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INTERNAL LAW DISTINCTIONS IN THE CONFLICT OF LAWS

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The basic fact which gives rise to Conflict of Laws is the division of the world into territorial states, with separate systems of courts and with distinct bodies of law for handling internal or local cases. Each system of courts and each body of law is set up and developed by a state with an eye primarily to cases and transactions wholly within that state. Men refuse, however, to confine themselves to one state, and in a single transaction they cut across the boundaries of half a dozen states. The Conflict of Laws problems created by such a transaction are usually handled by applying the law of the state deemed to have the most important relation to the case. A rule of Conflict of Laws is couched in two terms or sets of terms, one indicating the type of case or problem to be decided ("validity of a contract", "procedure", "legitimacy"), the other indicating the state whose court may pass on the case or whose law should be applied ("place of contracting", "forum", "domicil").

The formulation of these rules of Conflict of Laws does not end the difficulties, for the terms in which the rules are couched, of course, are not automatic in their application.[1] In each novel situation where one of the already formulated rules is urged to be controlling, the court must determine whether the problem or case is within the rule and must then identify the state indieated by the rule.

The problem of Classification, or "Qualification" as it is more commonly called, though much considered on the continent, has had little attention by common-law courts and writers. Professor Lorenzen's article[2] of fifteen years ago was the first discussion of it in English. An English writer has said: "English law and English lawyers seem to have been almost unaware of this important and fundamental problem of Private International Law."[3]

Various methods of handling the qualifieation difficulty have been

[1]"Private international law, apart from its intrinsic difficulties, has always suffered and sometimes almost seemed to collapse through its faulty and vacillating terminology." Mendelssohn-Bartholdy, *Delimitation of Right and Remedy in the Cases of Conflict of Laws* (1935) 16 BRIT. Y. B. OF INT. LAW 20.

[2]*The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247.

[3]Beckett, *The Question of Classification ("Qualification") in Private International Law* (1934) 15 BRIT. Y. B. OF INT. LAW 46, 81.

proposed.[4] Two of the methods have this in common — the use of definitions already developed. The first calls for the adoption by the forum of the content or definition of the term fixed by the Conflict of Laws itself. At times it has been proposed that the definition employed in the Conflict of Laws of an indicated foreign state should be used. The proposal that the foreign definition be employed is opposed by the writers on the subject and is rejected by the Restatement of Conflict of Laws, Section 7 of which provides in part: " . . . in all cases where as a preliminary to determining the choice of law it is necessary to determine the quality and character of legal ideas, these are determined by the forum according to its law."[5]

The second method is the adoption of the content or definition of the term worked out in internal law. The "internal law" of a state is the law applied to internal or local cases, cases with all their elements in the state. It is the purpose of this paper to show that the definitions and distinctions worked out in internal law may not be transferred uncritically and in gross to fill out the Conflict of Laws rule.[5a] The first part of the paper deals with rules of Conflict of Laws containing terms in use in internal law. The second part is concerned with situations in Conflict of Laws as to which it is sometimes said internal law distinctions are decisive, though the formulated rules do not contain internal law terms.

I

The introduction of internal law definitions into the rules of Conflict of Laws will be considered in connection with the rules relating to penal laws, public policy, and procedure.

Penal Laws. For over a century, it has been accepted that "The courts of no country execute the penal laws of another."[6] In determining whether a statute or a claim under it is penal within the meaning of this rule of Conflict of Laws, the courts have frequently drawn on characterizations of the statute in internal law cases.

Huntington, the creditor of a New York corporation, recovered a judgment in New York against Attrill, a director of the corporation,

[4] CHESHIRE, PRIVATE INTERNATIONAL LAW (1935) pp. 9–14.

[5] The limitations on the rule indicated by the RESTATEMENT itself are not here considered.

[5a] The paper does not concern itself with the question whether the definition of a term for one Confiict of Laws purpose may be carried over to all other purposes in Conflict of Laws.

[6] Chief Justice Marshall in The Antelope, 10 Wheat. 66, 123 (U. S. 1825). RESTATEMENT, CONFLICT OF LAWS (1934) § 611, gives the rule as follows: "No action can be maintained to recover a penalty the right to which is given by the law of another state."

because Attrill as director had falsely certified under oath that the full amount of the capital stock had been paid in. The plaintiff relied on a statute of New York providing that if any certificate by corporate officers was false in any material representation, the officers executing it should be personally liable for the debts of the corporation. In Maryland Huntington filed a bill in equity to reach property alleged to belong to Attrill, in order to satisfy the claim under the New York judgment. The Maryland court, assuming that the suit would not lie on the New York judgment if the original cause of action was penal,[7] proceeded to determine whether it was penal. The decisions it reviewed and relied on were internal law cases from New York and Maryland. In one of the cases, the New York courts had held a similar liability of directors fell within a statute fixing a short period of limitation as to "an action upon a statute for a penalty or forfeiture". In another New York case involving the survival of a similar claim, the statement was made that the New York courts had uniformly deemed such claims to be "penal in character". The Maryland case cited[8] involved a Conflict of Laws question as to the enforcement in Maryland of the statutory liability of the directors of a Pennsylvania corporation, but that case cited without discrimination internal law cases and Conflict of Laws cases and, indeed, gave greater weight to the internal law cases. Relying on these cases, the Maryland court held the Conflict of Laws rule applicable and denied Huntington relief.[9]

Huntington filed another proceeding against Attrill in the province of Ontario to satisfy the New York judgment. A witness testifying for Huntington as to the New York law stated that the New York courts deemed the statute "penal in its nature", and the Ontario court confirmed this statement through an examination of the New York cases referred to in the preceding paragraph. On this ground, principally, the Common Pleas Division dismissed the action.[10] On appeal, the Court of Appeals of Ontario was evenly divided in opinion.[11] Two of the four judges believed the characterization "penal" affixed to the statute by the New York courts was decisive of the Canadian case, for "those decisions are the law of the State of New York, and with that we are dealing."[12] The remaining judges, however, felt they were

[7]The assumption seems of doubtful validity. *Cf.* Milwaukee County v. M. E. White Co., 56 Sup. Ct. 229, 231 (U. S. 1935); RESTATEMENT, CONFLICT OF LAWS (1934) § 444.

[8]First National Bank of Plymouth v. Price, 33 Md. 487 (1870).

[9]Huntington v. Attrill, 70 Md. 191 (1889).

[10]Huntington v. Attrill, 17 Ont. Rep. 245 (1888).

[11]Huntington v. Attrill, 18 Ont. App. 136 (1890).

[12]Burton, J. A., 18 Ont. App. 136, 150.

bound neither by American Conflict of Laws decisions on what is penal in interstate cases nor by New York decisions as to the characterization of the New York statute.

> "It is, with all respect, a fallacy to say that this is a mere question of the existence, construction, or meaning of a foreign law which is to be proved as a fact in the cause by expert testimony. The question is one of the nature and character of the law, and that, it appears to me, must be ultimately defined and determined by the Courts of the country in which the action upon the foreign judgment is brought. They must be the judges of what is a foreign penal law in the sense in which that term is applied to a law which will, as being such, not be given effect to by them for it can hardly be that the question whether they shall take cognizance of the action or not is to depend upon the foreign expert's view of the nature of the law on which the judgment has been recovered."[13]

These two judges on an independent examination were of the opinion the New York statute was not "penal" within the meaning of the Conflict of Laws rule. But as the court was evenly divided, the decision of the trial court was affirmed.

In *Loucks v. Standard Oil Co.*, the New York courts were asked to enforce a death claim under a Massachusetts statute which allowed compensation at the suit of the personal representative of the deceased for the benefit of the family, for death occasioned by negligence, the recovery to be not less than $500 and not more than $10,000 and "to be assessed with reference to the degree of its [the defendant's] culpability." The Appellate Division, reversing the trial court, held the action would not lie because the Massachusetts statute was penal.[14] In reaching the result, the court relied, in part, on a Massachusetts case which characterized the Massachusetts statute as penal.

In no one of the three cases above outlined was any real consideration given by the court to the considerations of policy which, presumably, underlie the Conflict of Laws rule and which should shape its application and development. On the contrary, the courts seemed "to regard the word 'penal' as complete in itself, having always the same meaning regardless of possible differences in the sense or purpose of its use."[15] For this fundamental failure all three of the decisions were reversed by the appellate courts.

The decision of the Maryland court was reversed by the Supreme Court of the United States, because of the denial of full faith and credit

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[13]Osler, J. A., in 18 Ont. App. 136, 152–153.

[14]172 App. Div. 227, 159 N. Y. Supp. 282 (4th Dept. 1916).

[15]Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193, 204.

to the New York judgment.[16] In the opinion of that court, Mr. Justice Gray, pointing out the variety of meanings of the word "penal", warned "there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language." He then proceeded to consider

> "the question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State."

He concluded the answer depends upon

> "whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

Stating that the New York internal decisions could not "be regarded as concluding the courts of Maryland or this court, upon the question whether this statute is a penal law in the international sense," he concluded:

> "The test is not by what name the statute is called by the legislature or the courts of the State in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."[16a]

The decision of the Ontario Court of Appeal was carried to the Judicial Committee of the Privy Council, which reversed the Canadian court.[17] In holding the internal law decisions of the courts of New York, even with respect to its own statute, were not decisive of the Conflict of Laws question, Lord Watson said:

> "Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked."[18]

And after alluding to "the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal", the court stated its opinion "that the present action is not, in the sense of international law, penal."[19]

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[16]Huntington v. Attrill, 146 U. S. 657 (1892).

[16a]*Id.*, at 683.

[17]Huntington v. Attrill, [1893] A. C. 150.

[18]*Id.*, at 155.

[19]*Id.*, at 155, 161.

The decision of the New York Appellate Division in the *Loucks* case was reversed by the Court of Appeals.[20] Judge Cardozo put with sharpness the question before the Court:

> "Penal in one sense, the statute indisputably is . . . But the question is not whether the statute is penal in some sense. The question is whether it is penal within the rules of private international law."[20a]

Discussing a decision with respect to the statute of Massachusetts made by a court of that state, he said:

> "The courts of Massachusetts have said that the question is still an open one . . . No matter how they may have characterized the act as penal, they have not meant to hold that it is penal for every purpose . . . Even without that reservation by them, the essential purpose of the statute would be a question for our courts."[20b]

And speaking for a unanimous court, he held "that statute is not penal in the international sense."[20c]

These three decisions have been discussed at such length, beeause they reveal in the clearest way the error inherent in the uncritical introduction of an internal law definition of a term into a Conflict of Laws rule. Professor Beale has suggested a shift in emphasis.

> "In considering the problem of extra-state enforcement of penal law the courts have unfortunately placed the entire emphasis on an attempt to define the meaning of the term. In most of the cases at least it would seem that an elaboration of the reason for the rule would not only have been more eulightening generally but also more helpful to the court in arriving at the proper result."[21]

Such an examination of the reason for the rule, it is suggested in a thoughtful article,[22] may reveal that the rule is without substantial foundation and should be altogether rejected.

Public Policy. "A right acquired under the law of another state will not be enforced if it is of such nature that its enforcement would contravene the public policy of the state where enforcement is sought."[23] The term, "public policy", has given much difficulty in Conflict of Laws, as elsewhere in the law, because of loose use and variety of meaning.[24]

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[20]Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918).

[20a]*Id.*, at 102. [20b]*Id.*, at 103. [20c]*Id.*, at 103.

[21]BEALE, CONFLICT OF LAWS (1935) § 611.3.

[22]Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193.

[23]GOODRICH, CONFLICT OF LAWS (1927) p. 11.

[24]For an extended discussion of the use of the term in Conflict of Laws, see note (1933) 33 COL. L. REV. 508.

In *Loucks v. Standard Oil Co.*,[25] discussed above, the defendant sought to bar the enforcement in New York of the claim under the Massachusetts death statute on the additional ground that the statute violated the public policy of the forum. The argument for the defendant seems to have been that the death statutes of the two states were substantially dissimilar, and that the dissimilarity *per se* brought the case within the public policy rule. This defense, too, was rejected by the Court of Appeals.[26] In his opinion, Judge Cardozo showed that differences in internal law are not enough. On the contrary, as he pointed out:

> "The fundamental public policy [in Conflict of Laws] is perceived to be that rights lawfully vested shall be everywhere maintained. At least, that is so among the states of the Union."[26a]

And he restated the Conflict of Laws rule, without resorting to the troublesome term:

> "They [the courts] do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[26b]

The matter was concisely put, in more traditional language, by a trial court in the same state:

> " . . . it does not necessarily follow that our [internal] public policy differing from that of another State, will cause our courts to ban contracts made under a public policy different from our own."[27]

Unfortunately, later cases in the same state seem to have ignored the special meaning of the term in Conflict of Laws, and to have identified it almost completely with the policy marked out by the internal law of the state. In *Straus & Co. v. Canadian Pacific Ry. Co.*,[28] the defendant carrier, when sued for the loss of goods abroad, relied on a stipulation executed abroad exempting it from liability for theft or for negligence of its employees. The Court of Appeals of New York, while stating the validity of a contract is determined by the law of the place where it is made, refused to give effect to the stipulation, on the ground it

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[25] *Supra* note 20.

[26] One judge dissented.

[26a] *Supra* note 20, at 113.

[26b] *Id.*, at 111.

[27] Thuna v. Wolf, 130 Misc. 306, 308, 223 N. Y. Supp. 765 (City Ct. 1927), *rev'd on other grounds*, 132 Misc. 56, 228 N. Y. Supp. 658 (Sup. Ct. 1928).

[28] 254 N. Y. 407, 173 N. E. 564 (1930).

contravened the public policy of the forum. The court, quoting from a non-conflicts case, said:

> " . . . when we speak of the public policy of the state, we mean the law of the state, whether found in the Constitution, the statutes, or judicial records."[28a]

The language, it is submitted, is unfortunate; though the court may have had in mind that the numerous statutes of the state striking down exemptions from liability showed that such an exemption, in the language of the *Loucks* case, "would violate some fundamental principle of justice."[29]

In *Herzog v. Stern*,[30] the question was whether a cause of action in tort, which under the law of the place of the tort survived the death of the wrongdoer, could be enforced against his domiciliary representative in New York at a time when under the New York internal law such a cause of action did not survive. The majority of the court held the claim could not be enforced in New York, one of the grounds of decision being:

> " . . . comity depends upon the public policy of the state, and the Legislature had declared the public policy of this state when it provided that no action for personal injuries may be maintained against the executors or administrators of a decedent who resided in this state."

In the dissenting opinion by Hubbs, J., in which Pound, C. J., concurred, reliance was placed on the *Loucks* case, and it was emphasized that the internal public policy of New York as delimited by the existing laws should not be the test of the application of the rule of Conflict of Laws. Indeed, if there were such an identification of the terms, "rules in Conflict of Laws calling for the application of foreigu law . . . would be practically nullified."[31]

Procedure. "All matters of procedure are governed by the law of the forum."[32] This rule is never questioned, but there is wide disagreement as to what are matters of procedure. Professor Cook in a notable article[33] showed that the contrasting terms, "substance" and "procedure", are used to mark numerous distinctions in the law, eight of which he enumerated, each distinction having its own special legal

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[28a] *Id.*, at 413.

[29] Support is lent to this explanation of the case by the fact that the judge who wrote the opinion in the Loucks case concurred in the opinion in the Straus case.

[30] 264 N. Y. 379, 191 N. E. 23 (1934).

[31] GOODRICH, *op. cit. supra* note 23, pp. 11–12.

[32] RESTATEMENT, CONFLICT OF LAWS (1934) § 585.

[33] *"Substance" and "Procedure" in the Conflict of Laws* (1933) 42 YALE L. J. 333.

consequence and resting on special considerations of policy. If a particular matter has been characterized as "procedure" in a case involving one of these purposes, may that characterization be carried over uncritically and furnish the ready-made solution to the Conflict of Laws problem? In some decisions, this has been done.

In *Levy v. Steiger*,[34] there was an action in Massachusetts for a tort committed in Rhode Island. The question was whether a forum statute creating a presumption of due care on the part of the plaintiff in a negligence case was applicable to a suit on a foreign tort. The court, after repeating the Conflict of Laws rule as to procedure, stated it had been settled by an earlier decision in Massachusetts that the statute affected matters of procedure. In the case referred to the court had stated, it is true, that the statute "affects procedure"; but the case involved only the question of the constitutionality of the statute in application to a Massachusetts transaction.

An analogous use of a non-conflicts decision is found in the leading case of *Leroux v. Brown*.[35] The Court of Common Pleas held the fourth section of the English Statute of Frauds[35a] should be applied in an action in England on a French contract, because the language of the section, "No action shall be brought," and the ability to satisfy the statute by a writing subsequent to the contract, indicated the statute went to the "remedy" rather than the "right". In support of this conclusion, Jervis, C. J., cited the opinions in two non-conflicts cases to the effect that the section merely takes away the remedy.

The easy transfer to the Conflict of Laws cases of the result in the non-conflicts cases was induced by the identity of the terms used, "procedure" or "remedy". But the identity should not conceal that the questions in the two classes of cases are different and that each question is to be considered in the light of the particular issue involved. This has been so fully demonstrated in the article by Professor Cook[36] and so clearly made by other writers[37] that it will not be labored here.

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[34] 233 Mass. 600, 124 N. E. 477 (1919). [35] 12 C. B. 801 (1852).

[35a] 29 CAR. II, c. 3 (1677). [36] *Supra* note 33.

[37] "The term 'procedure' may have one meaning in matters of internal law, and a narrower meaning from the point of view of the Conflict of Laws. A precedent for this has been furnished us by the Supreme Court of the United States in the matter of 'penal' laws . . . The wide meaning given to the term 'procedure' in the Conflict of Laws has already done much mischief. Our courts would do well to keep in mind the real meaning of the rule that all matters of procedure are governed by the local law of the forum." Lorenzen, *The Statute of Frauds and the Conflict of Laws* (1923) 32 YALE L. J. 310, 330, 332.

"It cannot be safely assumed that the distinction between right and remedy adopted for other purposes, is always applicable in conflicts cases." McClintock, *Substance and Procedure in Conflict of Laws* (1930) 78 U. OF PA. L. REV. 933, 942. See also note (1933) 47 HARV. L. REV. 315.

The Restatement of Conflict of Laws in the Introductory Note to its Chapter on Procedure inferentially rejects, as do these writers, the blind use of definitions worked out in connection with other questions. After stating the importance of employing when practicable the law of the place of the transaction, and giving the reasons of policy for the Conflict of Laws rule as to the use of the law of the forum in certain situations, the Introductory Note continues: When "administration of the foreign law by the local tribunals [is] impracticable, inconvenient, . . . the local rules of the forum are applied and are classified as matters of procedure." The same thought is elaborated by Professor Beale in his recent treatise.[38] In each Conflict of Laws case, therefore, in which the rule as to procedure is invoked, it is for the court to determine whether the administration of foreign law is "impracticable, inconvenient."

The situations so far considered are the simplest ones in Conflict of Laws. The question before the courts, in a case as to a penal law or public policy, is whether the court will assume jurisdiction over the controversy; in a case as to procedure, whether the court will apply the forum law despite the foreign elements of the transaction sued on. In some of the cases criticized above, the court used the characterization of the statute or element given in internal law cases of the state of the transaction; in others, the court employed the characterization given in its own internal law cases. But the more carefully considered cases make clear that neither internal law characterization can be transferred to the Conflict of Laws case. The decision how to handle internal transactions has inevitably been made wholly without regard to any foreign element, for no such element was present and any consideration of it would have been misplaced. The rules of law and the terms they embody are formulated without regard to the Conflict of Laws question. In the Conflict of Laws case, however, the court is faced with a new question — What effect shall be given to the foreign elements? The considerations which dictate the answer to that question may be of a different kind from those shaping the relevant rule of internal law. In brief, internal law definitions can not be imported without examination into Conflict of Laws rules.

II

The situations considered in this subdivision of the paper are more complicated, as the transactions in question have contacts with several states and the problem is to determine which contact or group of

[38] BEALE, CONFLICT OF LAWS (1935) § 584.1.

contacts is decisive for the choice of law. The choice of law rules are rarely phrased in terms employed in internal rules. Nevertheless, internal law distinctions are frequently urged as decisive, and the question here considered is whether these distinctions may be taken over as the appropriate distinctions for the problems of Conflict of Laws.

Property. In Conflict of Laws property is divided into two kinds, "immovables" and "movables". The law governing the validity of a will, for example, differs with the kind of property, a will of immovables being governed by the law of the place of the land and a will of movables by the law of the domicil of the decedent at death.[39] In drawing the line between the two kinds of property for Conflict of Laws purposes, shall the court follow the line marked out in internal law between realty and personalty?

The internal law line was followed by the New York Court of Appeals in *Despard v. Churchill.*[40] In holding that a devise of a New York leasehold was governed by the law of the decedent's domicil, California, the court discussed the case wholly in terms of "realty" and "personalty" and relied on internal law cases for the conclusion that the leasehold was a chattel real.

The Chancery Division, however, rejected this method in a case concerning alleged equitable conversion through a direction in a will to convert English freeholds into money.[41] In determining the law governing the descent of the property on the death intestate of the beneficiary under the will, the court said:

> "The distinction between real estate and personal estate under English law has nothing to do with the question. The alternatives and the only alternatives for consideration are immovable property or movable property . . . the fact that [certain property] is regarded as personal estate for certain purposes in questions between our fellow subjects here has no bearing on the question whether such a mortgage should be regarded as a movable or not in questions of international law."[41a]

Torts. In a few cases, the defendant in one state, State X, is asserted to be liable under the internal law of another state, State Y, for the tortious act of an alleged agency or instrumentality in the latter state. Whether the relation of the defendant in X to the act in Y is such that the law of Y may be applied is a question of Constitutional Law; whether the relation of the defendant to the act is such as to make the law of Y applicable is a question of the common law of Conflict of

[39] RESTATEMENT, CONFLICT OF LAWS (1934) §§ 249, 306.
[40] 53 N. Y. 192 (1873).
[41] *In re* Berchtold, [1923] 1 Ch. 192.
[41a] *Id.*, at 200.

Laws. Can these questions of Constitutional Law and of Conflict of Laws be answered by first determining whether under the doctrines of causation in the law of torts the defendant would be liable in a wholly internal case in X or in Y? In two recent cases, the matter has been considered.

In *Young v. Masci*,[42] the owner of an automobile lent it in X (New Jersey) to a friend, with permission, as the court found, to drive to Y (New York). While in Y, the borrower negligently struck the plaintiff. The present action was brought in X by the injured party against the owner of the car to recover under a Y statute which made the owner of a motor vehicle liable for injuries resulting from negligence in the operation of the motor vehicle by any person operating it with the permission of the owner. The Court of X found the defendant liable and he appealed to the Supreme Court of the United States. Counsel for the defendant based his argument on the fact that under the X law a lender of an automobile was not liable for negligent injuries inflicted by the borrower in its operation. This immunity of the lender created by the law of the state where the lender acted must continue, so it was argued, when the car is taken into another state, and to use the internal law of the second state to impose liability on the lender was, it was said, a violation of the contract clause and of due process clause of the Fourteenth Amendment. So, "the essential question", as the court put it, was "the power of New York to make the absent owner liable personally for the injury inflicted within the state by his machine." The Supreme Court, affirming the decision of the X court, held the Y statute could constitutionally be applied to the X owner.

> "When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that state upon Balbino's [the borrower's] negligent driving as fully as if he had stood in the relation of master to servant . . . The power of the state to protect itself and its inhabitants is not limited by the scope of the doctrine of principal and agent."[42a]

The counsel for the plaintiff had argued that the Y law was properly applied, even if the defendant had not permitted the bailee to take the car into Y, saying:

> "Assuming that Young did not know at the time he lent his car that the bailee intended to take the car to New York, nevertheless he consented to the operation of the laws of New York because having lent his car for a day he was bound to know that the one to whom he lent it might go outside the state of New Jersey, and he took his risk of what the law of those states to which his bailee would take his car might be."[43]

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[42] 289 U. S. 253 (1933). [42a] *Id.*, at 258. [43] Brief of the appellee, p. 5.

The Supreme Court, however, did not find it necessary to pass on the contention, and expressly left open the question of the general test. Mr. Justice Brandeis said:

> "We have no occasion to decide where the line is to be drawn generally between conduct which may validly subject an absent party to the laws of a state and that which may not."[43a]

The Circuit Court of Appeals for the Second Circuit found it necessary to pass on a contention similar to the one quoted from the plaintiff's brief in *Young v. Masci.* In *Scheer v. Rockne Motors Corp.*,[44] a sales agent of the defendant, with territory in New York and Pennsylvania only, drove into Ontario in an automobile furnished by his employer. The plaintiff, a guest of the sales agent, was severely injured while in Ontario through the alleged negligent operation of the car. A statute of Ontario somewhat similar to the New York statute above outlined made the owner of a motor vehicle liable for damage suffered by reason of negligence in its operation unless the vehicle was in the possession of some one without his consent. In an action under the Ontario statute against the employer, in which the plaintiff recovered a large verdict, the District Court "ruled that the defendant might be liable even though it had not authorized Clemens [the sales agent] to go into the province at all."[45] On appeal, this ruling was held error, L. Hand, Circuit Judge, saying:

> "It is clear that the defendant did not give him authority to go to Canada merely by giving him the car. Unless more than that was shown, the law of Ontario could not reach the defendant."[46]

Though no constitutional limitation seems to have been invoked by the defendant, the court, discussing *Young v. Masci, supra,* said the opinion in that ease "should read equally as one on constitutional law, or on the conflict of laws."

> "It is true that the only point there before the Supreme Court was of the constitutionality of the New York statute; formally there is a distinction between that, and whether New Jersey ought to have raised a liability—a question of New Jersey law. But the same considerations determine both questions. The Fourteenth Amendment would protect the owner only in case he had no means of avoiding liability; when he chose to intervene by proxy in New York no such injustice resulted as made constitutional the action of New Jersey in holding him liable. Precisely the same reasons ought to determine whether New Jersey should raise up a liability, analogous to that of New York."[46a]

[43a] *Supra* note 42, at 260.
[44] 68 F. (2d) 942 (C. C. A. 2d 1934).
[45] *Id.*, at 944. [46] *Ibid.* [46a] *Ibid.*

The court then proceeded to determine whether the employer would be immune from liability, "if it [the employer] had authorized Clemens to take the car to Ontario, but if his errand in this instance had still not been within the scope of his authority; that is, whether the Ontario law might impute his wrong to the defendant merely from sending him into the province." On this the court held that if the defendant sent its agent to that province, the Ontario law could be applied to the defendant, even as to damages "too remote under ordinary principles."

These two cases taken together indicate that the internal law test of causation or liability is not to be used as the Conflict of Laws test of the necessary relation of the defendant to the harmful act in State Y. The Supreme Court rejected the causation or liability test set by the internal law of X. The Circuit Court of Appeals rejected the causation or liability test set by the internal law of Y.

Contracts. There is much disagreement and confusion as to the law that governs the validity of a contract. One rule which has the support of high authority[47] is that the "place of contracting" governs. The place of contracting—"place of making" is frequently used as a synonym—is the place in which occurs the last act necessary, under the law of contracts, to make a contract.[48]

> "It is necessary, therefore, in the first place, to determine *where* the contracts upon which this action is brought were made . . . *When* did the transactions become obligatory upon the parties as contracts? In other words, *when* were the notes delivered to the company, so as to invest it with the legal right of enforcing payment according to their terms; and *when* did the company become bound to the defendant, as an insurer. The answer to these questions involves the solution of the inquiry *where* the contracts were made."[49]

It results that the rules of Contract law are carried bodily over into Conflict of Laws and are made decisive. This method of dealing with the Conflict of Laws question, through identifying the Contracts question, "when", with the Conflict of Laws question, "where", has often been criticized.[50] It is unlikely that the same considerations of policy which induce a court to formulate a rule that a contract is complete at

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[47]RESTATEMENT, CONFLICT OF LAWS, § 332; BEALE, CONFLICT OF LAWS (1935) § 332.

[48]See RESTATEMENT, CONFLICT OF LAWS, § 311, Comment d, §§ 312-331.

[49]Hyde v. Goodnow, 3 N. Y. 266, 270 (1850). *Cf.* Shelby Steel Tape Co. v. Burgess Gun Co., 8 App. Div. 444, 448, 40 N. Y. Supp. 871 (4th Dept. 1896).

[50]Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565, 655, (1921) 31 YALE L. J. 53; Heilman, *Judicial Method and Economic Objections in Conflict of Laws* (1934) 43 YALE L. J. 1082.

a certain time are necessarily decisive considerations for the choice of law. "Many [continental] writers deny that the rules relating to the completion of contracts by correspondence from the point of view of time can be rationally invoked for the solution of the problem from the standpoint of the conflict of laws."[51] But if the considerations of policy for the two questions are not identical, the incorporation of the Contracts result into the Conflict of Laws rule means that the considerations appropriate to the Conflict of Laws problem are ignored, and the judge in the Conflict of Laws case has surrendered his power of decision to the judge in the Contracts case.

An example of the blurring of issues through the identity of terms occurs, it is believed, in the recent case of *Weissmann v. Banque de Bruxelles*.[52] The action was brought by the assignees of a New York corporation to recover from a Belgian bank the proceeds of a check drawn on the Treasury in Washington in favor of the corporation. The check had been indorsed by the corporate president and deposited in the Belgian bank for collection for his personal use without authority of the corporation. The Belgian bank collected it in Washington through its correspondent bank, and allowed the president of the corporation to withdraw the proceeds for his own use. The unusually interesting opinion[53] considered at length whether the law of the place where the check was delivered to the defendant should govern, but rejected that law because, as it said, the deposit for collection made the bank the "agent" of the depositor.

> "When the defendant bank accepted the check for collection for Bensuade, it became his banking agent. When it went outside the jurisdiction to collect the check for him, as it did when it sent the check to Washington for collection there, it was in the same position as if it had sent its agent to New York to collect for the corporate official a check drawn on a New York bank payable to the corporation. The law of New York would govern the transaction."[54]

Here the Court carried over into Conflict of Laws a characterization of the deposit-for-collection situation applied in non-conflicts cases.[55] In non-conflicts cases, however, there has been much disagreement as to how such a situation can best be characterized. It has heen called

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[51]Lorenzen, *The Theory of Qualifications and the Conflict of Laws* (1920) 20 COL. L. REV. 247, 253.

[52]254 N. Y. 488, 173 N. E. 835 (1930).

[53]Delivered by Pound, J. [54]*Id.*, at 495.

[55]The Court did not consider whether the characterization of the transaction by the Belgian law should govern because Belgium was the place where the defendant received the check.

"purchase", "bailment", "trust", and "agency".[56] A writer who has considered the problem with thoroughness objects to the exclusive use of any one of the terms or characterizations even in non-conflicts situations.

> "The chief objective [of the courts] appears to be to write in successive cases, although involving wholly different issues, a self-consistent statement of the law, following the supposed implications of the descriptive terms 'agency' or 'purchase', depending upon which may have been first used in the state . . . to attempt to sum up the contract in the one word 'agency' is to . . . allow an incidental matter, one of importance only in the unusual case, to outweigh all other elements of the transaction . . . It would be preferable to disregard the terms 'purchase' and 'agency' altogether and recognize that a broader formula is needed to serve as a rule of decision . . . While this may seem like attempting to blow both hot and cold at the same time, it is only so on the assumption that either 'purchase' or 'agency' as usually understood must serve as a starting point. To make such an assumption is to allow words to dictate decisions."[57]

Since there is disagreement on the appropriate characterization of the transaction even for non-conflicts purposes, it seems unsuitable to use a particular non-conflicts characterization as decisive of the Conflict of Laws case.

Constitutional Limitations. The extent of the control of the Constitution over choice of law is now in the process of development. In the course of the development, it is important that the essential nature of the problem be not obscured by confused terminology or by the use of misplaced concepts of internal law.

Conflict of Laws by its very nature deals with interstate and international cases. The federal control of the subject is part of the broad control of the central goverument over matters of interstate and international concern, illustrations of which are found in the interstate commerce clause and the treaty clause, and in the privileges and immunities clauses. In parts of this field, as in determining the extent of federal power[58] or the limits of state power over interstate commerce, the court has refused to be bound by the niceties of private law. When support for a municipal ordinance which actually burdened interstate trade was offered by an argument as to the time of the passage of title to the goods affected by the ordinance, Mr. Justice Holmes

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[56]See SCOTT, CASES ON TRUSTS (2d ed. 1931) p. 72, n.; COSTIGAN, CASES ON TRUSTS (1925) pp. 103, n., 111, n.

[57]Turner, *Deposits of Demand Paper as "Purchases"* (1928) 37 YALE L. J. 874, 897, 901, 902. *Cf.* BOGERT, TRUSTS AND TRUSTEES (1935) §§ 22-24.

[58]Stafford v. Wallace, 258 U. S. 495 (1922).

brushed aside the argument, saying: " 'Commerce among the several states' is a practical conception, not drawn from the 'witty diversities' (Yel. 33) of the law of sales."[59]

Unfortunately, the court has at times embraced the petty complexities of Contract law in its control of Conflict of Laws. In two well known cases, *New York Life Insurance Co. v. Dodge*,[60] and *Mutual Life Insurance Co. v. Liebing*,[61] the facts and issues were strangely alike. In each case, a Missouri policy holder had borrowed on his life policy from a New York insurance company, the funds to be loaned being forwarded from New York to Missouri. When the loan was not paid at maturity the insurance company had in each case appropriated the reserve to satisfy the loan, as it had the right to do under the law of New York and the provisions of the loan agreement. The common question in the two cases was whether a Missouri statute which forbade such an appropriation of the reserve and directed its use to another end could constitutionally be applied to the loan. In the first of the cases the Supreme Court by a five-to-four decision held the Constitution prevented the application of the Missouri statute, as the loan contract was made in New York. In the second case the Court unanimously held the Missouri statute could be applied, because the loan contract was made in Missouri. In the latter case Justice Holmes distinguished the earlier case because of a very slight difference in the policy provisions concerning the loan.

> "The policy now sued upon contained a positive promise to make the loan if asked, whereas, in the one last mentioned, it might be held that some discretion was reserved to the company. For here the language is, 'the company will . . . loan amounts within the limits of the cash surrender value,' etc., whereas there it was 'cash loans can be obtained'. On this distinction the Missouri court seems to have held that, as soon as the application was delivered to a representative of the company in Missouri, the offer in the policy was accepted and the new contract complete, and therefore subject to Missouri law. If, however, the application should be regarded as only an offer, the effective acceptance of it did not take place until the check was delivered to Blees [the borrower], which again was in Missouri, where he lived."[62]

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[59]Rearick v. Pennsylvania, 203 U. S. 507, 512 (1906). *Cf.* the language of Hughes, C. J.: "We do not regard that question [of the power of Congress to lay a tax upon the compensation of officers] as answered by mere terminology. The roots of the constitutional restriction strike deeper than that." Helvering v. Powers, 293 U. S. 214, 224 (1934).

[60]246 U. S. 357 (1918).

[61]259 U. S. 209 (1922).

[62]Mutual Life Insurance Co. v. Liebing, *supra* note 61, at 213–214.

This slight difference in language led to the result that in the *Dodge* case the loan contract was consummated in New York, while in the *Liebing* case the loan contract was complete when the indicated acts were done in Missouri and therefore it was made in Missouri; and as the opinion concludes, "the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act."[63]

In an earlier case, the same justice had used somewhat similar language in a cryptic opinion in a tort case.[64] In all of these cases the court seems to have treated as dominant a single element, as, place of making or place of wrong. This method of treatment, which might make all Conflict of Laws a part of Constitutional Law,[65] has met with strong opposition in the court itself. Mr. Justice Brandeis in the dissenting opinion in the *Dodge* case[66] pointed out that most of the acts done in the making of the loan contract were done in Missouri, not in New York, and that "it should, *if facts are allowed to control*,[67] be held to have been made in Missouri." In this insistence on control by the facts, the justice was evidently rejecting the formal place of contracting[68] as the appropriate test. Again, he urged that even though New York be deemed the place of making, nevertheless the Missouri statute could constitutionally be applied to the loan transaction.

> "Even if the rules ordinarily applied in determining the place of a contract required this court to hold, as a matter of general law, that the loan agreement was made in New York, it would not necessarily follow that the Missouri statute was unconstitutional, because it prohibited giving effect in part to the loan agreement. . . . The test of constitutionality to be applied here is that commonly applied when the validity of a statute limiting the right of contract is questioned, namely: Is the subject-matter within the reasonable scope of regulation? Is the end legitimate? Are the means appropriate to the end sought to be obtained? If so, the act must be sustained, unless the court is satisfied that it is clearly an arbitrary and unnecessary interference with the right of the individual to his personal liberty."[68a]

He found the Missouri contacts with the transaction made it entirely reasonable for Missouri to apply its law to the transaction.

In later cases, the court has refused to single out any one element as by itself controlling, but has grouped the factually important elements

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[63] *Id.*, at 214.
[64] Western Union Telegraph Co. v. Brown, 234 U. S. 542 (1913).
[65] See RESTATEMENT, CONFLICT OF LAWS, § 43, Comment to Caveat.
[66] *Supra* note 60.
[67] Italics by the author.
[68] See *supra* pp. 583–585.
[68a] *Supra* note 60, at 382.

for the purpose of showing that a substantial relation of a state to a transaction makes it appropriate to apply the state's law. In explaining the lack of power of the State of Texas to apply its law for the determination of rights under an insurance policy, Mr. Justice Brandeis, now speaking for the whole court, said:

> "But in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas . . . Texas was, therefore, without power to affect the terms of contracts so made."[69]

And explaining earlier cases, the opinion continued:

> "The division of this court in the Tabacos and Dodge Cases was on the question of fact whether there were in those cases things done within the state which the state could properly lay hold as the basis of the regulation there imposed . . . In the absence of any such things, as in this case, the court was agreed that a state is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there."[70]

Mr. Justice Roberts, also speaking for the whole court in another case, held the statute of the forum could not be applied to a contract entered into elsewhere, "if, as here, the interest of the forum has but slight connection with the substance of the contract obligations." And he condemned a state policy which attempt to draw to the forum control over contracts elsewhere consummated "regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract."[71]

In recent cases, the essential character of constitutional control in this field of interstate relations has been pointed out, with the Supreme Court the arbiter under the Constitution to determine the permissible field of application of the laws of the several states, each of which may seek to press outward its asserted sphere of control to the point of serious conflict with the interests of others.[72]

In the late case of *Alaska Packers' Association v. Industrial Accident Commission of California*,[73] the matter was considered at length. A

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[69]Home Insurance Co. v. Dick, 281 U. S. 397, 407, 408 (1930).

[70]*Id.*, at 408, n. The Tabacos case referred to in the quotation is Compania General De Tabacos v. Collector of Internal Revenue, 275 U. S. 87 (1927), involving the power to levy a tax with respect to foreign insurance contracts.

[71]Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143 (1934).

[72]Brandeis, J., in Bradford Electric Light Co. v. Clapper, 286 U. S. 146 (1932); Stone, J., dissenting in Yarborough v. Yarborough, 290 U. S. 202 (1933); Stone, J., in Milwaukee County v. M. E. White Co., 56 Sup. Ct. 229 (1935).

[73]294 U. S. 532 (1935).

Mexican, who had in California entered into a contract to work for a season in a canning factory in Alaska and was there injured, had been awarded compensation under the California Workmen's Compensation Act by the state tribunals of California. The employer urged that the application of the California statute was a violation of the due process clause, and that the failure to apply the Alaska Workmen's Compensation Act, which the employee in his contract had elected to have apply, was a violation of the full faith and credit clause. Mr. Justice Stone, writing for a unanimous court, held that both objections failed. In his outline of the relevant factors he listed elements that have rarely been referred to by the courts in formulating the common law rules of Conflict of Laws, as, the improbability that the injured employee, a migratory worker in a strange land, would be able to apply for compensation in Alaska, and the danger that the employee when brought back to California by the employer would become a public charge, "both matters of grave public concern to the state." As to the objection based on the due process clause, he said:

> "California, therefore, had a legitimate public interest in controlling and regulating this employer-employee relationship in such fashion as to impose a liability upon the employer for an injury suffered by the employee, and in providing a remedy available to him in California . . . Indulging the presumption of constitutionality which attaches to every state statute, we cannot say that this one, as applied, lacks a rational basis or involved any unreasonable exercise of state power."[73a]

As to the objection under the full faith and credit clause, the justice stated that the decision was to be made "by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." He said there was no adequate reason for finding "that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California."

Conclusion

Two closely related practices believed to be unfortunate have been discussed, — the uncritical transfer to Conflict of Laws of the meaning given to a term in internal law, and the use of a distinction worked out in internal law as decisive of an issue in Conflict of Laws without adequate consideration of whether the internal law distinction is appropriate to the other issue.

It is well to mention two other matters which are foreign to the article. *First*, it is not urged that all doctrine be rejected in Conflict of Laws. The suggestion is that the development of doctrine be based on

[73a] *Id.*, at 542.

perception of the considerations of policy relevant to the problem in hand, unobstructed by confusion of terminology and inappropriate distinctions.[74] *Second*, it is not proposed that the internal law be ignored. After the state with the dominant Conflict of Laws contacts with a transaction has been determined, the internal law of that state will ordinarily be used. Indeed, the use of the internal law may be enjoined on the courts by provisions of the Constitution of the United States, as, the full faith and credit clause with respect to public acts. Even in the process of determining the state of dominant contacts, attention will naturally be given to the factors shaping the internal law. It would be ruinous to the development of Conflict of Laws if its problems were considered in isolation from the related internal law cases. Conflict of Laws cases as to Contracts or as to Family Law are primarily cases as to Contracts or Family Law, with the interstate or international complexity added. As it is the task of the judge in the ordinary case in Contracts or Family Law to develop a body of law satisfactory for the purposes of commerce or the family inside the state, so it is the task of the judge when the interstate or international element is added to develop a body of law satisfactory for those same purposes in an interstate and international society. In the process of this development, however, the judge must give weight to the new element uncoerced by internal law terms and distinctions.

The decision of cases in Conflict of Laws may proceed through the selection of a single contact or factor as by itself properly determining the state whose law is to govern.[75] The courts, however, may be unwilling to select a single element as by itself controlling. In many cases the governing law has been determined according to the grouping or massing of factors deemed dominant for the purpose in hand.[76] The selection of a single governing factor or the choice of the dominant group of factors can wisely be made in Conflict of Laws only if the courts refuse to use inappropriate definitions and distinction of internal law.

[74] *Cf.* Goodrich, *Public Policy in the Law of Conflicts* (1930) 36 W. VA. L. Q. 156; Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173.

[75] As to workmen's compensation: Matter of Cameron v. Ellis Construction Co., 252 N. Y. 394, 169 N. E. 622 (1930). For a highly interesting analysis of recent decisions by the Supreme Court of the United States on workmen's compensation in Conflict of Laws, and related matters, see Beale, *Social Justice and Business Costs—A Study in the Legal History of Today* (1936) 49 HARV. L. REV. 593.

[76] For a discussion of the English doctrine as to Contracts in Conflict of Laws, see CHESHIRE, PRIVATE INTERNATIONAL LAW (1935) pp. 181–197. For other discussions of the problem of Contracts see the articles by Professor Lorenzen and Professor Heilman, *supra* note 50.