressor is purposely made hard. But the second class should be an object of anxiety and concern to all who follow the law.

Fairness demands that once one's rights and liabilities are settled under the law, those same rights and liabilities shall be the measure of legal obligation everywhere. This fundamental premise is at the bottom of nearly every Conflict of Laws case. Rights thus acquired, obligations thus imposed, should be recognized and enforced wherever occasion may demand, unless an exception is to be made where some countervailing rule of policy or expediency precludes it. Such a possible exception will be mentioned later.

If the soundness of what has been called the fundamental premise be granted, it must not be concluded that the settlement of all Conflict of Laws problems has been automatically made. No magic "Open Sesame" has been provided. We are, in fact, only at the threshold of the questions which must be answered in the development of our doctrines of Conflict of Laws. Sometimes the questions are not difficult. In our case of the automobile wreck, for example, all of our setting was made up of West Virginia properties, except the Ohio man and his car. It is not hard to conclude that the habitat either of man or car is not an important element in determining what state's tort rules are to apply in determining the legal consequences of this accident. American courts would unanimously agree that wherever the case was tried the rules of West Virginia tort law would be applicable.

But all problems are not so easily settled. Admitting that when rights are once settled under a contract which is valid they should be given effect everywhere, what law shall we look to, to determine whether a valid contract has been made? Suppose a New York business man dictates an answer accepting an offer of a manufacturing house to sell
him a quantity of merchandise at a stated price. The seller does business in Chicago, delivery of the goods is to be in St. Louis. The letter of acceptance comes to our business man’s desk just before closing on Saturday noon. He signs it and being the last one to leave the office, decides to mail it himself. He put it in his pocket, but forgets all about it until he gets to the country club in New Jersey, where he is to play golf that afternoon. He mails the letter from the club. What state’s contract law is to fix the rights of parties under this agreement?

Another instance: an Illinois man wanted to borrow some money to repair his house. He visited his brother-in-law in Ohio, borrowed the money and gave his note for the amount. He promised to pay the note the next summer when his brother-in-law visited him in Illinois. The rate of interest stipulated for was illegal by Ohio law but valid by Illinois law. Which should be applied if the question arose in West Virginia?

Every layman who reads the newspapers has heard of this or that famous or notorious person who has gone to Paris or Reno to procure a divorce from an unsuccessful marriage. A short time ago there appeared in the press what purported to be an interview with Senor Arturo del Toro who was called the “father of the divorce law in Sonora, Mexico”. He is reported to have said:

“Sonora has supplanted both Reno and Paris as the mecca of unhappily married couples, for there is no residential requirement attached to its decrees. They call me an enemy of Cupid, but my sole aim is to bring happiness to the thousands of mismated couples in this country. I think I am Cupid’s ally, for the way through a Sonora divorce court leads to new life for those shackled by the inhuman publicity which attends open divorces in this country.

“Simplicity itself is the procedure of a Sonora decree”, Senor Del Toro explains. “Three papers are necessary—a power of attorney signed by the plaintiff, one signed by the defendant, and a copy of the marriage certificate. The plaintiff will be unable to present himself in the Sonora courts to sign the petition? Regrettable, but it can be arranged. It
will take a little longer, perhaps two months in all. If you can go yourself to Sonora, or get your partner in misery to go it will take but six weeks.\(^2\)

Among well known persons who were stated to have been this gentleman's clients are Dolores del Rio, motion picture actress, Mlle. Alda, of the Metropolitan Opera Company; Georgette Cohan, daughter of George M. Cohan.

The question of the effect to be given a foreign divorce has been before courts in this country scores of times. The Supreme Court of Iowa very recently refused to recognize the legality of a Mexican decree given under circumstances similar to those described by the Mexican lawyer in his newspaper interview.\(^3\) Persons who have remarried after securing divorces in states where they did not make their homes, have been convicted of bigamy and sent to jail. There is overwhelming support for the statement that a divorce granted to an individual in a state in which he does not make his home will not be given effect elsewhere.\(^4\)

The instances just given could easily be increased one hundred fold by anyone who has devoted any considerable thought and study to Conflict of Laws problems. They show, I hope, two things: (1) that the problems are difficult; (2) that their solution in terms of certainty is tremendously desirable. It is not alone for the people who get into a law suit that we need to have our law of Conflict of Laws in certain terms. Of far more importance are the thousands of persons who seek to avoid litigation by a careful compliance with the law which is to govern their conduct. They should be able to know what rule of law is to govern them and have reasonable confidence that this rule of law will be the measure of their rights and obligations whenever and wherever the question may subsequently arise. They do not ask that Florida change its rules of contract, or property, or divorce, to conform to those of New York. They only ask that it be made clear which state’s law they shall comply with in order that conduct in

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\(^2\)Detroit Free Press, Jan. 29, 1929.

\(^3\)Bonner v. Reandrew, 203 Ia. 1355, 214 N. W. 536 (1927), and see Baumann v. Baumann, 228 N. Y. S. 539 (1928), noted in 29 Col. L. Rev. 213 (1929).

\(^4\)See Goodrich of Conflict of Laws, pp. 284 \textit{et seq}. 
accordance with the rule governing shall be given the same legal effect everywhere. Judge Cardozo in his brilliant little book called “Paradoxes of Legal Science”, deals with the conflicting demands of fluidity and certainty in the law. “The play of imagination upon the material in the legal store-room does not”, he says, “always evoke the spirit of change. There are times when it will yield the answer that rest should be preferred to motion . . . . One finds it . . . in one of the most baffling subjects of legal science, the so-called Conflict of Laws . . . . The walls of the compartments must be firm, the lines of demarcation plain, or there will be overlappings and encroachments with incongruities and clashes. In such circumstances, the finality of the rule is in itself a jural aim.”

As I see it, this is the picture: We live in a civilization where state and even national boundary lines no longer have much to do with our every day lives. We conduct our affairs, both business and social, without regard to them. But such lines do have legal significance. Each nation, and in this country, each state, has its own law-making and law-enforcing machinery. This will continue to be the situation unless there is a sweeping revolutionary change, no signs of which are apparent at present. But we may expect in the future, as easy communication further develops, even less significance in boundary lines in the life of the private citizen pursuing his own affairs. It is the task of the legal profession to make the facts of twentieth century life fit into this political scheme with a maximum of fairness and a minimum of friction. We must work out the principles which determine the selection of the state’s law which is to govern a transaction with elements in it from a dozen different places. The solution must be a just one to the parties; it must be so clear as to be easily understood and applied. It must be one that all courts can and will follow. We deal here with a different sort of question than that presented where the problem is confined to one state. Clarity is highly desirable anywhere in the law. But there is no extreme necessity that the property law of West Virginia or that the contract law of West Virginia be the same as that of Michigan. Each state can apply its own rules to West Virginia and Michigan local affairs respectively and no one will be seriously inconvenienced. But it is ex-
ceedingly necessary that if a New York contract comes before a court either in Michigan or West Virginia or Iowa or Kansas that the court apply the same rule of Conflict of Laws to determine the treatment which this foreign contract is to receive. If it does not, the parties will find that which they thought definitely and legally settled, varying according to the court in which questions between them may happen by chance to be raised. Conflict of Laws must be made clear and it must be made uniform.

Here is a task that demands the best legal brains we can bring to its settlement. The problems do not come “silently one by one” like the stars in “Evangeline”, but crowd in upon us all at once. When we remember that in our own lifetime we have seen the development of telephones, radio automobiles, paved highways, and airplanes the reason is not far to seek. Wharton said in the preface to the second edition of his Conflict of Laws in 1881 that the number of Common Law decisions had doubled since he had written the first edition, which appeared in 1870. In Wharton’s time the age of steam and electricity had only begun. The real development has come since. The legal questions come before courts almost faster than they can be answered, much faster than they can be carefully considered. We need careful, critical study into every phase of Conflict of Laws problems by all the trained lawyers who can be induced to give their attention to them. Accumulated decisions must be re-read and re-analyzed, the operation of the law in action observed, social considerations carefully determined. The courts cannot do it alone. In many of our appellate bodies each member is expected to write from eighty to one hundred opinions a year, in addition to hearing arguments of cases, sitting on motions, and transacting routine business. The judges must have help. The opportunity is a tremendously stimulating challenge to legal scholarship.

We may confidently expect, in our deepening understanding of Conflict of Laws and its problems, to see an ever diminishing amount of the petty provincialism that marred its growth in the last century. Such provincialism has shown itself in so great a tribunal as the Supreme Court of the United States when the majority of the judges (against strong dissent it should be parenthetically stated)
refused to give effect to a French judgment in America. It has appeared in numerous instances where a court which has been asked to give effect to an out-of-the-state transaction has refused to do so for the reason that the local public policy forbade.

That there is a rule of Conflict of Laws which states that a court will not enforce a foreign claim when enforcement is deemed contrary to the public policy of the forum, is well settled. At least it is as well established as anything can be which has been declared and re-declared over and over again by judges and text-writers. But "public policy of the forum" is an elastic kind of a grab bag from which one can take out anything which he chooses to put in. Applied in its broadest sense, the doctrine might run something like this: the public policy of this state is declared in the rules of law laid down by our courts and those enacted into statutes by our legislature. If you present to us a claim arising from a set of facts occurring outside the state, we will not give you relief unless under our law a similar claim would have arisen if the facts had had a domestic setting. To do so would violate the policy of our own state as shown in its established rules on such facts.

No court nowadays would enunciate or apply the doctrine so baldly as this. Says the keen-sighted Judge Cardozo, "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home". But as one reads through the decisions on Conflict of Laws there appear too many instances where a foreign solution of a problem is denied local effect because the domestic solution is different. Such an attitude is not surprising. Any account of the early history of our nation will show the jealousies, the controversies, and suspicions that existed among the people of our several states. It is only natural that such an attitude should come to the surface in judicial decisions.

To refuse local effect to a foreign claim when the claimed right arises in a foreign country is unfortunate. As among the States of our Union it is absurd. We have a common

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5 Hilton v. Guyot, 159 U. S. 113 (1895).
law, a common language, a common national government. Our differences may be dear to us but they are all minor in their nature. It is highly unbecoming for one of our number to take the attitude that another's solution of a legal question is so highly offensive to its sense of justice that it will receive no recognition in the latter's courts. Take a concrete instance: New York and New Jersey have somewhat different rules regarding what speculative contracts are permissible. Some agreements permitted in New York are condemned by New Jersey as gambling affairs and they are declared void. Such an agreement, made in New York where valid has been refused enforcement in New Jersey as against New Jersey policy. Yet thousands of New Jersey citizens are as much a part of the business life of New York as are those who dwell on Manhattan Island. It would be hard to find a more striking instance of "an intolerable affectation of superior virtue" by one state toward another.

Further, there is something to be said about a phase of public policy that such a decision as that mentioned overlooks. There surely is a policy both of good morals and commercial stability in giving legal effect to agreement lawfully made. To deny enforcement to the foreign made contract makes the state of the forum a shelter for those who refuse to perform their legal obligations. Unlike the cases where a court refuses relief to persons in pari delicto, such a rule penalizes the obligor who, by hypothesis, was doing nothing forbidden by law when and where his contract was made. Both morality and expediency are opposed to such a conclusion.

Fortunately we may say with high confidence that this attitude is passing. As we get about our own and other countries more easily and more often we become not only less suspicious of other people's food and customs, but of their legal institutions as well. As those of us who are lawyers grow to a better understanding of Conflict of Laws problems, we see in their application the principle of tol-

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7 Flagg v. Baldwin, 38 N. J. Eq. 219 (1884).
8 The words are those of Mr. Justice Beach. See "Interstate Enforcement of Vested Rights," 27 YALE L. J. 656 (1918).
erance known as live and let live. We see that the full recognition of foreign rights according to the law which governed their creation is no abdication of our own sovereignty but the application of the principle of fairness voluntarily made by ourselves. Such fair and impartial application by ourselves invites us to the confident expectation that transactions occurring under the governance of our laws will receive the same fair treatment by other courts.

Another means of improving our law of Conflict of Laws will be a better understanding of its principles. In the older cases and textbooks, we find repeated over and over again the statement that the foreign law has no force locally except by comity. Its application, therefore, was to be denied when it conflicted vitally with a contrary rule established by local court or legislature. With this conception of the operation of a foreign rule or law, it is not surprising that courts were reluctant to displace their own good rules with what seemed to them inferior foreign products. The use of the term “comity” in this connection has probably been responsible for much misunderstanding. Where the rule of the foreign law is applied simply as a matter of courtesy to another state, adjudication of rights according to the rule of the foreign law rests on a very weak foundation. The real basis of Conflict of Laws rules would probably no longer be seriously disputed. We know that a court applies only the law of its own state. But the principles of Conflict of Laws are just as much a part of a state’s local law as are its rules governing descent of property, contracts, or a right of action for assault. When a court has before it a case involving a foreign element, its principles of Conflict of Laws determine whether it applies the rule to that set of facts which would have been applied if they had all occurred locally, or whether a foreign law is to be applied because of the presence of the foreign facts. Perhaps an illustration will make the point clear. When a man dies without a will, his personal property is distributed according to the laws prevailing at his domicile at the time of his death. It has sometimes been said that the law of the domicile had in that case an extra-territorial operation; that somehow it reached out and determined the succession of that property from the dead to the living. We now know
that this is not the case. We recognize now that the rule of distribution is that of the domicile at death but we know it is because the Conflict of Laws rule prevailing generally has adopted this principle as one of convenience. The state where the property is may change it by statute if it pleases. This has been done in Illinois and Mississippi. If it is tangible property, only the state where it is may tax its transfer upon the death of the owner. The rule of distribution is that of the situs of the property. But where the property had a foreign owner, the rule of distribution applied by the state of the situs is not that on its own statute book, but that of the owner's domicile. When it is recognized that Conflict of Laws is just as much a part of the municipal law of each state as any other branch of law administered by its courts, much of the suspicion attached to the application of foreign rules drop away. The use of the term "comity" in this connection may well be restricted to the number of guns to be fired in salute to a foreign admiral and the place which a sister-in-law of a visiting ambassador is to occupy at an official dinner.

There is one point in the decision of cases involving Conflict of Laws problems which is not so easily disposed of. If our ideal could be perfectly carried out, the enforcement of a claim acquired under foreign law would not only give the person entitled to it what the foreign law gave him, but it would give it to him in exactly the same way. Obviously a perfect realization of this ideal was impossible. When a man comes to a local court to enforce a right which he claims to have acquired under the law of another state, he must as a practical matter take the local machinery of justice as he finds it. We could not possibly, for instance, give a man with a claim for breach of a French contract a new system of procedure which would enforce his claim the way a French court would enforce it. This practical difficulty has led to a statement of the rule that matters of substance are governed by the law of the place which creates the right, but matters of procedure are governed by the law of the forum. Like so many generalizations, this rule is easy to state but difficult to apply. What is a matter of procedure and what is a matter of substance? Suppose
that the law of a place where the injury happens make contributory negligence a matter of defense by the defendant, but that the law of the place where the case is tried makes such a proof a part of the plaintiff's case. Must the plaintiff conform to the rule of the forum? Clearly it is going to make a great practical difference with the outcome of his case which rule is applied.

The question is a difficult one. There is no litmus paper test which will give you blue for substance and pink for procedure. Professor Lorenson has pointed out that in the development of Conflict of Laws rules in England during the eighteenth century, the English courts, impatient at the differing foreign laws, were inclined to treat as procedure everything which could be thrown into that category. Such a state of mind is pretty well past by now. But the problem has not disappeared and probably never can disappear. Local procedural differences may continue to have important practical effects upon the individuals concerned in a particular case. The best we can do is to give the parties, so far as local machinery permits, what they are entitled to under the rules of law which govern their transaction.

We have thus come to the recognition of what Judge Cardozo has happily called a wider public policy. The acceptance of this wider public policy will give us a more nearly perfect body of rules in the great and important field of Conflict of Laws. More than that, it will develop a closer relation among the citizens of our own beloved country, and a better understanding among the peoples of the earth.