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# Justice Traynor and the Conflict of Laws

BRAINERD CURRIE\*

Conflict-of-laws cases come before appellate courts only sporadically.<sup>1</sup> In his entire career, an individual appellate judge may be called upon to write an opinion concerning a problem of conflict of laws in only a handful of cases. Not only so, but the thoughts required for insight and innovation in matters of conflict of laws are long, long thoughts; a busy appellate judge does not have the time for such reflective thinking, especially when the problems presented are not recurrent.<sup>2</sup> It is therefore not likely that many reputations for judicial greatness will be found to rest primarily on contributions to the theory of conflict of laws. Contrariwise, a judge may be great even though he may be singularly unperceptive when confronted with the esoteric mysteries of the conflict-of-laws system. Mr. Justice Cardozo confessed his bafflement and sense of futility in this field,<sup>3</sup> and his highly regarded opinion in *Loucks v. Standard Oil Co.*,<sup>4</sup> while almost piously liberal by comparison with some of the precedents, seems completely insensitive to the possibility that the New York dependents of the New York decedent might have been given the full protection provided for them by New York law<sup>5</sup>—a possibility that has now been made a reality by

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1. There is a widely held belief, which I share, that many cases are treated as if they were purely domestic because counsel do not recognize potential conflict-of-laws problems suggested by foreign aspects. So far as I am concerned, this is just as well, though it has been deplored on occasion. See Kales, *Presumption of the Foreign Law*, 19 HARV. L. REV. 401 (1906), discussed in Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

2. Any academic criticism of judicial work should acknowledge, expressly or impliedly, the advantage the academician has in terms of time. I should like to make the acknowledgment explicit and quite personal. In 1957–1958 I wrote a commentary on Justice Traynor's decision in *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953). See Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958). Before undertaking this commentary I spent some two months in a full-time effort to organize my ideas concerning methods of analyzing conflict-of-laws problems. See Currie, *Married Women's Contracts: A Study in Conflict of Laws Method*, 25 U. CHI. L. REV. 227 (1958). Then I devoted another two months of full-time concentration to the article on *Grant v. McAuliffe*. But Justice Traynor's opinion in that case was only one of the 31 that he wrote, on the average, every year, in addition to participating in the disposition of the other cases decided by the court—at that time, approximately 1,500 per year.

3. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67–68 (1928).

4. 224 N.Y. 99, 120 N.E. 198 (1918).

5. See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 47 (1960). In fairness to Cardozo it must be added that the plaintiff did not attempt to invoke New York law.

the New York Court of Appeals.<sup>6</sup> Mr. Justice Holmes' pragmatism was crushed out by his dedication to territorialist dogma, and he fashioned decisions on conflict of laws of which it is difficult to think him capable.<sup>7</sup> Other great judges have mixed records in the area. Judge Hand wrote doubletalk in *Scheer v. Rockne Motors Corp.*,<sup>8</sup> in *Louis-Dreyfus v. Paterson S.S. Ltd.*,<sup>9</sup> and in *Wood & Selick Inc. v. Compagnie Generale Transatlantique*;<sup>10</sup> but in *Hutchinson v. Chase & Gilbert, Inc.*<sup>11</sup> he paved the way for the Supreme Court's epoch-making decision in *International Shoe Co. v. Washington*.<sup>12</sup> Mr. Justice Brandeis had an instinct for the sound result but seldom articulated clearly the controlling considerations;<sup>13</sup> and on one occasion he formulated as constitutional doctrine one of the most treacherous fallacies of the system.<sup>14</sup> Mr. Justice Black is the author of the admirable opinions in *Watson v. Employers Liab. Assur. Corp.*<sup>15</sup> and *Hoopeston Canning Co. v. Cullen*,<sup>16</sup> but is more consistent in the results he reaches than in the analysis on which his results are based.<sup>17</sup>

Who are the modern American judges whose work has contributed to enlightenment and to the cause of justice and reason

6. *Kilberg v. Northeast Airlines*, 211 N.Y.S.2d 133, 172 N.E.2d 526 (Ct. App. 1961). The majority opinion of Chief Judge Desmond in this case reached a perfectly sound result, but by a process of reasoning singularly calculated to invite criticism of the decision and attacks on its constitutionality. Instead of forthrightly declaring that the policies expressed in the relevant New York law would be consistently applied for the benefit of New York residents, the opinion rested on such vulnerable propositions as that the measure of damages is a question of procedure, and that, while the Massachusetts statute provided the basis of recovery, a defense available under that statute was contrary to New York's public policy. See generally Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

7. The worst is *Cuba R.R. v. Crosby*, 222 U.S. 473 (1912), discussed in Currie, *supra* note 1, at 984-85; Currie, Book Review, 27 U. CHI. L. REV. 588 (1960). See also *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904). The strange offspring of these precedents was *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914), discussed in Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 69-70 (1958). In *Mutual Life Ins. Co. v. Liebing*, 259 U.S. 209 (1922), discussed in the article last cited at 31-35, Holmes contributed some incredible technical distinctions to reach a result that was distasteful to him as well as probably unsound—and never discussed the real problem presented by the facts.

8. 68 F.2d 942 (2d Cir. 1934).

9. 43 F.2d 824, 72 A.L.R. 242 (2d Cir. 1930).

10. 43 F.2d 941 (2d Cir. 1930).

11. 45 F.2d 139 (2d Cir. 1930).

12. 326 U.S. 310, 161 A.L.R. 1057 (1945).

13. See, e.g., *Kryger v. Wilson*, 242 U.S. 171 (1916), discussed in Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 73-74; *Home Ins. Co. v. Dick*, 281 U.S. 397, 74 A.L.R. 701 (1930), discussed in *id.* at 43-44.

14. *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 82 A.L.R. 696 (1932), discussed in Currie, *supra* note 13, at 23-30.

15. 348 U.S. 66 (1954), discussed in Currie, *supra* note 13, at 48-52.

16. 318 U.S. 313 (1943).

17. Compare *Hughes v. Fetter*, 341 U.S. 609 (1951), with *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 519 (1953) (dissenting opinion). See Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 63 n.103 (1959).

in the conflict of laws? One thinks of Mr. Justice Stone, whose opinions in *Alaska Packers Ass'n v. Industrial Acc. Comm'n*<sup>18</sup> and *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*<sup>19</sup> opened this metaphysical realm to the humanizing influence of sociological jurisprudence.<sup>20</sup> One thinks of Mr. Justice Jackson, not only for his opinion in *Lauritzen v. Larsen*<sup>21</sup> but also for his recognition of the importance of the full faith and credit clause and of the responsibility thereby imposed on Congress.<sup>22</sup> One thinks of Judge Wyzanski for his sensible opinion in *Gordon v. Parker*.<sup>23</sup> One thinks (perhaps without recalling his name) of the justice of the Minnesota Supreme Court who wrote the opinion in *Schmidt v. Driscoll Hotel, Inc.*<sup>24</sup> And I think of Roger Traynor as having long since earned a place of distinction in this select group.

This will be no paean of adulation. Like other judges, Justice Traynor has had relatively few conflicts cases to decide; I wish, and I gather he wishes, that more would come his way. Like other judges, he lacks leisure to develop a comprehensive philosophy of conflict of laws while scores of cases of all kinds press for his attention. Like other judges, he must work within the framework of precedent, and it would be surprising if he did not have to temporize from time to time to win the concurrence of enough of his brethren to form a majority. This will be an attempt to study objectively the opinions he has written in conflict-of-laws cases, and to appraise his handling of the problems. Even in advance of that study, however, it can be said that Justice Traynor himself has provided a most informative insight into the contribution he is in a position to make to improving the administration of justice so far as the conflict of laws is concerned:

In certain fields, as currently in Conflict of Laws, the wilderness grows wilder, faster than the axes of discriminating men can keep it under control. The concepts in the *Restatement* have been shattered

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18. 294 U.S. 532 (1935).

19. 306 U.S. 493 (1939).

20. See Currie, *supra* note 7, at 19-30. I do not share Professor Freund's enthusiasm for Stone's decision in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927). See Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1212-21 (1946). But that decision was rendered in the free-wheeling days of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), when there were no base lines for the development of a rational system of conflict of laws in diversity cases.

21. 345 U.S. 571 (1953), discussed in Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 65-75 (1959).

22. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945), in ASSOCIATION OF AMERICAN LAW SCHOOLS, *SELECTED READINGS ON CONFLICT OF LAWS* 229 (1956).

23. 83 F. Supp. 40 (D. Mass. 1949).

24. 249 Minn. 376, 82 N.W.2d 365 (1957). The name was Thomas Gallagher, Associate Justice.

by the devastating attacks of Cook and Lorenzen, and the compelling logic of the proposition that in the area between the prohibition of the due process clause and the mandate of the full faith and credit clause, local law is supreme, has made it necessary to search for acceptable doctrines to govern the making of exceptions to local law, and serve as the basis of a new and realistic system of conflict of laws. The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage; but it leaves him free to weigh competing policies without preconceptions that purport to compel the decision, but in fact do not. He has a better chance to arrive at the least erroneous answer if the scholars have labored in advance to break ground for new paths. If they have not, he must chop his own way through, however asymmetrically, and hope that scholars will speed their reinforcements to the job in hand.<sup>25</sup>

Here is more than the healthy skepticism that is required of any good judge; here is complete disillusionment so far as the orthodox concepts of conflict of laws are concerned. Here is hunger for true systematic guides to the objective decision, to replace the guides that have proved false. Here is willingness to accept the challenge: to search for guidance in what Stone called the "energizing forces" of the law.<sup>26</sup> Contrast this willingness to abandon the shattered edifice and accept the challenge of reconstruction with Cardozo's resigned, though reluctant, acquiescence in the system:

Fields there are in the domain of law where fundamental conceptions have been developed to their uttermost conclusions by the organon of logic. . . . One finds it again in one of the most baffling subjects of legal science, the so-called Conflict of Law. We deal here with the application of law in space. 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 end. I do not mean that even in this sphere the judge who seeks to reach the heart of a concept, its inmost implications, may not find, when he has gained the core, that the concept is one with policy and justice. All this may be true, yet when I view the subject as a whole, I find logic to have been more remorseless here, more blind to final causes, than it has been in other fields. Very likely it has been too remorseless.<sup>27</sup>

Finally, and significantly, Justice Traynor's statement on conflict of laws is a becoming recognition of the limitations under

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25. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 234. (Footnotes omitted.)

26. Stone, *The Future of Legal Education*, 10 A.B.A.J. 233, 234 (1924).

27. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67-68 (1928).

which a judge searches for new principles when iconoclastic scholars have destroyed faith in the old. It is a cry for help, to which there has been meager response: the American Law Institute, for example, responds by restating the *Restatement*. If, therefore, we of the cloistered precincts have fault to find with Traynor's opinions in conflict-of-laws cases—if we sometimes think his methods disingenuous, if he is suspected of indulging a predilection because there is no articulated general principle on which he can rely—the fault is our own. We have failed to do the part of the job that judges cannot be expected to do. While it is true that a great judge's flashes of intuition can accomplish more than could a brace of pedants in a decade, it is only those who have both professional competence and time for research and reflection who can be charged with responsibility for systematic improvement of the law.

### I. CHOICE OF LAW

Justice Traynor's opinions on questions of choice of law are heavily outnumbered by those dealing with the jurisdiction of courts and the effect of judgments. Yet choice of law is the central problem of conflict of laws, and some of Justice Traynor's boldest and most controversial opinions have dealt with this problem. Hence it seems appropriate to begin the discussion here. Next it will be in order to dispose of certain miscellaneous matters, leaving the cases on jurisdiction and judgments until last because of their importance and because at least one of them requires more than cursory examination.

Traynor's second opinion in a conflict-of-laws case concerned choice of law: it was a dissenting opinion concerning the statute of limitations, rendered in *Ohio ex rel. Squire v. Porter*.<sup>28</sup> Concisely stated, the situation was this: Under the banking laws of both Ohio and California, stockholders were subject to a "superadded" liability in an amount equal to the par value of their stock. In Ohio the liquidator of an insolvent bank was allowed six years in which to enforce this liability, the time running from the date on which he determined the bank's insolvency. In California a period of three years was allowed, the time running from the date of the

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28. 21 Cal.2d 45, 129 P.2d 691, 143 A.L.R. 1432 (1942), *cert. denied*, 318 U.S. 757 (1943). The first conflict-of-laws opinion was in *Biewend v. Biewend*, 17 Cal.2d 108, 109 P.2d 701 (1941), discussed in pt. III *infra*.

assessment. The Ohio liquidator's action against a California stockholder was brought less than two years after the date of the assessment and less than three years after the determination of insolvency. Yet the Supreme Court of California held the action barred by California's three-year statute of limitations.

Even readers familiar with the ways of courts in conflict-of-laws cases will find it a challenging task to reconstruct independently the rationale of such a decision. If the case had been entirely domestic to California the action would have been timely; if it had been purely domestic to Ohio the action would also have been timely. Where, then, was the conflict of laws? And how could the action have been barred since it was filed within the time allowed by either statute?

Startling as the result may seem, the majority opinion of Justice Shenk flows along plausibly enough, using the stock rhetoric of the conflict-of-laws system: It is "well settled" that the statute of limitations of the forum governs the time for commencement of an action predicated on foreign law. The California statute requires that the action be filed within three years after "the liability was created." To determine when the liability was created there must be reference to the foreign law; this, indeed, is "required" by the full faith and credit clause. Under the Ohio cases the liability of the stockholders is "direct and self-executing," and is created, if not when the bank incurs the obligation, at least as early as the day on which the bank fails to meet its current obligations. That day was February 27, 1933—three years and three months prior to the filing of the action. Thus the action was filed more than three years after the liability of the stockholders was "created." Q.E.D. The action is barred.

Justice Traynor's dissent—joined only by a temporary member of the court—was devastating. First he reviewed the history of the California statute limiting the time for enforcement of stockholders' liability. It was a strange statute of limitations. Most such statutes speak in terms of a period following accrual of the right of action; this one, however, spoke in terms of the time when the liability was created, and that clause had been construed to mean the time when the obligation is incurred, irrespective of the time when the cause of action accrues. Thus if a corporation were to borrow money, giving its promissory note payable in four years, the stockholders could never be liable, because the statutory limi-

tation period would begin to run from the date of the note, and the right of action against the stockholders would be barred before the note's maturity. History provided the explanation for this strange state of affairs. Until 1930 the California constitution had imposed personal liability on all corporate stockholders. This anachronism had inflicted hardship on stockholders and impeded the economic development of the state by discouraging investment in California enterprises. Judicial hostility to it had led to the strictest sort of construction, and the otherwise unreasonable holding that the right to enforce the liability might be barred before it could be asserted was intelligible only as a deliberate mitigation of the harshness of the constitutional provision. In this light, the statute was "no ordinary statute of limitations." It was a curtailment of the liability itself.

After the constitutional provision imposing general stockholder liability was repealed there remained no need for such a peculiar statute of limitations, though it remained on the books together with the cases giving it the highly restrictive interpretation. There was no comparable hostility toward the double liability of bank stockholders. Indeed, the California Supreme Court had held, in applying the statute to the liability of bank stockholders, that the limitation period began to run not when the obligation was incurred but when the assessment was made. Any other construction would have made nonsense of the statutory scheme for enforcing the liability.

There were Ohio cases holding that under Ohio law the liability is created as soon as the debt is incurred, or no later than the date on which the bank fails, but they had no effect on the limitation period in Ohio. It was clear that that period began to run only when the superintendent of banks made a determination of insolvency. The Ohio cases relied on by the court were simply not in point. One of them held only that a stockholder who acquired his shares after the bank suspended payments was not subject to the superadded liability.<sup>29</sup> The other held that the statutory period of sixty days prior to insolvency during which stock transfers did not relieve the transferor of liability ran backward from the date of suspension of payments.<sup>30</sup> Justice Traynor generously cited four additional Ohio cases, three of which said in so many words that

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29. *Squire v. Harris*, 135 Ohio St. 449, 21 N.E.2d 463 (1939).

30. *Bailey v. Ohio ex rel Squire*, 32 N.E.2d 453 (Ohio App. 1936).



the liability of the stockholders attaches as soon as the bank incurs indebtedness,<sup>31</sup> but none of these cases had to do with the statute of limitations.

A statute of limitations, said Justice Traynor, is designed to bar the action after the lapse of a reasonable time after the cause of action has accrued. When California construed its limitation statute in such a way that it could bar a foreign cause of action even before its accrual it arbitrarily imposed as a prerequisite of suit a condition impossible of fulfillment, on the pretext of regulating procedure.<sup>32</sup>

Where but in the conflict of laws can courts talk themselves so plausibly into indefensible results? For sheer perversity of result, the decision in *Porter* is matched—ironically enough—only by a unanimous decision of the Supreme Court of Ohio.<sup>33</sup> That case may be succinctly stated by a series of propositions:

1. The plaintiff sued in Ohio on a Florida contract which, according to Florida law, was a contract under seal.
2. The defendant pleaded the statute of limitations.
3. Ohio had abolished the seal, and the period of limitations for all contracts in writing was fifteen years.
4. Ohio had a "borrowing" statute, making available to the defendant any shorter period of limitation prescribed by the law of the state in which the cause of action arose.
5. The Florida limitation period for contracts under seal was twenty years, and for simple contracts in writing five years.
6. The action was filed seven years after the right of action accrued.
7. The Ohio Supreme Court (affirming the court of appeals)<sup>34</sup> held the action barred.

Readers will hardly need to be told the process of reasoning in this case; indeed, the point is that, despite the patent absurdity of the result, it was possible for the court to couch its opinion in terms that are respectable so far as conflict-of-laws theory is concerned.<sup>35</sup>

31. 21 Cal.2d at 54, 129 P.2d at 696, 143 A.L.R. at 1439.

32. Citing *Broderick v. Rosner*, 294 U.S. 629, 100 A.L.R. 1133 (1935), discussed in Currie, *The Constitution and the "Transitory" Cause of Action*, 73 Harv. L. Rev. 268, 286-90 (1959).

33. *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 33 N.E.2d 655 (1941), *appeal dismissed*, 313 U.S. 549 (1941) ("for want of a properly presented substantial federal question").

34. *Alropa Corp. v. Kirchwehm*, 19 Ohio Op. 257, 36 N.E.2d 511 (1940).

35. Cf. *Coral Gables, Inc. v. Christopher*, 108 Vt. 414, 189 Atl. 147 (1937); Annot., 109 A.L.R. 479 (1937).

In such cases one wonders whether the court was simply bemused by the metaphysics of the system or was capitalizing on it in order to reach a result that could not be reached forthrightly. In this case we are provided with a revealing clue: The action was brought to recover the deficiency remaining after foreclosure of a mortgage on real estate in Dade County, Florida. The defendant was not the original mortgagor, nor had he actually signed any undertaking to pay the obligation. The deed to him, however, recited the existing mortgage and stated that the grantee assumed and agreed to pay it. The defendant held the land for less than three months, and his grantee similarly assumed and agreed to pay the mortgage. The defendant acquired the land on April 23, 1925, and sold it on July 25, 1925.<sup>36</sup> That, for the benefit of those too young to remember, was the period in which the frenzy of speculation in Florida real estate was at its height.

No such consideration of makeshift equity appears to explain the result in California's *Porter* case. True, the plight of the bank stockholder in the depression may have aroused a degree of sympathy; but the double liability imposed on him was not unusual, and was doubtless being enforced routinely under the laws of California as well as of other states. The court simply seems to have started the conflict-of-laws machine by pressing what it thought were the proper levers, and to have sat back complacently while the machine ground out the result.

The law reviews received the *Porter* decision in silence. That is a pity, because Justice Traynor clearly pointed the way of escape from the mechanical "logic" of the majority opinion. He said:

California has *no policy* necessitating the destruction of the substantive right of the foreign bank depositor to enforce the liability imposed upon the bank's stockholders, and *no interest* in riding over such rights.<sup>37</sup>

He did not develop this theme at length; after all, he had forty-two other opinions to write in 1942. But what are law reviews for? Here was a quite indefensible decision, purportedly dictated by conflict-of-laws principles; here also, in the dissent, were common sense, insight, and guidance as to how a rational method of analyzing conflict-of-laws problems might be developed. If legal scholars had been on the alert, might they not have been inspired by

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36. 19 Ohio Op. at 257, 36 N.E.2d at 512.

37. 21 Cal.2d at 55, 129 P.2d at 697, 143 A.L.R. at 1440. (Emphasis added.)

this dissent to turn away from the banalities and the logic chopping of the conventional system, and to develop a method of analysis in terms of the policies and interests of the states involved?

Like most questions of conflict of laws, those relating to the statute of limitations are both oversimplified and overcomplicated by conventional doctrine. We say that, with certain exceptions, all matters relating to limitation are procedural, or pertain to the remedy, and so are governed by the law of the forum. We may then become entangled, as did the court in *Porter*, in subsidiary problems akin to the problem of characterization: The forum's statute of limitations refers to the time when the liability is created; so, somewhat inconsistently, we refer to the foreign law to determine when the liability was created. What has become of the controlling force of the law of the forum? What state's policies are being furthered by this strange eclecticism that mixes bits of California law with pieces of Ohio law to reach a result not contemplated by either legislature? Can there be any doubt that the analysis suggested by Traynor is infinitely preferable? He would construe the California statute of limitations in order to determine the legislative purpose, and how the statute must be applied in order to effectuate that purpose. The policies expressed in a statute of limitations may be multiple. Such a statute may reasonably be construed, for example, as protecting the plaintiff by assuring him of a reasonable time in which to bring his action.<sup>38</sup> More commonly, as in the *Porter* case, other policies are relevant: protection of the defendant against stale claims, and facilitating the administration of justice by making room on crowded dockets for current business. So far as the *Porter* case was concerned, the California statute quite clearly allowed the liquidator (1) time in which to complete the administrative task of determining whether and in what amount an assessment was necessary, and (2) three years thereafter in which to sue for enforcement of the liability. No more was required, whatever the law of Ohio; after the lapse of this time California policy required protection for its residents and its courts. No less was required; no California policy for the protection of either defendants or courts called for a shorter period of limitation. By arbitrarily cutting off the right of action before the lapse of that time California not only refused faith and credit to the laws of Ohio,

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38. *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); see *Cox v. Roth*, 348 U.S. 207 (1955).

as Justice Traynor suggested, but also discriminated arbitrarily against the depositors whom the liquidator represented.<sup>39</sup>

Justice Traynor's next<sup>40</sup> choice-of-law case was a routine one, involving the defense of accord and satisfaction in an action on a contract made and to be performed in Oklahoma.<sup>41</sup> He was able to rely on the *Restatement* for the proposition that the law of Oklahoma, rather than that of California, was applicable; but there was no difference between the two laws with respect to the issues involved, and so no real conflict.

The next choice-of-law opinion is the opinion of the court in *Grant v. McAuliffe*,<sup>42</sup> concerning which I have already expressed my views in detail.<sup>43</sup> The opinion was bitterly attacked because of its unorthodoxy,<sup>44</sup> and I undertook to defend it. I have no reason to change my earlier views of the case, and little to add to them.

Professor Sumner's accusation that the decision was influenced by the "sympathy factors" in the case—*i.e.*, that the result was legally unsound, and resulted from "sentimental bias in favor of the injured plaintiffs, and unbecoming hostility to the archaism of the Arizona law"<sup>45</sup>—still rankles. True it is that, as between the interests of an injured plaintiff and an archaic rule abating the right of action upon the tort-feasor's death, Justice Traynor's sympathies would be on the side of the plaintiff. After all, it was he who precipitated the overthrow of the rule of abatement in California's

39. See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960).

40. In 1945 he had occasion to refer to conflict-of-laws principles as providing helpful analogy where the problem was choice between state and federal law in a case of maritime collision. *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal.2d 365, 375, 159 P.2d 1, 8 (1945), 19 So. CAL. L. REV. 127. The opinion is interesting, however, not for this incidental reference to conflict of laws but because it demonstrates a masterly grasp of the delicate problems of federalism in maritime cases. Cf. D. P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 SUP. CT. REV. 1958. This is not surprising, though such versatility in a state-court judge is unusual. Traynor was also the author of the court's scholarly opinion in *Moore v. Purse Seine Net*, 18 Cal.2d 835, 118 P.2d 1 (1941), *affirmed sub nom.* C. J. Hendry Co. v. Moore, 318 U.S. 133 (1943).

41. *Grayhill Drilling Co. v. Superior Oil Co.*, 39 Cal.2d 751, 249 P.2d 21 (1952).

42. 41 Cal.2d 859, 264 P.2d 944, 42 A.L.R.2d 1162 (1953), 68 HARV. L. REV. 1260 (1955), 29 N.Y.U.L. REV. 1288 (1954), 27 So. CAL. L. REV. 468 (1954), 1 U.C.L.A.L. REV. 380 (1954); see Shavelson, *Survival of Tort Actions in the Conflict of Laws: A New Direction?*, 42 CALIF. L. REV. 803 (1954).

43. Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

44. Sumner, *Choice of Law Governing Survival of Actions*, 9 HASTINGS L.J. 128 (1958).

45. Currie, *supra* note 43, at 216-17. Professor Sumner's criticism is contained in CALIFORNIA LAW REVISION COMMISSION, RECOMMENDATION AND STUDY RELATING TO CHOICE OF LAW GOVERNING SURVIVAL OF ACTIONS 14 (1957).

domestic law.<sup>46</sup> But to suggest that the decision departed from sound legal principles in order to reach a result congenial to the predilections of the court is absurd. Nothing could be more unsound and indefensible than a rule, such as that contained in section 390 of the *Restatement*, commanding application of the law of Arizona in the situation presented by *Grant v. McAuliffe*. It is regrettable that Justice Traynor rationalized the result in terms of alternative characterizations (treating the question as one of procedure, or relating to administration of decedents' estates, rather than of the substantive law of torts); inevitably, such techniques create an impression that the system is being manipulated.<sup>47</sup> Yet characterization is inherently a question-begging process. Despite Professor Sumner's asseveration that "It is inescapable that the basic problem is one of tort recovery,"<sup>48</sup> there is just as much justification for treating the question as one of procedure or one relating to the administration of estates. The only rational choice between the possible characterizations is one determined by the result thereby produced; and since the result produced by Justice Traynor's characterizations made sense instead of nonsense, his characterizations were sound.

Still, one regrets that he chose this technique instead of spelling out the considerations of policy and interest involved, as he had done in the *Porter* case. But more than a decade had elapsed since that case was decided, and the legal scholars who might have developed his approach into a substitute for the capricious traditional system had done little or nothing in that direction. To win acceptance, the opinion had to wear traditional dress. In discussing *Grant v. McAuliffe* recently, however, Justice Traynor has stated its rationale explicitly in terms of governmental policies and interests.<sup>49</sup> Injecting a delightful personal touch, he said further:

It may not be amiss to add that although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law.<sup>50</sup>

46. *Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379 (1946) (Shenk, J.).

47. *Cf. Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 Atl. 163, 61 A.L.R. 846 (1928); *Kilberg v. Northeast Airlines, Inc.*, 211 N.Y.S.2d 133, 172 N.E.2d 526 (Ct. App. 1961).

48. See Currie, *supra* note 43, at 213.

49. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 670 (1959).

50. *Id.* at 670 n.35.

A fascinating subject for speculation remains. Now that *Grant v. McAuliffe* has so completely exposed the absurdity of section 390 of the *Restatement*,<sup>51</sup> what will the American Law Institute do? Obviously the section cannot be allowed to remain as it is. Yet how can it be intelligently changed without abandonment of the fundamental assumptions as to choice of law on which the *Restatement* is constructed?<sup>52</sup>

The most recent Traynor opinion on choice of law is the opinion of the unanimous court in *Emery v. Emery*.<sup>53</sup> While a California family was motoring in Idaho their car, driven by the son under his father's direction, overturned, causing injuries to the driver's two sisters. They sued the father and the brother. Justice Traynor began conventionally enough, treating Idaho law as determinative of the question whether the owner or the operator had violated a duty of care owed to the nonpaying guests. However, finding that the Idaho test ("reckless disregard of the rights of others") imposed a lower standard of care than the California test ("willful misconduct"), he inquired only whether there had been "willful misconduct" under the California cases, on the theory that the affirmative finding on that issue necessarily included a finding of "reckless disregard" under Idaho law. Thus nothing turned on this choice; there was no conflict. Turning to the defense of parental immunity, however, he encountered again the problem of characterization: Is the question of immunity one of the law of torts, or of procedure, or of incapacities imposed because of concern with the family relationship? Rejecting a Wyoming precedent applying the law of the place of injury,<sup>54</sup> and not even citing the *Restatement*,<sup>55</sup> he said, rather flatly, "It is not, however, a question of tort but one of capacity to sue and be sued and as to that question the place of injury is both fortuitous and irrelevant."<sup>56</sup>

One must say to Justice Traynor, as has been said to his critics,

51. RESTATEMENT, CONFLICT OF LAWS § 390 (1934): "Whether a claim for damages for a tort survives the death of the tort-feasor or of the injured person is determined by the law of the place of the wrong."

52. Cf. RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 332, 334(d) (Tent. Draft No. 6, 1960), for a possible straw in the wind.

53. 45 Cal.2d 421, 289 P.2d 218 (1955), 31 N.Y.U.L. REV. 1123 (1956), 30 So. CAL. L. REV. 368 (1957), 1 VILL. L. REV. 365 (1956); see Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason versus the Restatement*, 23 U. CHI. L. REV. 474 (1956).

54. *Ball v. Ball*, 73 Wyo. 29, 269 P.2d 302 (1954).

55. RESTATEMENT, CONFLICT OF LAWS § 384(2) (1934): "If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."

56. 45 Cal.2d at 427, 289 P.2d at 222.

that on the face of the matter there is about as much reason for classifying this problem as one of substantive tort law as for classifying it as a question of capacity. It is only when the consequences of the classification are considered that the soundness of the classification can be evaluated. Justice Traynor quickly reached that aspect of the matter. After rejecting the view that the law of the forum should control as governing matters of procedure, he said:

We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home. Since all of the parties to the present case are apparently domiciliaries of California, we must look to the law of this state to determine whether any disabilities or immunities exist.<sup>57</sup>

Thus the opinion employs a combination of the techniques used in *Porter* and *Grant v. McAuliffe*: alternative characterization, supported by pragmatic inquiry into the respective interests of the states. The substantive characterization would make the result depend upon the wholly fortuitous and irrelevant place of injury; the procedural characterization would make the result depend upon the plaintiff's choice of forum; the family-relations characterization, if generally accepted, would not only lead to uniformity of result but would tend to advance the interest of the only interested state. Indeed, there was no real conflict.<sup>58</sup> So far as appears, Idaho had no policy requiring that these California children not be permitted to sue their father, and no interest in the matter.

Having determined that the law of California was to be applied to determine the questions of parental and sibling immunity, Traynor still had work to do. What was the California law? He answered, breaking new ground, that (1) an unemancipated minor

57. 45 Cal.2d at 428, 289 P.2d at 223.

58. See Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 669 (1959).

A rigid choice-of-law rule pointing to the law of the domicile would not, however, work well in all situations. Thus if the law of the domicile does not permit action, there may be conflict with the interest of the state where the injury occurred in requiring compensation for persons injured within its borders, and the state of injury should be free to apply its own law.

child may sue his parent for a willful or malicious tort, and (2) tort actions between minor brothers or sisters are maintainable. These are simply questions of domestic tort law, and call for only limited comment in a discussion of the conflict of laws. The court's treatment of them, however, does throw light on one aspect of the method of analysis in terms of governmental interests. When one says that in a conflict-of-laws case a court should examine into the policy of domestic law and the extent of the state's interest in applying that policy, the reference is not necessarily to predetermined policy. The common law is no less dynamic in conflict-of-laws cases than in domestic cases. To appreciate this one need only note that the sequence of the reasoning in *Emery* might have been inverted. The court might first have determined the posture of California law with respect to intrafamily immunities, and then proceeded to determine whether the law of California or that of Idaho was to control. Justice Traynor has stated the proposition felicitously:

Should [the court] find that the local policy has not yet been articulated in statute or precedent, it may proceed to articulate it for the first time, for purely local as well as interstate cases, and thereby create an open conflict with the other policy. Thus the court has a dual responsibility. Within the confines of policy based on precedent, it can revise backward local precedent to harmonize with an enlightened policy of another state. It can also set an enlightened local precedent to conflict with the backward policy of another state.<sup>59</sup>

## II. MISCELLANEOUS CASES

1. *Ancestral property: The estate of the childless widow.* A common-law lawyer must approach with diffidence, if not trepidation, anything that smacks of community property. Yet two of Traynor's conflict-of-laws opinions touch that subject, and *Estate of Perkins*<sup>60</sup> presents a fascinating problem. I therefore grasp the nettle, being somewhat emboldened by my belief that the problem in *Perkins* will turn out not to be essentially one of community property after all.

Mr. Perkins had resided in New York with his second wife for many years prior to his death. He had been a successful banker, and from time to time made substantial gifts of securities to his wife; in addition, he named her as beneficiary of a policy of insur-

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59. Traynor, *supra* note 58, at 673.

60. 21 Cal.2d 561, 134 P.2d 231 (1943), 31 CALIF. L. REV. 331.



ance on his life. Shortly after his death the widow moved to California, taking with her money and securities thus acquired. When she died intestate and without issue, domiciled in California, her estate consisted, with exceptions not here material, of the remnants of this property. She was survived by three sisters, who claimed the estate; the adverse claimant was a son of Perkins by his first marriage.

The son's claim was based on sections 228 and 229 of the California Probate Code. The first of these provided, at the time of the widow's death:

If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse . . . such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation. . . .

Section 229 provided:

If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse and came to the decedent from such spouse by gift, descent, devise or bequest . . . such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation.

Now, in a manner of speaking, at least, the property in the widow's estate was neither community property nor separate property, as the latter term is used in a community property state. It was the product of the husband's earnings during the marriage; and since it had been earned while the couple were domiciled in New York, his interest in it was that of sole common-law ownership. The gifts to his wife transferred a like interest to her, and when she left New York the property was hers, and hers alone.

The majority of the court held that, on the death of the widow, this property descended to the son under either section 228 or section 229. It was not necessary to decide which.<sup>61</sup> The sections dealt only with intestate succession, a matter entirely within the control of the legislature. To give effect to the legislative policy embodied in them it was necessary to apply them to all property subject to administration in California, regardless of its acquisition in a com-

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61. So the court said. *Id.* at 571, 34 P.2d at 237. Yet it also said that the purpose of the sections would be fully carried out "if the probate court distributes the property upon the basis of its classification had it been acquired in California." Thus it appears that the court was applying § 228 on the basis of a classification of the property as community property.

mon-law jurisdiction. The court conceded that this involved reclassification of the property in accordance with California community property concepts. *Estate of Thornton*<sup>62</sup> was distinguished on the ground that it held such reclassification invalid only when it had the effect of unsettling vested rights—*i.e.*, only when it affected rights inter vivos as distinguished from the expectancy of inheritance. An earlier decision,<sup>63</sup> holding that the sections would be applied to property acquired out of the state only if the nature of the foreign ownership was substantially the same as it would have been had the property been acquired in California, was disapproved.

Justice Traynor wrote a vigorous dissent. The question was solely one of statutory construction; the majority had “construed the legislative purpose to extend beyond the legislative language and then read into the language an implication that alone would make possible the execution of the enlarged purpose.”<sup>64</sup> If the property in the widow’s estate was not community property, section 228 could not apply; if it was not separate property of her deceased husband, section 229 could not apply. The character of the property could be determined only by reference to the definitions in the Civil Code. Under sections 162 and 163 separate property is defined as all property owned by either spouse before marriage or acquired afterwards by gift, bequest, devise, or descent, together with the rents, issues, and profits thereof. Under section 164 all other property acquired by either spouse after marriage is community property. The Perkins property was not community property when it was acquired, nor was it converted into community property when its owner moved to California. Neither was it “separate property,” for that term “is but a differentiation from the term ‘community property’ in section 228.”<sup>65</sup>

In short, the majority conceived of the terms “community” and “separate” as being sufficiently comprehensive to describe all marital property subject to administration in California, while Justice Traynor recognized a third class, not covered by those terms, including property acquired outside the state in common-law ownership. It is not easy to choose between these two conceptions on the basis of the considerations discussed in the two opinions. It is necessary to inquire into the legislative policy expressed in sections

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62. 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934).

63. *Estate of Allshouse*, 13 Cal.2d 691, 91 P.2d 887 (1939).

64. 21 Cal.2d at 572, 134 P.2d at 238.

65. *Id.* at 575, 134 P.2d at 239.

228 and 229 of the Probate Code. Fortunately, we have available a comprehensive and searching study of the history and purpose of those sections.<sup>66</sup>

The "germ" of these sections was first introduced into California law in 1880, and clearly had the limited purpose of preventing escheat.<sup>67</sup> If the decedent were a widow or widower with no relatives, it seemed unjust that what had been community property should escheat, to the exclusion of relatives of the predeceased spouse whose efforts had presumably contributed to its accumulation. The original statutory provision was limited to correcting this situation. In 1905 the principle was extended to that portion of the estate which had been separate property of the predeceased spouse, and a wholly new principle was introduced: the right of the heirs of the predeceased spouse to inherit was made contingent only upon the decedent's having died without issue, instead of without kindred, as before.<sup>68</sup> On this new principle, the statute could no longer be regarded as simply designed to prevent unjust escheat. It now stated a policy of preference for the heirs of the predeceased spouse over those (other than lineal descendants) of the decedent. It became, in fact, a reversion to the common-law concept of ancestral property, *i.e.*, the rule that collateral relatives of the person last seized were entitled to inherit only when they were "of the blood of the first purchaser."<sup>69</sup>

In this light, the statute stated a policy that was by no means peculiar to the institution of community property. A community property state can get along without such a policy:

There is apparently nothing in the community property system which necessitates the rules of descent laid down by sections 228 and 229 of the Probate Code. While California has always had the law of community property, the principle of these Probate Code sections was not introduced into our law until 1905. With the exception of New Mexico, none of the other states in which the community property system exists have any such rules of descent.<sup>70</sup>

Common-law states, on the other hand, may have substantially identical policies.<sup>71</sup> Thus Ohio even now has a provision almost

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66. Ferrier, *Rules of Descent Under Probate Code Sections 228 and 229, and Proposed Amendments*, 25 CALIF. L. REV. 261 (1937).

67. *Ibid.*

68. *Id.* at 262.

69. *Id.* at 280.

70. *Id.* at 282-83.

71. *Id.* at 280-81 nn.54-57.

indistinguishable from that of California,<sup>72</sup> and Indiana has a similar provision, except that it operates to limit the estate which the surviving spouse can inherit from the one dying first, instead of upon the distribution of the estate of the surviving spouse.<sup>73</sup>

In this light, the statement of the majority in *Perkins* seems not unreasonable: "Sections 228 and 229 together provide for the succession of all property in which the predeceased spouse had some interest."<sup>74</sup> It is only if one concentrates on the distinctive institution of community property, and on the special connotation of "separate" property as that term is used in contradistinction to community property, that difficulties of characterization arise. Both the majority and the minority opinions suffer, it seems to me, from their assumption that "reclassification" of common-law property according to the concepts of the community system was involved; the majority's concession on this point was unnecessary, and served only to becloud the issue with problems of the sort associated with *Estate of Thornton*.<sup>75</sup> Certainly if the legislature had enacted a single statute providing for the distribution of all property in the estate of the decedent in which the predeceased spouse had any interest, and which came to the decedent either by the voluntary act of the predeceased spouse or by operation of law, there would have been no problem of reclassification. Of course, Justice Traynor's point was precisely that the legislature had done no such thing, but had legislated only with respect to community property and its correlative, separate property. Yet if one is persuaded by the legislative history and by common-law analogies that the legislature was not here primarily concerned with regulating the incidents of community property, but with a policy of intestate succession taking account of the source from which the property was acquired, the proposition that in this context, at least, the terms "community property" and "separate property" exhausted the possibilities seems preferable to Justice Traynor's insistence that the earnings of the husband while domiciled in a common-law state are not "separate property" as defined by the Civil Code.

This view may be tested by a hypothetical case. Assume that a husband and wife domiciled in California agree that their future earnings shall be their separate property, respectively. It seems clear

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72. OHIO REV. CODE ANN. § 2105.10 (Page 1954).

73. IND. ANN. STAT. § 6-201(b) (1953).

74. 21 Cal.2d at 569, 134 P.2d at 236.

75. 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343 (1934).

that this may be done.<sup>76</sup> The husband's earnings accumulate, and at his death he leaves the property to his widow. Upon her death intestate and without issue will this property pass under the "ancestral property" principle to the lineal descendants of the predeceased husband, or will it go to the heirs of the widow? Clearly, this was never community property. Nor was it, any more than the property accumulated by Perkins in New York, "separate" property as defined by the California Civil Code; *i.e.*, it was not property acquired before marriage or acquired thereafter by gift, bequest, devise, or descent. What was it? In one case, such property is referred to as being held "in severalty."<sup>77</sup> In another it is said that "it is clear that in California we have a modified form of certain estates known to the common law and have them operating alongside of the community property system . . . ."<sup>78</sup> This would seem to be one of them. In substance, for the purpose of sections 228 and 229, this property seems to be strictly analogous to that acquired by Perkins in New York and given by him to his wife.

I have found no case squarely determining the applicability of those sections to property that would be community but for the agreement of the parties to the contrary; yet, quite apart from the decision in *Perkins*, it seems altogether probable that such property would be subject to the provisions of section 229. The California Supreme Court has said that from the statutes defining community and separate property "it must follow that all property not held as community property must, *for want of a better name*, be classed as separate property."<sup>79</sup> On that basis, the earnings of the husband which, by agreement, are not community property, are separate property although they do not fit the statutory definition of separate property; and they are reached by section 229, which uses the somewhat inappropriate term "separate property" for want of a better name.<sup>80</sup>

76. CAL. CIV. CODE § 158; *Commissioner v. Mills*, 183 F.2d 32, 19 A.L.R.2d 856 (9th Cir. 1950); *Estate of Watkins*, 16 Cal.2d 793, 109 P.2d 417 (1940); *Siberell v. Siberell*, 214 Cal. 767, 7 P.2d 1003 (1932); *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, 103 Pac. 190 (1909); *Wren v. Wren*, 100 Cal. 276, 34 Pac. 775 (1893); *Fay v. Fay*, 165 Cal. 469, 473-74, 132 Pac. 1040, 1042 (1913) (dictum); *Marlow v. Barlew*, 53 Cal. 456 (1879) (dictum); see *Van Every v. Commissioner*, 108 F.2d 650 (9th Cir. 1940). *But cf.* the dictum in *Commissioner v. Cavanagh*, 125 F.2d 366, 369 (9th Cir. 1942): "Of course no voluntary agreement between the parties is sufficient to affect the marital status in such a manner as to impress upon property the status of that of unmarried persons."

77. *Marlow v. Barlew*, *supra* note 76, at 458, 461.

78. *Siberell v. Siberell*, 214 Cal. 767, 771, 7 P.2d 1003, 1004 (1932).

79. *Id.* at 770, 7 P.2d at 1004. (Emphasis added.)

80. *Cf.* Justice Traynor's remark in *Tomaier v. Tomaier*, 23 Cal.2d 754, 759, 146 P.2d 905, 908 (1944): "The *separate property* of a nonresident husband or wife invested in California land remains *separate property* . . . ." (Emphasis added.)

A suggestive case is *Estate of Watkins*.<sup>81</sup> All the property owned by the married couple (domiciled in California) was originally community property. Certain later transactions were alleged to have converted it into "joint tenancy property"; but the court found that, even assuming this to be true, the still later execution by the parties of joint and mutual wills, declaring all the property to be community property, had the effect of reconversion. Hence, upon the death of the surviving wife, the property passed in accordance with section 228, with shares going to the relatives of the predeceased husband. The trial court, not appreciating the effect of the declaration in the joint and mutual wills, had held that the property in the widow's estate was not community property but property held in joint tenancy, and so did not pass under section 228 but went entirely to the heir of the widow.<sup>82</sup> Assume for the moment that the joint and mutual wills were not in the picture, and that the parties had, as the trial court found, effectually converted their community property into a joint tenancy. What kind of estate was this? It was not a community estate; neither was it "separate" estate within the definition of the Civil Code, though the respective shares might be so called for want of a better name. It was quite analogous to a common-law estate of the same character, and was such that the interest taken by the wife on the death of the husband was her sole, or several, or "separate" property, as at common law. How it should be disposed of on her death is another question. But it seems to follow from this that when the parties voluntarily convert community property into an analogue of common-law property the resulting interests may without violence to the system be referred to as separate property, though they are not literally within the definition; and from this it follows, in turn, that in our hypothetical case the estate of the widow should be distributed according to section 229, on the basis that the property accumulated by the husband's earnings was separate property, acquired from him by gift, bequest, devise, or descent.

If this is so, what is the obstacle to treating the property acquired by Mr. Perkins in New York as his "separate" property, given by him to Mrs. Perkins, and subject to the provisions of sec-

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81. 16 Cal.2d 793, 108 P.2d 417 (1940).

82. Section 228 as in force at the date of the widow's death (1936) applied only to community property and did not contain the present provision extending the coverage to joint tenancies. Cal. Stats. 1931, ch. 281, § 228, at 597. Section 229 did not apply because the interest acquired by the survivor upon the death of a joint tenant was not one acquired by gift, descent, devise, or bequest.

tion 229? No "reclassification" in accordance with community property concepts seems necessary. The policy of the statute seems clearly applicable: the property was accumulated through the efforts of the husband; in the judgment of the legislature it is just that it should go to his son rather than to the collateral heirs of his second wife. The nature of Mr. Perkins' common-law interest was essentially the same as that of a California husband who has agreed with his wife that his earnings shall be his sole property.<sup>83</sup>

Justice Traynor's most telling points were made in connection with his contention that it would be incongruous to treat the property earned by Mr. Perkins in New York as "separate" property. "It is a strange construction that interprets the term 'separate property' in a California statute to include the very kind of property it was designated to exclude"<sup>84</sup>—*i.e.*, property resulting from the earnings of the husband during the marriage. "To treat such earnings as if they were separate property would do violence to the scheme of succession embodied in Probate Code sections 228 and 229, which contemplates that in the event both spouses die without lineal descendants, marital earnings are to be inherited equally by the respective families of the two spouses by whose efforts it was accumulated."<sup>85</sup> But these arguments seem to lose their force if we are right in assuming that a California couple can agree that their respective earnings shall not be community property, and that the husband's earnings will then be treated as separate property under section 229. No more violence is done to California's policy by letting the fruits of the husband's common-law earnings pass from his widow's estate to his heirs, to the exclusion of the collateral heirs of his widow, than is done by allowing California husbands

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83. In *Estate of Allshouse*, 13 Cal.2d 691, 91 P.2d 887 (1939), adopting the principle that property acquired elsewhere could be subjected to §§ 228 and 229 only if the incidents of ownership were substantially the same as those of community property or separate property in California, the court declined to treat property resulting from the husband's earnings during the marriage in Missouri as substantially comparable to "separate" property. "It differs from the husbands' separate property in that it includes the wife's right of dower, which although inchoate is exceedingly valuable." *Id.* at 699, 91 P.2d at 891. But the wife's inchoate right of dower in property which she acquires outright from her husband seems totally irrelevant to the interpretation of a statute concerned with the source from which the property was acquired.

84. 21 Cal.2d at 577-78, 134 P.2d at 240.

85. *Id.* at 576, 134 P.2d at 239-40. Justice Traynor was here referring to an aspect of the statutory scheme not directly involved in the *Perkins* case. Under § 228, relating to community property, if there were no lineal descendants of the predeceased husband, the property is divided equally between his heirs and those of the widow; whereas under § 229, dealing with separate property, the only takers were the heirs of the predeceased spouse.

and wives to contract for what are in effect common-law interests with the same result.<sup>86</sup>

One final point: The construction contended for by Justice Traynor might well raise a substantial question as to equal protection of laws.<sup>87</sup> If the younger Perkins had been denied the right to inherit, might he not with some justification have complained that he was arbitrarily being denied equal treatment with persons similarly situated? California had established a policy to the effect that in a family situation such as was presented in that case, the fruits of the predeceased husband's earnings should go to his son rather than to the collateral heirs of the second wife. If the property had been earned while the elder Perkins was domiciled in California, that would be the result; similarly, if the property had been earned under a no-community agreement while he was domiciled in California, that would be the result. What reason is there for differential treatment simply because the property was earned in a common-law state?

A state may, of course, establish reasonable classifications without violating the equal protection clause; but what would be the reasonable basis for distinguishing between the case of property acquired in a common-law jurisdiction and that acquired under similar circumstances in California? The most effective answer would be that the policy of sections 228 and 229 is so intimately related to the community property system that its application to common-law interests would be inappropriate. We have seen, however, that this is not true; that policy has no peculiar relevance to the institution of community property. Another possibly effective answer might be that as a matter of convenience California was disinclined to trace the origins of property brought into the state by its owner from another jurisdiction; but there is little support for such an attitude in the cases. In *Allshouse*, indeed, the court indicated its willingness to engage in a form of tracing more arduous than that required by the result in *Perkins*. It might be a sufficient answer that California was disinclined to apply its policy in such a way as to interfere with the interest of New York; but

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86. Cf. *Estate of Allie*, 50 Cal.2d 794, 329 P.2d 903 (1958). Premiums on the husband's National Service Life Insurance policy had been paid from community earnings; the wife was named beneficiary; on her death the proceeds of the insurance were held distributable under § 228 as community property, although because of federal law they could hardly be so characterized for any purpose except that of intestate succession.

87. U.S. CONST. amend. XIV. See generally Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960).



it is difficult to conceive how New York could have an interest in the intestate distribution of the estate of a widow who had long since left that state and established a domicile in California.<sup>88</sup> Possibly it might be a satisfactory answer that California was simply disinclined to apply its policy to common-law property interests because to do so would be to upset the justifiable expectations of the parties: *e.g.*, when Mr. Perkins gave the property to his wife in New York he thought he was doing so with no strings attached, and did not contemplate that it might some day revert to his son; and Mrs. Perkins received the property on the same understanding. But this explanation does not square very well with the universally conceded proposition that the statute deals only with the right to inherit intestate property, which is a mere expectancy, and that Mrs. Perkins could very easily alter the pattern of succession to the property on her death by changing her domicile—whether to a community property state or not. Nor does it square very well with California's general policy of applying its truly community-oriented rules of intestate succession to common-law property brought into the state by married couples who become domiciliaries.<sup>89</sup> Whether or not the construction urged by Justice Traynor would amount to a denial of equal protection, the question is so close, and it is so difficult to suggest a convincing basis for the reasonableness of the classification, that avoidance of the possibility of discrimination may be suggested as a further justification for the construction adopted by the majority.

My conclusion, then, is that the result reached by the majority hardly called for dissent, and that the major flaw in the majority opinion was the apparent willingness to treat the Perkins property as community property under section 228 rather than separate property under section 229.<sup>90</sup>

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88. Although the California policy is for the benefit of the predeceased spouse and his heirs, who so far as appears never had any connection with California, I assume that California had an interest in applying the policy because the estate was being administered in California and the decedent was domiciled there. See Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 221-22 (1958). It would *not* be a satisfactory answer to the younger Perkins that he was not given the benefit of the statute because California had no interest in applying its policy for his protection because neither he nor his father had any connection with the state. See Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960).

89. CAL. PROB. CODE § 201.5.

90. The distinction, though not material in *Perkins*, would be material if the predeceased spouse is not survived by lineal descendants, in which case community, but not separate, property would be divided among the heirs of the respective spouses. See note 85 *supra*.

2. *Community property. Tomailer v. Tomailer*<sup>91</sup> was a divorce action between domiciliaries of California in which the trial court had divided as community property real estate in California and Missouri purchased with community funds and held "in joint tenancy." The district court of appeal reversed, and on retrial the trial court excluded evidence that the intention of the parties was that the property should remain part of the community. The supreme court unanimously reversed, Justice Traynor writing the opinion, holding such evidence admissible not only as to the California real estate but also as to that in Missouri.

The decision seems unquestionably sound, and only one real problem in the conflict of laws is suggested.<sup>92</sup> In discussing the Missouri property Justice Traynor cited the Missouri case of *Depas v. Mayo*<sup>93</sup> and said: "Since Missouri would protect the respective interests of a husband and wife if community funds were invested in Missouri land without the wife's consent, it would certainly protect such interests when the Missouri property is acquired pursuant to an agreement between the parties that the property retain its community character."<sup>94</sup> This sounds like section 238 of the *Restatement*: "The effect of marriage upon an interest in land acquired by either or both of the spouses during coverture is determined by the law of the state where the land is."<sup>95</sup> But does it really matter what Missouri would decide with respect to the respective interests of the parties in this property? Leaving aside the constitutional questions that would be raised by an attempt by Missouri to alter the character of those interests,<sup>96</sup> is it not clear that the California court, having two California domiciliaries before it in a divorce proceeding, can and should enter whatever decree for division of the marital property is called for by California law and policy, irrespective of the law of Missouri? In the course

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91. 23 Cal.2d 754, 146 P.2d 905 (1944), 32 CALIF. L. REV. 182, 17 So. CAL. L. REV. 401.

92. A question of domestic law arises, which is best not discussed in this context and by this noncommunity writer: What difference did it make whether the property was part of the community or was held in joint tenancy? "In its holding, as distinguished from its language, the Siberell case [note 78 *supra*] established only that whether such property is a joint estate or community property, the trial court in a divorce proceeding has the power to divide the property equally." 23 Cal.2d at 759, 146 P.2d at 907.

93. 11 Mo. 314, 49 Am. Dec. 88 (1848).

94. 23 Cal.2d at 759, 146 P.2d at 908.

95. RESTATEMENT, CONFLICT OF LAWS § 238 (1934); RESTATEMENT (SECOND), CONFLICT OF LAWS § 238 (Tent. Draft No. 5, 1959). Justice Traynor did not cite this section, though he did cite § 260, which is similar in principle.

96. *Cf.* Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1 (1934).

of the events leading to the well-known case of *Fall v. Eastin*<sup>97</sup> the courts of Washington, the domiciliary state, entered a decree dividing the property and directing the conveyance of Nebraska real estate in a manner that would not have been permissible under Nebraska law. Yet the Nebraska court, while refusing enforcement to the decree, conceded that if the husband had made a conveyance in compliance with the decree it would have been perfectly effectual.<sup>98</sup> And in the recent case of *Rozan v. Rozan*<sup>99</sup>, Justice Traynor, for a unanimous court, held that real estate in North Dakota purchased with community funds was community property, subject to division by the divorce decree, without making any reference to the law of North Dakota. No such reference is necessary, the *Restatement* to the contrary notwithstanding.

3. *Grounds for administration: wrongful death.* A resident of New Mexico and a resident of Arizona were killed in New Mexico in the course of their employment by the Atchison, Topeka & Santa Fe Railway, a Kansas corporation. The railroad was doing business in California—specifically, in the two counties in which petitions were filed for letters of administration. The petitions alleged that the Federal Employers' Liability Act created a cause of action for wrongful death in each case, authorizing suit by the administrator in any state where the carrier does business. Neither decedent had other assets in California. Section 301 of the Probate Code authorized administration only in the county in which the decedent was a resident, or where he left "estate." For a unanimous court, Justice Traynor held that the causes of action constituted "estate" authorizing administration; to hold the contrary would be to nullify the right given by the act.<sup>100</sup>

The decision is noncontroversial and in accord with most, if not all, authorities. Only a subsequent development raises a minor question as to whether it can be relied on as still stating the law of California. Ten years later the California court recognized the doctrine of *forum non conveniens*,<sup>101</sup> according to which wrongful

97. 215 U.S. 1 (1909).

98. *Fall v. Fall*, 75 Neb. 104, 128 (1905) (dictum): "In the instant case, if Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed." See Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 636 (1954).

99. 49 Cal.2d 322, 327-28, 317 P.2d 11, 13-14 (1957).

100. *Estate of Waits*, 23 Cal.2d 676, 146 P.2d 5 (1944).

101. *Price v. Atchinson, T. & S.F. Ry.*, 42 Cal.2d 577, 268 P.2d 457 (1954).

death actions in cases of the type involved in *Estate of Waits*<sup>102</sup> may not be maintainable in California.<sup>103</sup> Does this development alter the rule that letters of administration may issue? Probably not. Dismissal on forum non conveniens grounds is a discretionary matter, most appropriately determined after the action has been filed. Probably the courts will continue to grant letters of administration on the ground that the venue provisions of the Federal Employers' Liability Act permit suit against the carrier in California, leaving the question of forum non conveniens to be determined on motion in the wrongful death action itself. It would be simpler, however, if California would simply permit the foreign administrator to sue in wrongful death cases,<sup>104</sup> without requiring a local appointment which in the end may prove futile.

4. *Criminal matters.* Criminal cases having foreign aspects tend to fall between two stools, in the academic world at least. They are given scant attention either in the course on conflict of laws or in criminal law courses. That they deserve more careful study than they get is strongly suggested by certain cases encountered in the preparation of this paper.

California's habitual-criminal statute allows conviction when prior offenses were committed in another state, provided the minimum elements of the foreign offense are substantially similar to the minimum elements of one of the offenses enumerated in the California statute.<sup>105</sup> One Morton was adjudged an habitual offender, one of the prior convictions having been in Tennessee. The principal evidence as to the nature of the crime for which he had been convicted was a record from the files of the Tennessee State Penitentiary showing that he had served a term for a crime designated by the initials "HBL." There was some testimony, which the court found insufficient, tending to indicate that this meant "housebreaking with intent to commit larceny"; there was no evidence at all as to the minimum elements of the offense under Tennessee law, and the court set aside the conviction.<sup>106</sup> The People, said Justice Traynor, must prove the alleged prior convictions beyond a reasonable doubt; it was not unreasonable to require the People to ascertain the particular statute that the defendant had

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102. 23 Cal.2d 676, 146 P.2d 5 (1944).

103. See *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929).

104. See *Ghilain v. Couture*, 84 N.H. 48, 146 Atl. 395, 65 A.L.R. 553 (1929).

105. CAL. PEN. CODE § 644(a).

106. *People v. Morton*, 41 Cal.2d 536, 261 P.2d 523 (1953).

violated, or to obtain a certified copy of the judgment of conviction for the purpose of proving the elements of the offense.<sup>107</sup>

The interesting thing about this decision is that there was in force a California statute authorizing the court to take judicial notice of "the laws of the several states of the United States and the interpretation thereof by the highest courts of appellate jurisdiction of such states."<sup>108</sup> Assuming the court had been satisfied with the testimony as to the meaning of the initials "HBL," why did it not simply take judicial notice of the elements of that offense under Tennessee law? The explanation may be that the question was not reached, since the testimony as to the meaning of the abbreviation was unsatisfactory. I prefer to think, however, that the fact that neither Justice Traynor, nor any member of the court, nor counsel for the People thought of the judicial-notice statute in this context demonstrates the sound common sense of all concerned. If the statute had been brought to the attention of the court it would have been held inapplicable, I cannot doubt, despite the generality of its language. Law reformers have pressed legislation calling for judicial notice of foreign law without adequate analysis; whatever may be said in favor of such legislation, it seems clear that it should not relieve the state of establishing guilt beyond a reasonable doubt in criminal cases, and that it should not infringe the right to trial by jury.<sup>109</sup>

*People v. Burt*<sup>110</sup> was an appeal from a conviction for soliciting the prosecutrix to commit the crime of extortion. The evidence showed that the defendant in Los Angeles solicited the prosecutrix to induce men in the Los Angeles area to go with her for immoral purposes to Tijuana, Mexico, where she would join the defendant in acts that would constitute extortion as defined by the law of California. The defendant contended that to punish him for soliciting the prosecutrix to commit in Mexico acts that would amount to extortion as defined by California law would be to punish him for acts done beyond the jurisdiction of the state. In a fine opinion for a unanimous court, Justice Traynor rejected this extreme territorialist defense, construing the statute on solicitation in order to

107. *Id.* at 539, 541, 261 P.2d at 525, 526.

108. CAL. CODE CIV. PROC. § 1875(3).

109. See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1019-21 (1958).

110. 45 Cal.2d 311, 288 P.2d 503, 51 A.L.R.2d 948 (1955), 7 HASTINGS L.J. 206 (1956), 29 So. CAL. L. REV. 363 (1956).

determine the legislative policy and the circumstances in which that policy must be applied to effectuate the state's interest:

Section 653f is concerned not only with the prevention of the harm that would result should the inducements prove successful, but with protecting inhabitants of this state from being exposed to inducements to commit or join in the commission of the crimes specified . . . and the evils it seeks to prevent are present whether the object of the solicitation is to be accomplished within or without this state. Thus, in the present case the defendant used the prospects of large monetary rewards to attempt to induce the prosecutrix to commit acts of prostitution and extortion, with residents of this state as intended victims. Such solicitation is inimical to the public welfare and to the safety and morals of the inhabitants of this state, regardless of where the solicited acts are to be performed, and a construction of section 653f that limits its operation to solicitation of acts that are to be consummated within this state would defeat, rather than effect, the object of that statute.<sup>111</sup>

The contention that the prosecution should have been required to prove that the acts solicited would have constituted extortion under the law of Mexico was similarly rejected: "Since it is the solicitation in this state alone that is punishable, and since it is immaterial where the acts solicited are to be performed, the law of other states governing such acts is likewise immaterial . . . and proof of the law of Mexico was therefore unnecessary."<sup>112</sup>

The only cause for regret here is that the court chose to distinguish, rather than to discredit, its earlier decision in *People v. Buf-fum*,<sup>113</sup> on which the defendant relied. There the defendants had been convicted of conspiracy "to induce miscarriages contrary to section 274" of the Penal Code. The evidence tended to establish that the defendants conspired in California to perform, and did perform, abortions in Mexico. Overt acts were committed in California; the defendants and the subjects were all apparently residents of California. The conspiracy statute provided for the punishment of conspiracy "to commit any crime."<sup>114</sup> There was evidence that abortion was criminal under Mexican as well as California law. Yet the convictions were reversed: "The statute makes no reference to the place of performance of an abortion, and we must assume that the Legislature did not intend to regulate conduct taking place

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111. 45 Cal.2d at 314, 288 P.2d at 505-6, 51 A.L.R.2d at 951.

112. *Id.* at 315, 288 P.2d at 506.

113. 40 Cal.2d 709, 256 P.2d 317 (1953).

114. CAL. PEN. CODE § 182.1.

outside the borders of the state."<sup>115</sup> Why must the court make any such assumption? Is one to believe that California has no policy against crimes committed in Mexico by residents of California against other residents of California, or no interest in the effectuation of such a policy? If one Californian lures another to Mexico and there murders him is California indifferent or helpless? Surely there is no lack of power.<sup>116</sup> The question, as the California court recognized, is only one of statutory construction. In spite of generations of territorialist dogma, California's criminal statutes might well be reasonably construed as extending to crimes perpetrated by Californians against other Californians outside the state.<sup>117</sup>

Not every criminal statute, of course, should be construed as regulating conduct outside the state. *People v. One 1953 Ford Victoria*<sup>118</sup> was a proceeding to forfeit an automobile used for the unlawful transportation of narcotics. The car had been purchased from a dealer in Texas who held a chattel mortgage. Without the dealer's consent and contrary to a term of the mortgage the buyer took the car to California, where it was seized. The California statute allowed the innocent holder of a mortgage to claim his interest free from forfeiture if he had made a reasonable character investigation of the purchaser at the time of sale. Texas had no law relating to forfeiture of vehicles used in the transportation of narcotics; the dealer made no character investigation, though he was otherwise innocent. For a unanimous court, Justice Traynor held the requirement of a character investigation inapplicable to the dealer in Texas. The purpose of the law was, by regulating the conduct of those financing automobile sales, to reduce the probability that the cars sold would be used to violate California law. But it was not reasonable to assume that the legislature intended to require dealers in every state to make character investigations

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115. 40 Cal.2d at 715, 256 P.2d at 320, citing *inter alia* the discredited case of *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

116. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 20-21 (1955) (dictum). Since 1861, murder or manslaughter committed by a British subject on land out of the United Kingdom has been punishable in England, irrespective of the nationality of the victim. *Offenses Against the Person Act, 1861*, 24-25 Vict., c. 100, § 9.

117. Justice Traynor wrote no opinion in *Buffum*, but concurred in the majority opinion. Distinguishing *Buffum* in his opinion in *Burt*, he did not foreclose entirely the possibility of constructions giving criminal statutes extraterritorial effect: "Since the Legislature is not ordinarily concerned with regulating conduct in other jurisdictions . . . and since [the conspiracy statute] suggests no answer to the many difficult questions that would otherwise arise from the conflict in California law and the law of other states, that section may reasonably be interpreted as limited to conspiracies to commit crimes in this state." 45 Cal.2d at 314, 288 P.2d at 505.

118. 48 Cal.2d 595, 311 P.2d 480 (1957).

against the contingency that automobiles sold would be taken to California without their consent and contrary to the sales agreement. The case is a fine illustration of how a court may, by defining local interests with moderation and restraint, avoid conflict with the interests of another state.<sup>119</sup>

### III. JUDGMENTS

1. *Foreign alimony decrees.* The principle that a court may and should apply domestic law in such a way as to effectuate domestic policy where the state has a legitimate interest in so doing has no application to judgments within the scope of the full faith and credit clause.<sup>120</sup> Congress, in the exercise of its power to implement that clause, has declared that "records and judicial proceedings" of the courts of a state "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."<sup>121</sup> This means that in a suit to enforce the judgment of a sister state the policies of the forum are irrelevant. Justice Traynor's first conflict-of-laws opinion—the opinion of the court in *Biewend v. Biewend*<sup>122</sup>—dealt with the problem of the approach to an intermediate type of case: Given a foreign judgment not entitled to full faith and credit, is governmental-interest analysis to be applied as in an ordinary case of choice of law, or are domestic interests to yield by analogy to the case of a judgment entitled to full faith and credit? The problem is not an easy one. With respect to foreign judgments for alimony, however, Justice Traynor exhibited not only faithful devotion to the full faith and credit clause but also a strong disposition to treat sister-state judgments as if they were fully within the command of that clause although the Supreme Court has not so held.

The parties were divorced while domiciled in Missouri, and the husband was ordered to pay weekly alimony. Thereafter they

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119. In a recent discussion of the decision Justice Traynor has explicitly stated its rationale in terms of governmental policy and interest. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 672-73 (1959).

120. U.S. CONST. art. IV, § 1.

121. 28 U.S.C. § 1738 (1958). The attempt of the revisers of the Judicial Code in 1948 to apply the same rule to the acts of state legislatures was meaningless and ineffectual. See CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 19 (1958); CURRIE, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 82 n.162 (1959).

122. 17 Cal.2d 108, 109 P.2d 701 (1941), 29 CALIF. L. REV. 754, 25 MINN. L. REV. 946.



moved to California, and the wife sued not only to recover accrued installments but to establish the husband's obligation to make future payments. In the meantime the minor children who had been taken into account when the alimony was fixed had attained majority, and the wife had married and divorced a second husband. A California statute<sup>123</sup> provided that alimony payments shall cease upon the wife's remarriage. Although Justice Carter, in dissent, made a strong argument that the statute expressed an important policy that ought to be furthered, Justice Traynor held that as a matter of comity California would respect and enforce the rights created by the Missouri decree until they were modified by the Missouri court. The mere difference between Missouri and California as to the right of the wife to alimony after remarriage did not amount to such a strong local public policy as to justify a refusal to enforce vested rights: "[Enforcement of the decree] offers no threat to either the moral standards or the general interests of the citizens of this state. To hold that the right created in Missouri is so immoral as to be unenforceable here would involve a complacent attribution of moral superiority to this state."<sup>124</sup>

Such language must cause some initial uneasiness to an advocate of the governmental-interest analysis. This is very close to traditional conflict-of-laws doctrine: "local public policy" is something different from the legal policies expressed in the laws of the state; only a very strong moral revulsion against the enforcement of rights "vested" under another law justifies the interposition of local policy. The uneasiness is relieved only when we recall that it is a judgment that is involved, not simply a choice of law. Even apart from the full faith and credit clause a judgment presents a special case. The plaintiff is not simply claiming the benefit of the laws of Missouri *in nubibus*; there has been an adjudication that she personally has certain rights against the defendant under those laws. Especially in light of the fact that the alimony provisions of divorce decrees are commonly arrived at by agreement, it is not farfetched to liken the Missouri decree to a contract between the parties, entered into under circumstances giving California no interest in regulating its incidents. Moreover, the truth may be that the *Biewend* case does not really present the problem of how governmental interests shall fare in competition with a foreign judgment not entitled to full

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123. CAL. CIV. CODE § 139.

124. 17 Cal.2d at 114, 109 P.2d at 705.

faith and credit. It may be that modifiable decrees for future installments *are* entitled to full faith and credit, and that Justice Traynor was simply ahead of his time in treating them as if they were:

Neither the full faith and credit clause of the Constitution nor the Act of Congress implementing it says anything about final judgments or for that matter, about any judgments. Both require that full faith and credit be given to "judicial proceedings" without limitation as to finality. Upon recognition of the broad meaning of that term much may some day depend.<sup>125</sup>

If this is the ultimate explanation of the decision, however, the defense of conflict with strong "local public policy," impliedly recognized by Justice Traynor, must be rejected.

In *Biewend* the court recognized that the husband was entitled to apply to the Missouri court for modification of the decree in the light of the changed circumstances, but held that the decree should be enforced as it stood until such time as it should be modified by the Missouri court. A student commentator suggested that it might have been more appropriate for the California courts themselves to modify the decree, applying the law of Missouri.<sup>126</sup> This was the result reached in *Worthley v. Worthley*<sup>127</sup> some fourteen years later. The action was to recover arrearages under a New Jersey separate maintenance decree and to establish the obligation to make future payments pursuant to it; the decree was modifiable both prospectively and retroactively. A closely divided court, Justice Traynor writing for the majority, held not only that the decree would be enforced but that the California court should try the issue of modification on its merits. The strong implication was that the question of modification would be determined in accordance with the law of the rendering state.<sup>128</sup>

125. *Barber v. Barber*, 323 U.S. 77, 87 (1944) (Jackson, J., concurring).

126. 29 CALIF. L. REV. 754, 757-58 (1941).

127. 44 Cal.2d 465, 283 P.2d 19 (1955), 8 ALA. L. REV. 118 (1955), 31 N.Y.U.L. REV. 397 (1956), 3 U.C.L.A.L. REV. 247 (1956), 1956 WASH. U.L.Q. 246.

In the meantime, Justice Traynor wrote the opinion of the unanimous court in *Howard v. Howard*, 27 Cal.2d 319, 163 P.2d 439 (1945). The defendant husband resisted enforcement of a Nevada decree incorporating a property settlement agreement on the ground that the agreement had been obtained by fraud. Distinguishing "extrinsic" from "intrinsic" fraud, the court held the decree not subject to collateral attack. The decision is clearly right, and requires no comment.

128. 44 Cal.2d at 474, 283 P.2d at 25.

The overruling of *Biewend*, insofar as it held the decree modifiable only by the state of rendition, is only a mild indication that Justice Traynor possesses one of the rarest traits of the great judge: the ability to confess error. For a dramatic instance, see *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955).

Although *Worthley v. Worthley* in enforcing a modifiable foreign decree rejected the rule of the *Restatement*,<sup>129</sup> the decision was acclaimed by the law reviews,<sup>130</sup> and, indeed, it is difficult to understand objections to the result in view of its practical utility. The interesting question relates not to the enforceability of the foreign modifiable decree, nor to the freedom of the court in which enforcement is sought to modify the decree, but to choice of the law governing modification. In a nonconflicts situation the Supreme Court has held that due process requires that the defendant be given notice and an opportunity to be heard on the question of modification before judgment is entered against him,<sup>131</sup> but this does not necessarily mean that the law of the rendering state is controlling. The analogy of custody decrees points away from the dominance of that law. The Supreme Court has said of such decrees that "it is clear that the State of the forum has *at least* as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered";<sup>132</sup> and it is easy to imagine a case in which the state originally rendering the judgment has lost all interest in the matter, while the state in which custody is being litigated has a compelling interest in the application of its own law in the interests of the child's welfare. Where alimony decrees are concerned it may be necessary to distinguish between the grounds for and the limits of modification.<sup>133</sup> I find the problem a difficult one,<sup>134</sup> and shall not attempt to suggest a solution in this context. The problem has been thoughtfully analyzed in a student law review comment<sup>135</sup> which provides an excellent point of departure for intensive study.

In *Hopkins v. Hopkins*<sup>136</sup> Justice Traynor, writing for a majority of the court, held that the California court in which a divorced wife sought to enforce a Colorado decree embodying a property settlement agreement could determine for itself what proportion of the gross monthly alimony and support payments was "reasonably necessary for the support, maintenance, and education" of

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129. RESTATEMENT, CONFLICT OF LAWS § 435 (1934).

130. See comments cited note 127 *supra*.

131. *Griffin v. Griffin*, 327 U.S. 220 (1946).

132. *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947). (Emphasis added.)

133. See Comment, 26 U. CHI. L. REV. 136, 145 (1958).

134. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 82 (1958).

135. See note 133 *supra*.

136. 46 Cal.2d 313, 294 P.2d 1 (1956).

the children during their minority, and thus determine the amounts to be paid to the plaintiff, the children having attained the age of majority. In *Lewis v. Lewis*<sup>137</sup> he held for a unanimous court that an ex parte Nevada divorce, obtained by the husband while an action for divorce was pending in Illinois, could not be pleaded as a defense to the wife's action on the Illinois alimony decree: The Nevada decree should have been pleaded as a defense in the Illinois proceeding. In *Kubon v. Kubon*<sup>138</sup> he dissented from a holding that the wife's violation of a California temporary restraining order relating to custody constituted a "clean hands" defense to her suit on a Nevada decree for accrued arrearages. This brief, stark recital does not do justice to the careful judicial workmanship that is evident in the three opinions; but all three are so clearly right that there is nothing more to say.

2. *The effect of ex parte divorce decrees on the right to support.* Prior to 1942 there was little reason for state courts to consider critically the effect of divorce on the right to support. The easy assumption that such rights were mere incidents of the marital status, and terminated with it, was not often subjected to stress. In the extreme case, where a husband abandoned his wife and established a domicile in a sister state, procuring a divorce there and returning to the marital domicile, the problem was not acute; the state of marital domicile was free to disregard the foreign divorce, and enforce the duty to support.<sup>139</sup> The first *Williams* case,<sup>140</sup> however, radically altered the situation by requiring full faith and credit to such divorces. The blow was softened by the holding of the second *Williams* case<sup>141</sup> that the effect of such a divorce could be avoided by a showing that the divorcing spouse was not in fact domiciled in the rendering state; but this was not an easy path of refuge for the abandoned wife.<sup>142</sup> By what appears to have been a fortunate coincidence, the Court had occasion on the same day to intimate indirectly that the right to support might survive such a divorce, even if the jurisdiction of the divorcing court could not be successfully attacked, if that right, by the law of the wife's domicile,

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137. 49 Cal.2d 389, 317 P.2d 987 (1957), discussed further at notes 158 and 165 *infra*.

138. 51 Cal.2d 229, 233, 331 P.2d 636, 638 (1958).

139. *Haddock v. Haddock*, 201 U.S. 562 (1906).

140. *Williams v. North Carolina*, 317 U.S. 287, 143 A.L.R. 1273 (1942).

141. *Williams v. North Carolina*, 325 U.S. 226, 157 A.L.R. 1366 (1945).

142. "The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant." *Id.* at 233-34, 157 A.L.R. at 1371.

could survive a valid divorce.<sup>143</sup> The proposition that, although the divorce might effectually dissolve the marital relation, it could not, in the absence of personal jurisdiction over the wife, affect her financial interests, was expressly advanced by three justices in concurrence, although a resolution of that question was not necessary to the decision.<sup>144</sup> In the course of time the proposition came to be fully established.<sup>145</sup> The time had come for most of the states to reexamine critically the nature of the right to support, and whether it could survive a valid divorce. If it did not survive an ex parte decree, it ought to.

The question was very obliquely presented to the California Supreme Court in *Dimon v. Dimon*.<sup>146</sup> The parties were married in Oregon; they separated, and thereafter the wife obtained an ex parte divorce in Connecticut. Since the validity of the divorce was conceded, we must assume that she was domiciled in Connecticut at the time. Later, when she was a resident of Oregon and the ex-husband a resident of Nevada, she sued in California for alimony.<sup>147</sup> The majority, without discussing the relevance of the law of any other state, held that in California the wife's right to support does not survive divorce. Justice Traynor dissented from this portion of the opinion, maintaining that "the wife's right to support, although arising out of the marriage, is not lost by dissolution of the marriage unless it could have been litigated in the proceedings" for divorce.<sup>148</sup> After a painstaking review of the California authorities he concluded that, while no case had squarely held that an independent suit in equity would lie after divorce to enforce the duty of support, there were substantial indications that such was the law. Then he indicated forthrightly the basis for his concern. The case before the court involved only the right of a nonresident wife who herself had obtained the ex parte divorce. If no more had been involved, perhaps he would not have been moved to dispute the majority's conclusion so vigorously. But recent developments in

143. *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279, 280, 157 A.L.R. 1396, 1397 (1945).

144. *Id.* at 281-83, 157 A.L.R. at 1398-99.

145. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Estin v. Estin*, 334 U.S. 541, 1 A.L.R.2d 1412 (1948).

146. 40 Cal.2d 516, 254 P.2d 528 (1953), 37 MARQ. L. REV. 279 (1953-1954), 26 So. CAL. L. REV. 325 (1953).

147. One wonders about the reasons for this choice of forum, and whether such an action would not be likely to be dismissed on forum non conveniens grounds since the decision in *Price v. Atchison, T. & S.F. Ry.*, 42 Cal.2d 577, 268 P.2d 457, 43 A.L.R.2d 756 (1954). Neither the majority nor Justice Traynor doubted the propriety of retaining jurisdiction. 40 Cal.2d at 525, 540, 254 P.2d at 532, 541.

148. *Id.* at 532, 254 P.2d at 536.

the law of full faith and credit meant that "If a valid ex parte divorce is granted the husband by another state, the California wife may be protected only if she is allowed a subsequent action for support."<sup>149</sup> The law of California should keep pace: "Since the courts have evolved rules of law that allow the husband readily to obtain a divorce, corresponding rules of law must be invoked to protect the wife and prevent injustice. Accordingly, we should give effect to an ex parte foreign decree obtained by the husband insofar as it affects marital status, but declare it ineffective on the issue of alimony, thus accommodating the interests of each state by restricting it to matters of her dominant concern."<sup>150</sup> In the state of the precedents, this need be understood as nothing more than an argument that, since existing law did not clearly preclude suit for alimony after divorce, practical considerations dictated resolution of the ambiguity in favor of the right. It may mean more: It may mean that judicial conclusions reached in earlier times should be reevaluated in the light of new conditions, not then in contemplation. If so, it is not to be stigmatized as judicial legislation, but is simply the common-law tradition at its best.

As we shall see, the central question whether the right to support survives a valid ex parte divorce was settled later. Before pursuing that story, however, we may notice an interesting sidelight of the *Dimon* case.

Unlike the majority, Justice Traynor was interested in the law of Connecticut, although the greater part of his opinion is devoted to California law. It is not clear whether the parties properly invoked the foreign law; probably they did.<sup>151</sup> If not, the inquiry into foreign law on appeal was questionable practice, irrespective of the judicial notice statute.<sup>152</sup> In that event, the preferable procedure would have been to dispose of the case according to the law of the forum; but this is, in effect, what Justice Traynor proposed when, finding Connecticut law inconclusive, he indulged the familiar presumption that the common law of the foreign state is the same as

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149. *Id.* at 539, 254 P.2d at 540.

150. *Id.* at 539-40, 254 P.2d at 541.

151. It appears that the plaintiff based her action "upon the theory that under the law of Connecticut she had a right to support at the time of the divorce. . . ." *Id.* at 531, 254 P.2d at 536. And Justice Traynor said, "No Connecticut decisions have been discovered or cited by the parties that directly pass on the question whether a wife domiciled in Connecticut at the time of an ex parte divorce decree may subsequently bring an action for support." *Id.* at 542, 254 P.2d at 542.

152. See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

that of the forum.<sup>153</sup> On the assumption that Connecticut law was properly invoked, it is clear that Justice Traynor was rightly concerned about the posture of that law. Thus if Connecticut, the state of the wife's domicile at the time of divorce, had no law and policy allowing survival of the right to support, California (having no interest in the matter) would have denied full faith and credit to the Connecticut decree by imposing that duty on the husband.<sup>154</sup> On the other hand, if by Connecticut law the right to support survived a valid ex parte divorce obtained at the suit of the wife, as Justice Traynor assumed, the case may present one of the most troublesome problems in modern conflict-of-laws analysis: the problem of the disinterested third state.<sup>155</sup> Assume that the husband was at the time of the divorce and thereafter domiciled in Nevada, and that Nevada recognized no duty of support after a valid divorce. There would then be a clear conflict of interests between Connecticut and Nevada, Connecticut having an interest in the allowance of support for the wife domiciled there, and Nevada having an interest in the protection of its domiciliary from such liability. The conflict would pertain only to choice of law, not to the recognition of judgments: the Connecticut decree could not, in the absence of personal jurisdiction over the husband, adjudicate the right to support. Hence neither Nevada nor California would be compelled by the full faith and credit clause to recognize the right to support asserted under Connecticut law. Having no interest in the matter at all, what should California do? To weigh and choose between the competing state interests would be to exercise a purely legislative judgment. To concoct a "rule" that the law of the wife's domicile "governs"<sup>156</sup> would be to do the same thing sub silentio and by mere fiat. In the absence of congressional implementation of the full faith and credit clause, it seems that the best course for California to follow—if it is to adjudicate the case at all—would be to apply the law of the forum simply by default. That law is presumptively applicable,<sup>157</sup> and neither party has sustained the burden of showing that a particular foreign law is entitled to preference. This is the

153. 40 Cal.2d at 542, 254 P.2d at 542.

154. *Id.* at 540, 254 P.2d at 541.

155. See Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1961).

156. As New York did, in substance, in a similar situation. See *Dean v. Dean*, 241 N.Y. 240, 149 N.E. 844, 42 A.L.R. 1398 (1925); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 257 n.55 (1958).

157. *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532, 547-48 (1935).

result that both the majority and Justice Traynor would have reached, but by different routes and with different consequences. The majority did not consider the relevance of foreign law, and concluded that in California the right to support terminated upon divorce. Justice Traynor considered the Connecticut law (though not that of Nevada);<sup>158</sup> found the Connecticut cases inconclusive; and applied California law (under which, according to his view, the right to support survived) because of the presumption that the law of Connecticut was to the same effect.

If, instead of the wife's obtaining the ex parte divorce in Connecticut, the husband had obtained it in Nevada, the same problem of the disinterested forum would be presented. At first sight it may seem that this is not so, because an element of due process is involved: Lacking jurisdiction of the person of the wife, Nevada is powerless to affect her financial rights. But this assumes that her rights are fixed by the law of Connecticut rather than by the law of Nevada. Here we are not concerned with the effect of the divorce decree: Concededly it cannot affect personal rights, but the question is whether she has any right to support that survives divorce. Thus if Connecticut should hold that there is no such right under Connecticut law it is not a denial of due process for Connecticut to treat the Nevada divorce as terminating the right to support. It is not lightly to be assumed that the law of Connecticut is necessarily to be applied. Connecticut is free to apply its own law, to be sure, but if, as I believe, Nevada is equally free to apply its own, there is no denial of due process if Nevada refuses to grant support to the wife on the ground that its law recognizes no right of support after divorce.<sup>159</sup>

*Worthley v. Worthley*,<sup>160</sup> which has already been discussed with reference to the enforcement of foreign modifiable decrees,<sup>161</sup> pre-

158. Cf. *Lewis v. Lewis*, 49 Cal.2d 389, 317 P.2d 987 (1957), where, discussing an ex parte divorce obtained by a husband in Nevada, Justice Traynor said, citing Nevada cases: "The decree would terminate plaintiff's right to support if she were a Nevada domiciliary." *Id.* at 391 n.\*, 317 P.2d at 989 n.l.

159. The question whether the right to support survives a valid ex parte decree obtained by the wife, as distinguished from one obtained by the husband, is purely a question of domestic law. That is to say, it does not present the question of due process that is presented where the husband is the plaintiff. A discussion of the question would therefore not be appropriate here, and I shall say only that I am inclined to sympathize with Justice Traynor's humanitarian view that the wife who cannot obtain personal jurisdiction of her husband should not be treated as having forfeited her support rights by suing for divorce. The argument is persuasive in the case of the deserted wife; but I am troubled by the case of the California wife who could easily sue for divorce and alimony there, but chooses instead to obtain an ex parte divorce in Nevada.

160. 44 Cal.2d 465, 283 P.2d 19 (1955).

161. See text accompanying note 127 *supra*.



sented the question as to the effect on support of ex parte divorce somewhat more directly. After the wife had obtained her New Jersey decree the husband obtained an ex parte divorce in Nevada. For the majority, Justice Traynor, referring to New Jersey law, held the divorce ineffective to cut off the wife's right to support under the decree. This troubled Justice Spence, who dissented. If it was the law of California, as he believed, that a valid divorce terminates all rights to support, even those embodied in a decree, so that a California wife's rights would be lost upon her husband's obtaining a valid ex parte divorce, it seemed to him anomalous to say that California must enforce the rights of a nonresident wife in similar circumstances—especially rights under a foreign decree modifiable both prospectively and retroactively.<sup>162</sup> This position is challenging enough to warrant a closer look at the majority opinion.

Said Justice Traynor:

Since the full faith and credit clause compels recognition of the Nevada decree only as an adjudication of the marital status of plaintiff and defendant and not of any property rights that may be incident to that status . . . the effect of the dissolution of the marriage on defendant's preexisting obligations under the New Jersey maintenance decree must be determined by the law of New Jersey.<sup>163</sup>

One may well ask: Why must that question be determined by reference to New Jersey law rather than by reference to the law of Nevada or California?<sup>164</sup> In the absence of the New Jersey judgment—*i.e.*, if the question were simply one of choice of law—there would be as much reason to apply the law of Nevada, or perhaps of California, as to apply the law of New Jersey, so far as principles of conflict of laws or of constitutional law are concerned. This was not a mere matter of choice of law, but of rights that had ripened into judgment; yet if the judgment was not entitled to full faith and credit the question of choice of law was, theoretically at least, as open as if there had been no judgment.

It is necessary to bear in mind two things to understand Justice Traynor's position here. First, he differed with Justice Spence as to the state of the California law regarding the effect of divorce; in applying the law of New Jersey he was applying what he thought

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162. 44 Cal.2d at 475-76, 283 P.2d at 26.

163. *Id.* at 468, 283 P.2d at 21.

164. We must assume that the husband was domiciled in Nevada at the time of the divorce. It does not appear whether he was domiciled in California at the time of the pending action.

was California law as well. Second, he was by no means prepared to disregard the New Jersey decree and proceed as if the question were merely one of choice of law. As the discussion of the *Biewend* case has shown, he was supported by a majority of the court in his attitude that modifiable foreign decrees for alimony and support are to be treated as if they were entitled to full faith and credit, even though the Supreme Court has not so held. If California is disposed to do so, and it appears to be, it may subordinate local interests, or the interests of another state such as Nevada in our example, to foreign rights embodied in a judgment. This explains to my satisfaction the ready determination that New Jersey law was applicable: The New Jersey judgment was being given the same faith and credit as it had by law or usage in the state from which it was taken. The same analysis applies to *Lewis v. Lewis*,<sup>165</sup> which carried the process a step further by recognizing an Illinois wife's rights to alimony under a decree obtained *after* the husband had obtained an *ex parte* divorce in Nevada.

When the question whether a wife's right to support under California law survives a valid *ex parte* divorce was squarely presented<sup>166</sup> to the California Supreme Court, Justice Traynor's affirmative view, first expressed in dissent,<sup>167</sup> prevailed.<sup>168</sup> Doubtless this result was facilitated by the California court's previous protection of the rights of wives under the law of New Jersey and Illinois;<sup>169</sup> basically, however, Justice Traynor had convinced a majority of the court that, even though two precedents would have to be overruled,<sup>170</sup> California law should be adjusted to the new conditions created by the Supreme Court's decisions regarding full faith and credit to *ex parte* divorces.<sup>171</sup>

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165. 49 Cal.2d 389, 317 P.2d 987 (1957), discussed in text accompanying note 136 *supra*.

166. This is perhaps an exaggeration: the case might have been decided on other grounds. See *Hudson v. Hudson*, 52 Cal.2d 735, 746, 344 P.2d 295, 301 (1959) (McComb, J., concurring); *Baldwin v. Baldwin*, 28 Cal.2d 406, 416-17, 170 P.2d 670, 676-77 (1946). But Justice Traynor and all but one of his brethren doubtless felt that the time had come to settle the issue.

167. *Dimon v. Dimon*, 40 Cal.2d 516, 526, 254 P.2d 528, 533 (1953).

168. *Hudson v. Hudson*, 52 Cal.2d 735, 344 P.2d 295 (1959), 48 CALIF. L. REV. 303 (1960).

169. *Lewis v. Lewis*, 49 Cal.2d 389, 317 P.2d 987 (1957); *Worthley v. Worthley*, 44 Cal.2d 465, 283 P.2d 19 (1955). The court in *Hudson* refers to these cases in 52 Cal.2d at 741, 344 P.2d at 298.

170. *Dimon v. Dimon*, 40 Cal.2d 516, 254 P.2d 528 (1953); *Cardinale v. Cardinale*, 8 Cal.2d 762, 68 P.2d 351 (1937).

171. The new rule was securely nailed down in *Weber v. Superior Court*, 53 Cal.2d 403, 348 P.2d 572, 2 Cal. Rep. 9 (1960), where Justice Traynor, now writing for a unanimous court, held that it made no difference that the husband's *ex parte* divorce was obtained before the wife filed her action for support.

3. *Miscellaneous matters.* A lurid marital situation gave rise to some zany legal arguments, particularly concerning *res judicata*, in *Rediker v. Rediker*.<sup>172</sup> The case, with some detail omitted for the sake of clarity, involved a husband, who upon being sued for separate maintenance, cross-complained for annulment on the ground that at the time of their marriage the plaintiff was the wife of another. He got nowhere with this, since it was found that the plaintiff was divorced from her former husband six years prior to her marriage to the defendant. The defendant did succeed, however, in persuading the trial court (1) that the *ex parte* divorce which he had obtained in Cuba from his own first wife was void, and (2) that an *ex parte* Florida divorce obtained by his first wife some five years after his marriage to the plaintiff established conclusively that there was a valid and subsisting marriage between the defendant and his first wife at that time. On the basis of these arguments the trial court annulled the marriage as bigamous.

The first argument was so patently frivolous that it is difficult to conceive how the trial court could have been gulled by it. The defendant was domiciled in Cuba when he obtained the divorce from his first wife, and the fact that the defendant in that action was not personally served was immaterial; moreover, the defendant, as the moving party, was estopped to attack the validity of the Cuban divorce. The second argument was no more substantial, but had a certain superficial plausibility: An existing valid marriage is a condition precedent to divorce under Florida law; the decree of divorce necessarily imported a finding that there was a subsisting marriage; a divorce decree is a judgment *in rem*, binding on all the world; ergo, it follows that the defendant was still married to his first wife when he married the plaintiff. My first reaction was to classify this along with arguments sometimes made by the poorer law students, which are so farfetched that they cannot be refuted by authority, no one ever having had the temerity to advance them in court, and can only be dismissed as nonsense. Justice Traynor, however, writing for a unanimous court, laid down a scathing barrage of authority, reason, and policy considerations to demolish the argument. The power of the opinion is such as to suggest that it was written with a betatron. It is a pity, all the same, that so much judicial industry and talent should have to be wasted in refutation of arguments that border on the irresponsible.

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172. 35 Cal.2d 796, 221 P.2d 1, 20 A.L.R.2d 1152 (1950), 2 HASTINGS L.J. 86.

In *Scott v. Scott*<sup>173</sup> the court upheld an ex parte Mexican divorce, finding that the plaintiff in the divorce proceeding was domiciled in Mexico at the time. Justice Traynor wrote a concurring opinion in order to (1) discourage any implication that domicile was requisite in all cases to recognition of foreign-country divorces, and (2) drain some of the nonsense out of section 1915 of the Code of Civil Procedure, which provides: "A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state." So doing, he outlined some good law for the future. A country other than the domicile may have a legitimate interest in the marital status, and, if so, our monolithic attitude toward domicile should not be permitted to inject uncertainty into matters of status. On the other hand, even if the divorcing court had jurisdiction under its own law, California must reserve its freedom to withhold recognition because of limitations of due process or local policy. "[W]e cannot assume that in section 1915 the Legislature meant to override such limitations or policy."<sup>174</sup>

In *Rozan v. Rozan*,<sup>175</sup> speaking for a unanimous court, Justice Traynor squarely placed California in the ranks of those states which, rising above the anaemic negativism of *Fall v. Eastin*,<sup>176</sup> will accord full faith and credit to foreign decrees ordering the conveyance of local land. Though the precise question was not before the court—here the California courts were ordering conveyance of North Dakota land—Justice Traynor characteristically seized the occasion to establish the proper rule to be applied if the situation were reversed, and did so in such a conclusively convincing manner that it is impossible to conceive that the opinion will not be accepted as authoritative on the point. My own enthusiasm for this result has been revealed elsewhere, and need not be reiterated.<sup>177</sup>

*Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*<sup>178</sup> is not a conflict-of-laws case at all; yet my interest in the case over the

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173. 51 Cal.2d 249, 331 P.2d 641 (1958).

174. *Id.* at 256, 331 P.2d at 645.

175. 49 Cal.2d 322, 317 P.2d 11 (1957), 11 OKLA. L. REV. 214 (1958).

176. 215 U.S. 1 (1909).

177. Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620 (1954).

178. 19 Cal.2d 807, 122 P.2d 892 (1942), 57 HARV. L. REV. 98 (1943).

years has been heightened by its potential interstate significance. In the purely domestic context the overthrow of the mutuality rule as to collateral estoppel may not cause serious repercussions; the informed reaction is likely to be that this represents desirable progress away from the artificialities of the common law (though this reaction may well be tempered by doubts as to the anomalous results to which complete overthrow may lead in the case of multiple claimants).<sup>179</sup> When one considers the effect to which a judgment is entitled in other states under the full faith and credit clause, however, a new dimension is added. Thus if a plaintiff may choose to sue in any one of a dozen states, his use of the initiative in such a way as to force a defense in a very inconvenient forum raises doubts that are not apparent when attention is focused on the domestic scene. When all is said, however, one remains enthusiastic about the overthrow of the mutuality rule, and happy that Justice Traynor went beyond the necessities of the case in order to accomplish it.<sup>180</sup> If the language of the opinion is nevertheless too broad, the case-by-case method of the common law can be expected to contain it.<sup>181</sup>

#### IV. JURISDICTION OF COURTS

1. *In general.* Certain opinions relating to jurisdiction of courts require only brief mention. *Reynolds v. Reynolds*<sup>182</sup> affirmed the continuing jurisdiction of the court in which the defendant has appeared to modify an order for support upon proper notice, although the defendant has left the state.<sup>183</sup> *Redicker v. Redicker*,<sup>184</sup>

179. See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

180. *Id.* at 322. There remain critics of the decision, however. See EHRENZWEIG, *CONFLICT OF LAWS* 225-28 (1959); Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961).

181. A district court of appeal has refused to apply the broad language of *Bernhard* in the multiple-claimant situation. *Nevarov v. Caldwell*, 161 Cal. App.2d 762, 327 P.2d 111 (1958) (petition for hearing by supreme court denied August 28, 1958).

Collateral estoppel is a tricky problem, and discussion of it always involves some risk of inappropriate statement. See Currie, Book Review, 73 HARV. L. REV. 801, 807 n.25 (1960). Jeremy Bentham, before Justice Traynor the foremost critic of the mutuality rule, said: "It is right enough that a verdict obtained by *A* against *B* should not bar the claim of a third party *C*; but that it should not be evidence in favor of *C* against *B*, seems the very height of absurdity." 7 BENTHAM, WORKS 171 (Bowring ed. 1840). Of course what he meant to say was that, if *A* sues *B* and loses, *B* should not be able to plead the verdict in defense against *C*, who was not a party; but that if *A* prevails over *B*, *C* should be entitled to use the verdict against *B*. *Indignor quandoque bonus dormitat Homerus*.

182. 21 Cal.2d 580, 134 P.2d 251 (1943).

183. The principle of continuing jurisdiction and the requirement of adequate notice were also recognized in *Lewis v. Lewis*, 49 Cal.2d 389, 317 P.2d 987 (1957).

184. 35 Cal.2d 796, 221 P.2d 1 (1950).

as we have seen, denied the jurisdiction of a court not having jurisdiction of both parties to a divorce proceeding to determine that there was a subsisting valid marriage, though the divorce decree itself is entitled to recognition.<sup>185</sup> *McDonald v. Superior Court*<sup>186</sup> gave a liberal construction to California's nonresident motorist statute:<sup>187</sup> Its authorization of substituted service on the nonresident owner in "any action . . . growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent" was held to cover an accident occurring in the process of unloading an allegedly defective truck rented from the defendant for immediate use on California highways.<sup>188</sup> And *Rozan v. Rozan*,<sup>189</sup> as we have seen, affirmed the jurisdiction of a California court, having the defendant before it, to order a conveyance of land in another state.<sup>190</sup>

A case of more than passing interest is *Owens v. Superior Court*.<sup>191</sup> At a time when both parties were residents of California, the plaintiff was bitten by the defendant's dog. The defendant moved to Arizona, and thereafter plaintiff sued in California, obtaining an order for service by publication and serving defendant personally in Arizona. The defendant appeared specially and moved to quash.

California's statutes providing for extraterritorial service of process were not, and still are not, aptly designed to take advantage of the Supreme Court's relaxation in recent years of due process restrictions.<sup>192</sup> Sections 412 and 413 of the Code of Civil Procedure, which in terms appear to authorize service by publication generally, had been construed as limited by traditional conceptions of due process.<sup>193</sup> In an effort to adjust to modern conceptions the legislature enacted section 417, which, ironically, is in the form of a limitation on sections 412 and 413:

Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and

185. See text accompanying note 171 *supra*.

186. 43 Cal.2d 621, 275 P.2d 464 (1954).

187. CAL. VEHICLE CODE § 404.

188. *Cf. Nelson v. Miller*, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

189. 49 Cal.2d 322, 317 P.2d 11 (1957).

190. See text accompanying note 175 *supra*.

191. 52 Cal.2d 822, 345 P.2d 921 (1959), 48 CALIF. L. REV. 295 (1960), 60 COLUM. L. REV. 237 (1960), 7 U.C.L.A.L. REV. 808 (1960).

192. See Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958); Note, *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

193. See, e.g., *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 Pac. 345 (1896).

413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State (a) at the time of the commencement of the action, or (b) at the time that the cause of action arose, or (c) at the time of service.

In *Owens* the defendant was not a resident of the state at the commencement of the action, nor at the time of service. There was statutory basis for the exercise of jurisdiction, therefore, only because he was a resident at the time the cause of action arose.

Is the domicile of the defendant in the state at the time the cause of action arose, without more, an adequate constitutional basis for the exercise of jurisdiction? Justice Traynor conceded this to be a debatable question. On the other hand, the cause of action arose out of the defendant's activities in the state; and no constitutional objection to the exercise of jurisdiction would be tenable in such circumstances. Yet the California statute did not provide for injuries to local residents growing out of activities of the defendant within the state. For a majority of the court, and with the aid of a severability clause, Justice Traynor concluded that the exercise of jurisdiction was authorized by section 417 by reason of the defendant's domicile in the state at the time the cause of action arose; and, while that provision of the section might be unconstitutional in some applications, it was not so in the circumstances of the instant case, since recognizing California's interest in providing a forum in those circumstances did no violence to conceptions of fair play and substantial justice. Thus the court did a workmanlike job of making bricks without straw—of reaching a just and desirable result in the absence of adequate legislative implementation of the powers of the courts under modern constitutional doctrine.

2. *Parent and child.* According to the *Restatement*, "A state can exercise through its courts jurisdiction to determine the custody of children . . . only if the domicil of the person placed under custody . . . is within the state."<sup>194</sup> But in 1944 Professor Dale F. Stansbury of Duke University took a cool, hard look at the cases and concluded that this dogma bears little resemblance to what courts do in fact, and still less to what they must be able to do if they are to deal at all adequately with the human and social prob-

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194. RESTATEMENT, CONFLICT OF LAWS § 117 (1934). Somewhat grudgingly, a state is conceded power to appoint a "temporary guardian" of a person found within its territory. *Id.* § 118.

lems of child custody. "A court of any state that has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part, has jurisdiction to determine his custody, and this jurisdiction may exist in two or more states at the same time."<sup>195</sup> In *Sampsell v. Superior Court*<sup>196</sup> Justice Traynor, speaking for a bare majority, enthusiastically endorsed the Stansbury position; yet the decision, if limited to the facts of the case before the court, could give no offense to the American Law Institute, since the child was, technically at least, domiciled in California when the action was filed.

In the beginning the husband and wife lived together in California with their child. They separated, and the wife left California, taking the child with her, intending to obtain a Nevada divorce and then make her home in Utah. While she and the child were in Nevada, and before they went to Utah, the husband filed suit for divorce in California, and the wife appeared in the action. The trial court denied the husband's petition for an order awarding him custody pendente lite on the ground that it lacked jurisdiction to enter such an order, and the case reached the supreme court on the husband's petition for mandamus.

It would have been sufficient, in order to dispose of the pending action, to hold that the trial court had jurisdiction to enter a custody decree because the child was domiciled in California at the time the action was brought. The court did so hold, on two rather technical bases: (1) a demurrer admitted the allegation of domicile and (2) even if the child's domicile followed that of the mother, with whom he was living, rather than that of the father, the mother did not lose her California domicile until she reached Utah, her intended home; and jurisdiction, once attached, was not lost by the subsequent establishment of a Utah domicile. If a make-weight argument had been desired, it could have been found in the fact that the court had personal jurisdiction of both parents. Such narrow justifications for the decision were not satisfactory to Justice Traynor and the majority of the court. They undertook to clarify the whole vexed problem of custody jurisdiction, with the salutary result that trial courts were given maximum freedom to deal with the merits of custody cases. At the same time, there was

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195. Stansbury, *Custody and Maintenance Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 831-32 (1944).

196. 32 Cal.2d 763, 197 P.2d 839 (1948), 57 MICH. L. REV. 703 (1949), 22 So. CAL. L. REV. 293 (1949).



to be no arrogant or exclusive exercise or assertion of the power: the trial courts were to exercise a sound discretion, taking into account the interests of other states, and there was no thought that California's decrees were to be conclusive. Such decrees were modifiable at home, and would be similarly modifiable by the courts of any interested state.

The rather passionate dissent, apart from criticizing allowance of mandamus as a matter of procedure,<sup>197</sup> concentrated on the futility of ordering the trial court to assume jurisdiction to issue an order it probably could not enforce.<sup>198</sup> But the majority did not command the trial court to award custody to the father. It only required the court to recognize that it had jurisdiction to hear the application on the merits and to exercise a wise discretion. It was specifically left free "to refuse to determine the custody of the minor child in the pending proceeding."<sup>199</sup>

The *Sampsell* case, together with Professor Stansbury's article, has persuaded the American Law Institute of the error of its monolithic requirement of domicile.<sup>200</sup>

A question may be raised as to how the *Sampsell* case comports with the subsequent decision of the United States Supreme Court in *May v. Anderson*.<sup>201</sup> There Wisconsin, where the children were technically domiciled (though they were actually living with their mother in Ohio), awarded custody to the father in a divorce action, the mother not having been personally served in Wisconsin. Thereafter the children lived with him in Wisconsin for a time; but when the mother refused to surrender them after a visit to Ohio, the father sought their release on habeas corpus. Ohio ordered their release to the father, treating the Wisconsin decree as conclusive.<sup>202</sup> The Supreme Court reversed. Finding an analogy in the cases holding that ex parte divorce decrees, while entitled to recognition as dissolving the bonds of matrimony, could not cut off support

197. A matter which is beyond the scope of this paper.

198. 32 Cal.2d at 788-90, 197 P.2d at 755-56 (Schauer, J.).

199. *Id.* at 780, 197 P.2d at 750.

200. See RESTATEMENT OF THE LAW CONTINUED, CONFLICT OF LAWS § 177 (Tent. Draft No. 1, 1953); RESTATEMENT (SECOND), CONFLICT OF LAWS § 144a (Tent. Draft No. 4, 1957). The new § 117 recognizes three bases of jurisdiction: domicile, physical presence, and personal jurisdiction of the adverse claimants.

201. 345 U.S. 528 (1953).

202. "[T]he Probate Court decided that it was obliged by the Full Faith and Credit Clause of the Constitution of the United States to accept the Wisconsin decree as binding upon the mother." *Id.* at 529. "The children were domiciled in Wisconsin . . . where the Wisconsin court had exclusive jurisdiction . . ." *Anderson v. May*, 48 Ohio Op. 132, 136, 107 N.E.2d 358, 362 (1952).

rights, it asserted that "a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony."<sup>203</sup> Mr. Justice Frankfurter concurred on the ground that the Court was deciding only that full faith and credit did not require Ohio to treat the Wisconsin decree as conclusive. Justices Jackson and Reed dissented on the ground that the decree of the domiciliary court was entitled to full faith and credit. Mr. Justice Minton dissented on the ground that the constitutional question was not presented by the record. Mr. Justice Clark took no part in the decision. Thus the opinion of the Court represents the views of only four of the Justices: Burton (the author), Vinson, Black, and Douglas.

It is not easy to adopt an unqualified position regarding the opinion of the Court. A more promising approach is to state several propositions concerning it:

1. It rejects the *Restatement* view that the state of the child's domicile has exclusive jurisdiction. To that extent, as Justice Traynor would no doubt agree, it is sound.

2. It enables other interested states—here the state in which the children were physically present with their mother—to reexamine the custody question without regard to whether the decree was modifiable in the state of rendition,<sup>204</sup> and without being limited by any requirement of a showing of changed circumstances, or of evidence not presented to the rendering court. This does not quite square with the usual formula for according qualified faith and credit to such decrees, but one wonders how much practical difference the divergence makes. The dissenting opinion of Mr. Justice Jackson, with its rigorous demand for full faith and credit until there has been a properly ceremonious modification of the decree, would hardly be an acceptable substitute for the opinion of the Court.

3. It affords the mother a realistic opportunity to appear and be heard, and that of itself cannot be offensive to believers in due process of law. True, it gives her little more than the right, that even the dissent would concede her, to seek a modification of the decree in Ohio's courts; but to the extent that this is so it serves only to show that the difference between Burton and Jackson was

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203. 345 U.S. at 534.

204. This, however, may be an academic matter, since such decrees are probably modifiable in all states.

a narrow one. True, also, the mother might have appeared in the Wisconsin divorce proceeding and litigated the custody issue there; but in mere matters of custody there is not the same social urgency to dispense with personal jurisdiction over the absent spouse that exists where the purpose of the action is to dissolve the marital relationship.

4. Despite Mr. Justice Frankfurter's disclaimer, it is difficult to read the opinion of the Court as not laying down the rule that the decree of the domiciliary state is wanting in due process and void as to the mother, in the absence of personal service, even in the rendering state. In this aspect the decision may have most unfortunate effects. It may, for example, lead trial courts to deny their jurisdiction to make custody orders, even when the child is present and domiciled within the state, for lack of jurisdiction over the absent parent. That would fly in the face of common sense, as well as of the principles of *Sampsell*, *Stansbury*, and the new *Restatement*. But no discriminating court should react in any such way. The opinion of the Court protects only the rights of parents, and the domiciliary court is justified in asserting jurisdiction to settle the question of custody (subject to modification) for all other purposes. Moreover, the limited scope of the opinion of the Court, to be noted immediately, provides a sound reason why any court having jurisdiction under *Sampsell* should exercise it notwithstanding *May v. Anderson*.

5. The opinion has a very narrowly confined sphere of operation. Under Ohio law it was settled that habeas corpus was not an appropriate procedure for determining in plenary fashion the issue of custody. "[T]hat writ tests only the immediate right to possession of the children. It does not open the door for the modification of any prior award of custody on a showing of changed circumstances. Nor is it available as a procedure for settling the future custody of children in the first instance."<sup>205</sup> The right to immediate custody may well have been of crucial importance; being given that right, the husband might spirit the children out of the state before the wife could take appropriate action to have the issue settled in plenary fashion. With only this question before it, the Ohio court treated as conclusive the decree of a court having no personal jurisdiction of the wife. She could not introduce evidence of changed circumstances; she could not introduce evidence

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205. 345 U.S. at 532.

that was not before the Wisconsin court. In short, a decree that was modifiable and nonfinal was given final and preclusive effect: it was accorded more force than would have been given it in the state in which it was rendered. It is one thing to say that personal jurisdiction of the absent parent is not necessary when she has the right, before the children are taken from her, to be heard on the question of modification and changed circumstances; it is quite another to say that personal jurisdiction is not necessary when the decree is to be treated as cutting off her right to be heard altogether.

Hence I find no substantial threat in *May v. Anderson* to the admirable solution of custody jurisdiction outlined in *Sampsell*. California trial courts may and should continue to determine questions of custody in proper cases without jurisdiction of the absent parent; in the normal custody proceeding in another state, where the questions of modification and future custody are open, the decree will be given the usual effect, and the objection that there was no personal jurisdiction will have no force. It is only when procedural rules in the second state give excessive weight to foreign decrees that the principle of *May v. Anderson* comes into operation. To give a foreign judgment *more* faith and credit than it has in the state from which it is taken may certainly constitute a denial of due process of law.<sup>206</sup>

I have heard fears expressed that *May v. Anderson* may hamper the right of a state in which a child is domiciled, or present, to bind an absent parent by an adoption decree. That would be a very serious consequence, indeed; but I believe, or at least hope, that the rule of the case would not be so far extended. The foregoing discussion of the limited scope of the decision supports this hope. In addition, it may be noted that adoption has to do with "status" in a way that custody certainly does not.<sup>207</sup> This is an unsatisfactory way of saying that strong considerations of social policy demand that courts have power to act upon a relationship—especially an incapacitating one—although the conditions are not ideal for doing perfect justice to all interested parties, and that no comparable exigency exists when what is involved is not a final change of relationship but only a provisional arrangement for physical care. It would be intolerable if a deserted wife, having found a new help-

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206. This kind of denial of due process occurred, I believe, in *Harnischfeger Sales Corp. v. Sternberg Dredging Co.*, 189 Miss. 73, 191 So. 94 (1939).

207. See *Stansbury, Custody and Maintenance Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 826 (1944).

mate, could not divorce her husband without personal service on him; it would be equally intolerable if an abandoned child for whom a foster parent has been found could not be adopted without personal service on the absent parent. The welfare of the child requires, too, that any state having an interest in him or in the family unit be able to make provisional arrangements for his custody; but since there is involved no question of family relationship or obligation or incapacity there is no urgent need to cut off the rights of the absent parent, and so we do not ordinarily do so, but handle the matter by nonfinal, modifiable decrees. *May v. Anderson* simply plugs one small hole in this plan: an ex parte decree intended to be provisional only must not be treated as preclusive.

Interestingly enough, somewhat similar considerations are involved in another of Justice Traynor's opinions. In *Hartford v. Superior Court*<sup>208</sup> a seventeen-year-old boy sought a declaratory judgment establishing that he was the illegitimate child of the non-resident defendant, who was not personally served in California. The supreme court was unanimous in granting a writ of mandamus requiring that service of summons be quashed. It was properly unimpressed by the plaintiff's argument that, since the purpose of the proceeding was to establish the status of parent and child, the action was "in rem." There is a difference, said Justice Traynor, between severing a relationship, or declaring its nonexistence, and establishing a relationship. Thus an ex parte divorce adjudicates that the parties are free from the bonds of matrimony, but not that there was a subsisting valid marriage. California might reasonably assert jurisdiction over a nonresident to determine that the relation of parent and child did not exist, so as to free its domiciliary from handicaps; but the purpose and effect of a judgment establishing a relationship would be to preclude relitigation of the issue in disputes over personal rights and obligations. "Basically the difference is between the state's power to insulate its domiciliary from a relationship with one not within its jurisdiction and its lack of power to reach out and fasten a relationship upon a person over whom it has no jurisdiction."<sup>209</sup> The significance of this reasoning as supporting jurisdiction in cases of adoption without personal service on the absent parent is clear.

### 3. *Foreign corporations. Henry R. Jahn & Son, Inc. v. Superior*

208. 47 Cal.2d 447, 304 P.2d 1 (1956), 30 So. CAL. L. REV. 336 (1957), 4 U.C.L.A.L. REV. 647 (1957).

209. 47 Cal.2d at 454, 304 P.2d at 5.

*Court*<sup>210</sup> gave the California court the opportunity to take two constructive steps, one of them of far-reaching importance: (1) To declare that local statutes authorizing substituted service on foreign corporations "doing business in this State" impose no limitation not imposed by the due process clause; and (2) to state that there is no difference for jurisdictional purposes between the activity of buying and the activity of selling within the state. The second proposition would seem to present no great difficulty, since no practical or conceptual difference between buying and selling, for jurisdictional purposes, is readily conceivable; yet most of the precedents were concerned with selling activities, and the proffered distinction had to be dealt with. The first proposition is of more moment. Prior to *International Shoe Co. v. Washington*<sup>211</sup> state statutes of this sort had been restrictively construed under the compulsion of old notions as to the restraints imposed by the due process clause. If a state is to take full advantage of the liberating decision in *International Shoe*, it must somehow, by legislation or by judicial construction, put its house in order by modernizing its statutes providing for service of process. It is eminently reasonable for the courts to bring this about, simply by declaring that statutes whose scope had been compressed by restrictive concepts resumed their full body as soon as the pressure was removed. This Justice Traynor did:

[The term "doing business"] is a descriptive one that the courts have equated with such minimum contacts with the state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " . . . Whatever limitation it imposes is equivalent to that of the due process clause. "[D]oing business' within the meaning of section 411 of the Code of Civil Procedure is synonymous with the power of the state to subject foreign corporations to local process."<sup>212</sup>

Other states will save themselves and their citizens trouble by doing likewise.

The broad principle of the *Jahn* case was reaffirmed in *Carl F. W. Borgward, G.M.B.H. v. Superior Court*.<sup>213</sup> In both of these cases the cause of action had arisen out of the local activities of the foreign corporation, and in both Justice Traynor, faithful to the reasoning of the Supreme Court in *International Shoe*, had

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210. 49 Cal.2d 855, 323 P.2d 437 (1958).

211. 326 U.S. 310, 161 A.L.R. 1057 (1945).

212. 49 Cal.2d at 858, 323 P.2d at 439.

213. 51 Cal.2d 72, 330 P.2d 789 (1958).

given appropriate weight to that fact. But *Fisher Governor Co. v. Superior Court*<sup>214</sup> provided a test of this indication that the court was committed to a course of moderation and restraint, limiting jurisdiction in cases of "minimum contacts" to cases in which California had an interest in providing a forum. Actions for wrongful death and personal injuries occurring in Idaho were brought against the defendant in California on the theory that its sales activities there were sufficient to subject it to jurisdiction. Those activities were such as to support jurisdiction if local injury to a local resident had stemmed from them. But "In the present case, the causes of action arose in Idaho, the defective equipment was not sold in this state, neither of the decedents was a California resident, and none of the plaintiffs are California residents. The causes of action are not related to any business done by Fisher here."<sup>215</sup> After a thorough review of the considerations bearing upon the propriety of assuming jurisdiction over foreign corporations under *International Shoe*, Justice Traynor concluded that to assume it here would not be consistent with "the fair and orderly administration of the laws which it was the purpose of the due process clause to insure,"<sup>216</sup> and hence that it could not constitutionally be assumed. The court had passed the test with flying colors.<sup>217</sup>

4. *Jurisdiction over intangibles.* The last opinion to be considered is one of Justice Traynor's boldest and most controversial, and deserves far greater attention than it can be given here. Two groups of California musicians filed actions against their employers—producers of motion pictures and phonograph records—to prevent the consummation of contracts whereby funds deducted from their wages were to be paid to a New York trustee for certain union purposes. All parties having a substantial interest, including the union, were before the court; but there had been only constructive service on the New York trustee. For this reason the trial court ruled that it lacked jurisdiction to grant the relief sought. The supreme court unanimously issued its mandate, holding that the trial court had jurisdiction quasi in rem to determine the conflicting claims to the intangible property.<sup>218</sup>

214. 53 Cal.2d 222, 347 P.2d 1, 1 Cal. Rep. 1 (1959), 1960 WIS. L. REV. 549.

215. 53 Cal.2d at 224, 347 P.2d at 3, 1 Cal. Rep. at 3.

216. *Id.* at 225, 347 P.2d at 3, 1 Cal. Rep. at 3.

217. Although the record presented only an issue as to whether service should be quashed for want of jurisdiction, it is interesting to me that Justice Traynor made no reference to the doctrine of *forum non conveniens*, but forthrightly made the decision one of constitutional principle.

218. *Atkinson v. Superior Court*, 49 Cal.2d 338, 316 P.2d 960 (1957), *appeal dismissed and cert. denied sub nom.* *Columbia Broadcasting System v. Atkinson*, 357 U.S. 569 (1958), 46 CALIF. L. REV. 637 (1958), 10 STAN. L. REV. 750 (1958).

Traditional doctrine would deny this jurisdiction; yet on every consideration of common sense it ought to be recognized. Except for the fact that the trustee was a nonresident, all the parties and all the facts were associated with California alone. On the basis of traditional doctrine, no state would be competent to adjudicate the interests of all parties without their submission to jurisdiction; any attempt to exercise jurisdiction would be attended by the risk of double liability.<sup>219</sup> The court was handicapped in dealing with the problem, as it has been on other occasions, by the failure of the legislature to modernize the statutes on service of process. No California statute authorized service as a basis for a personal judgment against the trustee. If there had been such a statute, the court could have taken advantage of the Supreme Court's willingness to disregard the categorization of jurisdiction as in personam or in rem,<sup>220</sup> and could have brought directly to bear the entire arsenal of modern thinking on jurisdiction in personam. Perhaps, however, it is just as well for the development of the law that the jurisdiction had to be sustained in rem or not at all; for the consequence of this limitation was that Justice Traynor, instead of treating the case in traditional terms of the "situs" of the intangible and the purposes for which the situs state can exercise jurisdiction, appealed to the modern conceptions of interest and fairness applied in such cases as *International Shoe* and asserted their relevance for jurisdiction in rem as well. No more useful service could be performed for this benighted area of the law.<sup>221</sup>

Two decisions of the United States Supreme Court stood in the way of the desired result, apparently establishing that, while the state in which an obligor is found has jurisdiction to apply the obligation to payment of a claim against the obligee, it has no jurisdiction to adjudicate that an adverse claimant has rights superior to those of the nonresident obligee: *Bank of Jasper v. First Nat'l Bank*<sup>222</sup> and *New York Life Ins. Co. v. Dunlevy*.<sup>223</sup> The *Jasper* case could be distinguished on the ground that there the obligation was embodied in a negotiable instrument not within the state; *Dunlevy* was another matter, and the attempt to distinguish it is

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219. The defendant employers might have interpleaded the rival claimants in a federal court, 28 U.S.C. § 1335 (1958), although in view of the character of the union as an unincorporated association it is not completely clear that the requisite diversity of citizenship was present. Cf. 3 MOORE, FEDERAL PRACTICE ¶ 22.09, at 3026 (2d ed. 1948).

220. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

221. See Note, *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 956-60 (1960).

222. 258 U.S. 112 (1922).

223. 241 U.S. 518 (1916).



not convincing.<sup>224</sup> The strength of the opinion lies in its rejection of *Dunlevy*, and in its resort to considerations of practicality and fairness in judicial administration: "We find no relevance in the distinction . . . between jurisdiction to take over a nonresident's claim to a chose in action admittedly his and jurisdiction to establish that it was never his."<sup>225</sup>

It is doubtful whether today the United States Supreme Court would deny to a state court the interstate interpleader jurisdiction that federal courts may exercise. A remedy that a federal court may provide without violating due process of law does not become unfair or unjust because it is sought in a state court instead. To sustain jurisdiction in these cases, however, we are not required to forecast the overruling of the *Dunlevy* case and act on that basis. For the reasons stated above, this case is clearly distinguishable from the *Dunlevy* case, and the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi in rem jurisdiction over the intangibles in question.<sup>226</sup>

Perhaps because of the unconvincing character of the distinctions drawn, a colleague of mine has frowned and commented that a good result was achieved "by way of an ingenious doctrine of quasi-in-rem jurisdiction."<sup>227</sup> Any disparaging connotations of this point of view must be rejected. There is nothing devious about rejecting judicial error; and Justice Traynor said as plainly as a state-court judge becomingly can that he did not recognize the authority of the Supreme Court's decision. What a judge cannot say a commentator can say for him (without authority, of course): The *Dunlevy* case was wrong when it was decided, and would almost certainly not be followed in the light of modern developments in the law.

As I read it, *Dunlevy* is based on two propositions: (1) Even in a garnishment proceeding, which is a proceeding quasi-in-rem, a

224. "[B]ut the court was careful to point out that the interpleader action 'initiated by the company was an altogether different matter' from the garnishment proceedings and that under the applicable state law a judgment exonerating the garnishee was not binding on the absent debtor whose claim against the garnishee the local creditors had unsuccessfully attempted to reach." 49 Cal.2d at 344, 338 P.2d at 963-64. But it would seem to make no difference whether the proceeding is initiated by the stakeholder or by one of the adverse claimants; and the effect of a judgment exonerating the garnishee is not merely a matter of state law, but of due process. The first point, however, is reiterated: "The present case is not one in which an obligor has . . . sought to compel conflicting claimants to adjudicate their rights in a forum of his own choice." *Id.* at 347, 338 P.2d at 966.

225. *Id.* at 346, 338 P.2d at 965.

226. *Id.* at 348, 338 P.2d at 966.

227. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 619 (1958).

judgment that the garnishee is not indebted to the defendant, but to another, does not bind the absent defendant; (2) a fortiori the same must be true of a judgment in interpleader, since that is an equitable proceeding, and equity acts only in personam. The first of these propositions is true, but its truth rests upon the fact that in garnishment the defendant gets no notice of any adverse claim, but only notice that one claiming to be his creditor is pursuing his asset.<sup>228</sup> Plainly, it would be a denial of due process if, on the basis of such notice, a judgment should be entered in favor of an adverse claimant. Consider Mrs. Dunlevy's position: In California she receives notice that her undoubted creditor is proceeding in Pennsylvania against an asset of which she may have been in ignorance, and to which her claim is doubtful. She may well decide to make no contest: the worst that can happen is that the asset will be applied to payment of the debt, and to that extent she will be in better financial condition. If, however, she is told that there is an adverse claim to the asset, her strategy must be different; for if she does not defend, the asset may be lost while the debt remains unpaid.<sup>229</sup>

The second proposition is another painful instance of the mischief that can be worked by the false and trouble-making maxim, "Equity acts in personam." For in interpleader the nonresident claimant gets due notice of the adverse claim; Mrs. Dunlevy got just such notice; and the only substantial reason for not holding the judgment binding disappears. The only remaining basis for the doctrine is that the judgment is necessarily "personal."

I find striking confirmation for the view that this kind of thinking was responsible for the *Dunlevy* decision in the writings of Professor Zechariah Chafee, the great advocate of federal interpleader. Although he was keenly aware of the injustice of the decision, he did not attack it, but acquiesced because he agreed that the interpleader proceeding was not in rem, and there was no personal jurisdiction of the nonresident claimant. Why was the proceeding not in rem? For two reasons: (1) Notwithstanding the garnishment cases and other analogies, Chafee was unable to accept the "question-begging" assertion that the obligation is a res within

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228. Under the decided cases, the defendant may be entitled to no notice at all other than that given him by the garnishee. See *Harris v. Balk*, 198 U.S. 215 (1905).

229. Similarly, even if there is no adverse claim, a judgment exonerating the garnishee may be regarded as denying due process since the creditor does not represent the debtor and is probably in no position to prove the claim of the debtor against the garnishee. Cf. *Hansberry v. Lee*, 311 U.S. 32 (1940).

the jurisdiction where the obligor brings his interpleader action.<sup>230</sup>  
 (2) Even if it be assumed that the chose in action was a res within the jurisdiction, a court could not act in rem in an interpleader suit without the aid of statute. It is illuminating that on this ground the power of a state to bind a nonresident was denied even where there was unquestionably a res within the state in the form of land or chattels:

If the *res* is land there is territorial jurisdiction. But since equity acts *in personam*, a statute will be necessary to enable the court to determine the rights of the claimants without personal jurisdiction over them. Statutes enabling equity to remove clouds on title imposed by the claims of non-residents are frequent, but it is doubtful whether interpleader can be considered a proceeding to remove cloud on title, since the applicant asserts no interest which he wishes protected. However, a broader statute conferring jurisdiction *in rem* where the interpleader concerns domestic land, would be a simple matter. Now suppose that the *res* is a chattel physically situated in X. If it was brought there by consent of the non-resident claimant, it is doubtful whether his rights in the chattel can be cut off unless he personally appears. If, however, the chattel is in X by his consent, that State has territorial jurisdiction, and a statute may give the court jurisdiction *in rem* which will make it possible to bind non-residents by interpleader as well as by other equitable proceedings.<sup>231</sup>

One may fully sympathize with Chafee's distaste for question-begging assertions as to the "situs" of intangible property. Yet the truth is that where, as in the garnishment cases, compelling practical considerations dictate recognition of jurisdiction to proceed against the assets of a nonresident defendant, the Supreme Court has not scrupled to justify the result on the basis that the chose in action is a res located within the state. In the interpleader situation the practical considerations are even more compelling; and, if there is no other way to sustain the jurisdiction, no great intellectual dishonesty is involved in asserting that the debt is a res within the jurisdiction here just as much as in the garnishment cases. Chafee could not distinguish those cases; he could only conclude that they "should not establish a general principle of jurisdiction *in rem*, but merely represent an isolated rule."<sup>232</sup> In this he was influenced by

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230. "[B]ut the assumption that there is a chose in action within the jurisdiction begs the question. If in fact the non-resident claimant is entitled to the obligation of the insurance company, the chose in action is outside the forum, unless it be said that it exists wherever the debtor is, and this is the very question at issue." Chafee, *Interstate Interpleader*, 33 *YALE L.J.* 685, 707-8 (1924).

231. *Id.* at 698-99.

232. *Id.* at 710.

the fear, also reflected in Justice Traynor's opinion, that from recognizing jurisdiction in rem with respect to intangibles in interpleader "it is only a small step farther to bind the nonresident when he is the only claimant against the debtor-plaintiff."<sup>233</sup> But the practical considerations that call for recognition of jurisdiction in rem in garnishment and interpleader obviously do not support an attempt by a local debtor to have the courts declare that he is not indebted to his nonresident creditor.

As to the requirement of statutory authorization to proceed in rem, that is surely a matter of state law; apart from the fact that it is entirely possible for such authority to be developed through judicial decision as distinguished from statute,<sup>234</sup> its existence or nonexistence is not a matter of constitutional moment. Yet Mr. Justice McReynolds appears to have assumed in *Dunlevy* that the inability of a court of equity to act in rem is a principle of natural law. At all events, Chafee's concern with this matter demonstrates that the problem was not thought to be solely one of whether a chose in action could be a res; it also concerned the powers of courts of equity.

If it is recognized that the nonresident claimant in interpleader must be given adequate notice of the proceedings and what they involve, and that courts of equity can, indeed, act in rem, nothing is left of the *Dunlevy* case. It is a pity that Chafee was not more critical of the decision. He seems to have been so convinced that federal interpleader was necessary to meet all the problems that he was not concerned with defending the jurisdiction of the states.<sup>235</sup> But federal interpleader does not solve all the problems. If Chafee had been more critical the impediment of *Dunlevy* might have been brought down years earlier, by judges less bold and perceptive than Justice Traynor.

### CONCLUSION

This review of Justice Traynor's conflict-of-laws opinions has been a stimulating experience for me. I was generally familiar with most of them, and had previously studied two of them inten-

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233. *Ibid.*

234. See HUSTON, *THE ENFORCEMENT OF DECREES IN EQUITY* ch. V (1915).

235. For example, he noted that a state court would not have jurisdiction to enjoin suits in other jurisdictions by nonresident claimants. Chafee, *supra* note 230, at 717-18.

sively. This study, however, has yielded new problems, and revealed old problems in new light. The cases cover a surprising range of subject matter—perhaps as representative a cross section of the field as will be found in the work of any judge. Generalizations can be no substitute for the case-by-case analysis that has been attempted; yet it must be evident that Justice Traynor is almost invariably right in conflict-of-laws matters, and that he has brought to the adjudication of conflicts cases an enlightened, common-sense approach which, while not articulated as a “system,” may well foster a new age of reason in this area of superstition and sorcery. Superlatives, too, can add little to what has been said with respect to specific cases; and without similar studies of the work of other judges I would hesitate to make comparisons. Yet until other such studies are available I submit that the evidence points to Justice Traynor as preeminent in the conflict of laws.<sup>236</sup>

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236. This paper had been completed when Justice Traynor's opinion for the unanimous court in *Bernkrant v. Fowler*, 55 Adv. Cal. 591, 360 P.2d 906, 12 Cal. Rep. 266 (1961) was filed; but so revolutionary an opinion cannot go unremarked. It is probably the only judicial opinion concerning the Statute of Frauds in the conflict of laws that does not so much as mention the substance-procedure dichotomy. The analysis is explicitly in terms of governmental policies and interests. The problem is approached as one of statutory construction. The restraint and moderation with which domestic interests are defined raise a standard to which the wise and honest can repair, and should be a reproach to those who feel that the method of governmental-interest analysis must necessarily produce egocentric or provincial results. Perhaps as good a gauge as any of Traynor's stature is provided by a comparison of the judicial statesmanship displayed here with that of one of Holmes' better conflict-of-laws opinions in a parallel case, *Emery v. Burbank*, 163 Mass. 326, 39 N.E. 1026 (1895), discussed in Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws*, 69 YALE L.J. 1323, 1331-35 (1960).