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Raymond J. Heilman
University of Tennessee

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TREATMENT OF CAPACITY TO CONTRACT IN CONFLICT
OF LAWS CASES.

RAYMOND J. HEILMAN*

The decision of a case often depends upon the conception which is held of the fundamental nature of the problem presented in the controversy. Perhaps in no field is this more true than in that of the "conflict of laws." And it may be ventured that in no other has resulted more confusion and inconsistency in adjudications as a result of failure to analyze the legal problems in particular cases down to their foundations and even their sub-structures, or as a result of failure to agree upon such analysis. Because of the additional complexity which the "conflict of laws" phase gives to a case which might be difficult enough if it involved a purely domestic controversy, in no field of the law is clear comprehension and therefore sound and thorough analysis of each particular problem more needed or desirable. It is proposed to consider the nature of "the conflict of laws problem" in general and then with reference to a few cases of a particular type and to show the significance of fundamental analysis in affecting the result of judicial determinations.

The term "conflict of laws" suggests to the imagination a combat off in space between rivals contending with lance and shield for supremacy. Who are those contenders? Are they juristic champions who have surmounted to the dignity and degree of a "law" and must they fight to extinction to see which one is fore-ordained to survive? Or are they combatants of the status of mere "rules", contending for the favor of the sovereign who will confer upon the successful one, the name of "law"? If we assume that if the second question is answered in the affirmative, the surviving champion will be all-powerful in his status or station as victor even as against the nominal sovereign of the realm where this contest takes place, we have in this picture a somewhat fantastic illustration of a fundamental difference of conception of the nature of a "conflict of laws problem".

* Professor of Law, University of Tennessee, Knoxville, Tenn.

A court of state A, is confronted with a group of facts, of which a part have taken place in state X and a part in state Y. If all of these facts had occurred in state X, there would be a domestic rule of that state clearly applicable to them; if they had all happened in state Y, its domestic rule, different from that of state X, would apply. Suppose further that state A, in which the case comes up, has a third domestic rule by which the controversy would be decided if the facts were local to state A. What is the question with which the court must now deal? Is it whether "*the law*" of state X or of state Y or of state A, (apart from the fact that the forum is in state A), governs the case so as to compel or require any forum to apply the domestic rule of that state or one homologous with it? Does a particular state become the law-giver for the forum, wherever it may be, on the group of facts involved in the case so as to leave the problem that of ascertaining which state that is, and is the "rule" of that state inherently appropriate or required to be applied as "*law*"? So it would seem if it is true that "the topic called 'conflict of laws' deals with the recognition and enforcement of foreign-created rights"¹ or that "rights being created by law alone, it is necessary in every case to determine the law by which a right is created"², or that "a right having been created by the appropriate law, the recognition of its existence should follow everywhere."³ Or would a more accurate analysis of the problem bring the state A court to conclude: "None of the so-called rules of state X, state Y or state A, pertain to this case for each is merely a domestic rule relating only to cases involving groups of facts which are localized within the state and not pertaining to cases involving groups of facts which include an extra-territorial element. As this is a conflict of laws case, in which each of these domestic rules of states X, Y and A is inapplicable, and it is before this, a state A court, state A is the law-giver for the case and the problem for the court is to determine what the *state A conflict of laws rule* is for the group of facts involved. We will be determining our own law, not applying the *law* of some other state, although the rule which we shall apply may happen to be identical in scope and effect with the domestic rule of state X or state Y or of some

¹ BEALE, SUMMARY OF THE CONFLICT OF LAWS, in 3 CASES ON THE CONFLICT OF LAWS (1902) 501.

² BEALE, *op. cit. supra*, n. 1, p. 515, § 41. This section continues:

"The creation of a personal obligation, which has no situs and results from some act of the party bound, is a matter for the law which has to do with those acts. A personal obligation, then, is created by the law of the place where the acts are done out of which the obligation arises."

³ BEALE, *op. cit. supra*, n. 1, p. 517, §47, continuing: "Thus an act valid where done cannot be called in question anywhere."

other state or with our own domestic rule or with the conflict of laws rule of some other state?"

That the definition of the "topic of conflict of laws" as dealing "with the enforcement of foreign-created rights" is not casual or inadvertent, but describes a concept actually held, clearly appears from the statements of writers and judges, only a few of which will it be necessary to quote from illustratively to show that this is a fact. In addition to the statements of Professor Beale, which have been set forth above, he has also said⁴ in discussing what rule should be applied to decide the question of the validity of a contract (in a conflict of laws case): "In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, i. e., the law of the place where the parties act in making their agreement. If by that law their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it." Notice that he assumes that the agreement in question is already binding as a contract if the so-called "*appropriate law*" (it would be better perhaps to say "*appropriate rule*", as we shall see) would declare the agreement a binding contract if all the facts pertaining to it were purely domestic, even before the question ever reaches the court which has the conflict of laws problem to solve, whereas the agreement in question is one which is essentially different from one of the kind which the so-called "*appropriate law*" purports to cover, not being purely domestic or local but being one which involves an element or elements extra-territorial to that state, whose rule is declared by the last quotation to be "*governing*" as *law*.

Again Professor Beals says,⁵ quoting his own summary,⁶ "the question whether a contract is valid, that is, whether to the agreement of the parties the law has annexed an obligation to perform its terms, can on general principles be determined by no other law than that which applies to the acts, that is, by the law of the place of contracting. If the law of that place annexes an obligation to the acts of the parties the promisee has a legal right which no other law has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no

⁴ 23 HARV. L. REV. at p. 268.

⁵ BEALE, *op. cit. supra*, n. 4, at pp. 270, 271.

⁶ BEALE, *op. cit. supra*, n. 1, § 90.

other law which has power to do so." He goes on:⁷ "So far is this the case that it is everywhere agreed that where a statute of the state where the parties contract applies to the contract, no other law, whether that of the place of performance or any other can avoid the effect of the statute.⁸ This doctrine gives full scope to the territoriality of law and enables each sovereign to regulate acts of agreement done in his own territory." The general doctrine now being discussed, that in a conflict of laws case what the court has to do is to enforce a foreign-created right not determine a conflict of laws rule of its own which may (or possibly may not) adopt and apply a rule similar in scope to the domestic rule which would be applicable if all of the facts occurred in the jurisdiction in which, in the last quotation the agreement of the parties is treated as having taken place, is founded certainly, upon an idea of the territoriality of law, but that this is an idea which is inaccurate or at least incomplete and one-sided, is, I think, shown in the very last sentence quoted. Does not the description of law as "territorial" mean that each state is sovereign, that is, all powerful, within its own territory and if that is so as to each state is it not true that no one state can regulate as against another, any matter which comes up for the latter to deal with in its own exclusive territory? Yet, is not the statement now spoken of actually intended to express not only that, but also that the state in which the acts are treated as having taken place, which constituted the agreement in question, has power to regulate outside of its own confines and in and upon the state in which the conflict of laws case is before the court, the legal effect which the latter state, through its court, shall give to the acts of agreement said to have been done in the first state? Does not "territoriality" truly mean that neither state may interfere with the other as to the functioning of their respective courts in the declaration of what is "law" for each? The conception here expressed by Professor Beale connotes that the first state shall be supreme as to the legal consequences which it shall attach to acts occurring within its limits, that the second state may not interfere therewith, but the first state can regulate or dictate what the second shall do with the case, if the question comes up to it, as to what legal consequences the second state shall attach to the acts which have taken place in the first state and upon parties whose interests are before a court of the second state not one of the

⁷ BEALE, *op. cit. supra*, n. 4, at p. 271.

⁸ Citing *Fowler v. Equitable Trust Co.*, 141 U. S. 384, 12 Sup. Ct. 1, 35 L. ed. 786 (1891); *New York Life Ins. Co. v. Cravens*, 177 U. S. 389 (1900).

first state, for adjudication. In other words the doctrine expressed seems to come to this: That the first state may so operate extra-territorially on the second, that the second may not even operate intra-territorially on the group of facts involved in the case, the issues and parties of which are solely and exclusively before one of its courts.

The first state would be imposing a conflict of laws rule upon the second state, for we must not fail to keep in mind that only part of the facts in the case occurred in the first state and therefore its domestic rule is inapplicable as "law" in the case.

Minor apparently takes the same view as Professor Beale for he says:⁹ "The only law that can operate to make a contract is the law of the place where the contract is entered into (*lex celebrationis*). If the parties enter into an agreement in a particular state, the law of that state alone can determine whether a contract has been made. If, by the law of that state no contract has been made, there is no contract. Hence, if by the *lex celebrationis*, the parties are incapable of making a binding contract, there is no contract upon which the law of any other state can operate, it is void *ab initio*.¹⁰

In *Slater v. Mexican National Railway Co.*,¹¹ Mr. Justice Holmes says: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which like other obligations, follows the person and may be enforced wherever the person may be found." However, it is only fair to note and it is significant that just above the sentence quoted, Mr. Justice Holmes says ("this was a wrongful death case and will be more fully discussed below): "As Texas has statutes which give an action for wrongfully causing death, of course, there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. *On the other hand, it equally little means that the law of the place of the act is operative outside its own territory.*"¹² In the last sentence, (italicized) Mr. Jus-

⁹ MINOR, TREATISE ON CONFLICT OF LAWS (1901), 171.

¹⁰ Minor uses the term *lex celebrationis* instead of the term *lex loci contractus* meaning the law (rule of law) of the place of the making of the contract as distinguished from the law (rule of law) of the place of performance, (*lex loci solutionis*).

¹¹ 194 U. S. 120, 126, 24 Sup. Ct. 581, 48 L. ed. 900 (1904).

¹² The italics are the present writer's.

tice Holmes adopts a qualification which apparently Professor Beale, as noted above, does not recognize as true, judging by his statement which we concluded could only mean that the state in which the acts forming the operative facts of the case, took place, could regulate the matter of what legal consequences shall be attached by the state of the forum. Even with the limitation set by Mr. Justice Holmes however, his theory is still that the problem is one of the "enforcement of foreign created rights."

If this way of regarding the problem were always inconsequential in effect on the result of the decision in a case having one or more elements foreign to the forum, there would be no worthwhile purpose served in testing the truth or correctness of this viewpoint. On the other hand, if a difference in the legal consequences of the operative facts in a case may depend upon whether the problem which the court has to solve is the "enforcement of foreign-created rights" or of the determination by the forum of its own "law" for the controversy and its own right-duty and other legal relations, it is very important to see which of these conceptions is sound or the sounder of the two and to adopt a basic conception which explains the problem in the case as it is. Professor Cook has, I think, thoroughly proved, quite recently,¹³ that this difference of analysis which we are now considering not only brings about actual differences of result in the decision of cases but in some instances, radical and striking differences. In order to make this appear most clearly, it seems unavoidable to use two or three or the cases which Professor Cook has taken as illustrations¹⁴ and to re-present here, the essentials of his treatment of the point.

In *Loucks v. Standard Oil Co. of New York*¹⁵ Judge Cardozo said: "A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found.'¹⁶ 'No law can exist as such, except the law of the land, but * * * it is a principle of every civilized law that vested rights shall be protected.' The plaintiff owns something, and we help him to get it.¹⁷ We do this

¹³ Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L. J.* 457. The writer wishes here to acknowledge his debt to Professor Walter Wheeler Cook for his ideas of the subject of Conflict of Laws, gained chiefly as a student under Professor Cook in that subject.

¹⁴ Especially the Slater Case, *supra*, n. 11, the Loucks Case, *infra*, n. 15, and *Guinness v. Miller*, *infra*, n. 20.

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

¹⁶ Citing Slater *v. Mexican National Railway Company*, *supra*, n. 11, and other cases.

¹⁷ Citing several cases and BEALE, *TREATISE ON THE CONFLICT OF LAWS* (1916) §§ 51, 73.

unless some sound reason of public policy makes it unwise for us to lend our aid. 'The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there.'"¹⁸

Compare what Judge Learned Hand said in a recent Federal case:¹⁹ "Coming then to the actual issues, I have to decide what person the company must recognize as a shareholder. In deciding that question I can only follow the law of the place where I sit. It is indeed commonly said that, when a court must consider the legal effect of events happening elsewhere, it enforces foreign law. That I conceive is a compressed statement, which it is at times useful to expand. Of necessity no court can enforce the law of another place. It is, however, the general law of all civilized peoples, that in adjusting the rights of suitors, courts will impute to them rights and duties similar to those which arose in the place where the relevant transactions have occurred." In *Guinness v. Miller*²⁰ the plaintiff sought to recover a debt owed by a German defendant on an account stated in Germany on December 16, 1917, and payable in Germany in marks. The question was whether the amount of the recovery (stated in dollars) should be based on the exchange value of marks in dollars as of the date when the account was stated in 1917, or of the date of the Court's decision in 1923. If the court were enforcing a German right, created in Germany, it should of course reach the same result as would have been reached by a German Court sitting at the same time, which would be to allow the recovery of so many marks and then translate the amount into dollars at the rate of exchange existing at the time of the judgment or decree. The Court, however, decided that it was dealing with a right existing by virtue of the law of its own jurisdiction, that this right arose at the same time that the right existing under German laws was created and therefore its scope was defined in a sum expressed in marks and translatable in dollars as of that time. Judge Hand argued from the analogy of a tort obligation, saying:²¹ "When a court takes cognizance of a fact committed elsewhere it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. And, if this were true, it would seem to follow that the obligation should be discharged in the money of the sovereign in whose territory the

¹⁸ Citing *Cuba R. R. Co. v. Crosby*, 222 U. S. 478, 32 Sup. Ct. 132, 51 L. ed. 274, 38 L. R. A. (N. S.) 40 (1911).

¹⁹ *Direction Der Disconto-Gesellschaft v. U. S. Steel Corp.*, 300 Fed. 741 (1924).

²⁰ 291 Fed. 769 (1923).

²¹ *Supra*, n. 20, p. 770.

tort occurred, and that the proper rule would be to adopt the rate of exchange as of the time of the judgment.

“However, no court can enforce any law but that of its own sovereign and when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs. But since, apart from specific performance, such an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium. The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign and that obligation necessarily speaks of the time when it arose; that is when the loss occurred.”

Let us take one more actual decision to show how a difference in fundamental theory may effect a difference in result, the decision in *Slater v. Mexican National Railway Company*²² previously quoted from. Action was brought in a federal court in Texas to recover for an alleged wrongful death which was caused and occurred in Mexico, under a Mexican statute providing a method of compensation unusual for an American Court, at least in this kind of a case, requiring periodical payments by the losing defendant, subject to modification by the court, but after all not so very unlike the method applied frequently to alimony payments. The proceeding was at law and recovery was denied upon the ground that the court had “no power to make a decree of this kind contemplated by the Mexican statutes.” Chief Justice Fuller and Justices Harlan and Peckham dissented upon the ground that “the method of arriving at and distributing the damages pertains to the procedure or remedy” and therefore was governed by the law of the forum. The keynote of Mr. Justice Holmes’ opinion was contained in the following extract, part of which has already been quoted: “The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an *obligatio*, an obligation, which like other obligations follows the person and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation but equally determines its extent.”²³

²² *Supra*, n. 11.

²³ *Supra*, n. 11, *loc. cit.*

Would not a better solution of this case have been for the federal court sitting in Texas to have recognized a *right* of recovery of *its own* (i. e., of its own applicable body of law) because of the Mexican statute and to have afforded the plaintiffs a remedy in such manner as it saw fit, as nearly analogous to the Mexican method as its judicial machinery made possible? On the reasoning of Judge Learned Hand in *Guinness v. Miller*²⁴ and the later federal case in which he said, "I can only follow the law of the place where I sit * * * Of necessity no court can enforce the law of another place,"²⁵ could it not have done so?

Let us now examine a few cases dealing with the specific problem of so-called contractual capacity of married women, after first noticing the apparent trend of authority on the subject of capacity.

On the continent of Europe, the doctrine generally followed has been to treat the question of capacity as determined by the "*personal law*," which formerly was the rule of the domicile (*lex domicilii*) and now more commonly is the rule of the nationality (*lex patriae*).²⁶ What the prevailing view is in England at the present time appears to be uncertain.²⁷ Formerly the rule favored seems to have been that of the place where a contract was regarded as having been made. Since the case of *Sottomayer v. De Barros*²⁸ in which it was said: "As in other contracts so in that of marriage, personal capacity must depend on the law of domicile", the rule has been in dispute, the *lex domicilii* being said on the one hand to "determine capacity" to contract, except that the *lex loci celebrationis* must also be complied with in the case of marriage contracts,²⁹ the view being taken on the other hand that the former rule (that of the place where the contract is regarded as having been made) still prevails in commercial contracts.³⁰ In this country the tendency and prevailing practice is undoubtedly to apply the same rule to determine capacity that would be applied to determine the question of the validity in general (essential validity), the rule of the place where the contract is regarded

²⁴ *Supra*, n. 20.

²⁵ *Supra*, n. 19.

²⁶ LORENZEN, *THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES*, 1910, p. 65, n. 26.

²⁷ LORENZEN, *op. cit.*, *supra*, n. 26, p. 61; *Male v. Roberts*, 3 Esp. 163 (1800).

²⁸ 3 P. D. 1, 5, 47 L. J. P. & M. 23, 37 L. T. Rep. N. S. 415, 26 Wkly. Rep. 446 (1877, C. A.).

²⁹ WESTLAKE, *PRIVATE INTERNATIONAL LAW*, (5th ed., 1912), pp. 43-46, 61; LORENZEN, *op. cit. supra*, n. 26, p. 63.

³⁰ DICEY, *CONFLICT OF LAWS*, (2nd ed., 1908), Rule 149, Exception 1, p. 538; LORENZEN, *op. cit.*, *supra*, n. 26, p. 63.

as having been made (*lex loci contractus*).³¹ An exception is applied, in at least some states, that where it "would contravene the established policy of the forum, having for its object" the protection of infants and married women, the courts of the domicile of either an infant,³² or of a married woman,³³ "may decline to enforce their contracts entered into in a foreign state, and valid, under the law of such state."³⁴ "Whether these rules apply to infants contracts cannot be stated definitely."³⁵

Two leading cases involving the question of the power of a married woman to make a contract (in an interstate transaction), in which differing results were reached with the respective courts failing to appreciate, apparently, that the solution of the problem comprised anything else than a determination of which of two domestic rules "governed", were *Milliken v. Pratt*,³⁶ decided in Massachusetts in 1878 and *Freeman's Appeal*³⁷ decided in Connecticut in 1897.

In the former case, Mrs. Pratt, a married woman domiciled in Massachusetts with her husband, there signed and gave to him, addressed to a Maine firm, an offer to guarantee payment by Mr. Pratt up to a certain amount if certain goods were shipped by them from Maine to him in Massachusetts. Pratt posted the letter containing this offer of guaranty in Massachusetts and the goods were shipped as requested. The action was brought by members of the firm against Mrs. Pratt, on her guaranty agreement. Under the Maine local rule, married women were under no disability from making contracts like this agreement. At the time of this transaction, married women were under such a disability under the Massachusetts local rule, although a statute doing away with that disability had been passed in Massachusetts after the transaction in question and before action was brought in the case. The court held that Mrs. Pratt was bound by the agreement.

Notice that this was an agreement which would be a unilateral contract if any, acceptance being by shipment of the goods by the Maine firm. Mrs. Pratt was not at the time in Maine, neither was her husband. The Court, however, treated her as having made a

³¹ *Nichols & Shepard Co. v. Marshall*, 103 Ia. 518, 79 N. W. 282 (1899); *Thompson v. Taylor*, 56 N. J. L. 253, 49 Atl. 544, 54 L. R. A. 585; 88 Am. St. Rep. 485 (1900); *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251 (1879).

³² *International Text Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722 (1912).

³³ *First National Bank v. Shaw*, 109 Tenn. 237, 70 S. W. 807, 59 L. R. A. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473 (1893).

³⁴ *LORENZEN*, *op. cit. supra*, n. 26, pp. 63-64.

³⁵ *LORENZEN*, *op. cit. supra*, n. 26, pp. 64-65.

³⁶ 125 Mass. 374, 28 Am. Rep. 241 (1878).

³⁷ 68 Conn. 533, 37 Atl. 520. 37 L. R. A. 472, 57 Am. St. Rep. 112 (1897).

contract there and at the same time applied the Maine rule to determine that there was such a contract binding upon her. Chief Justice Gray said "The question therefore is, whether a contract made in another state by a married woman domiciled here, which a married woman was not at the time capable of making under the law of this commonwealth, but was then allowed by the law of that state to make, and which she could now lawfully make in this commonwealth, will sustain an action against her in our courts."³⁸ Two things are conspicuous in the above quotation and in the decision as a whole. One is that the court says this was "a contract made in another state" (Maine) by a married woman, when she had not been in Maine at all. No acts of hers had occurred in Maine. The most that can be said is that some consequences of her acts occurred there. How does the court set up a contract as made by her in Maine? Of course it is by what has been called the "last act" test under which in applying the rule that the validity (for example) of a contract is determined by the law of the place where it is "made", it is said that a contract is made *where* the last act takes place which makes the contract complete, in the case of an agreement consisting of actions or happenings some of which occur in one state or country and some of which occur in another. A contract, or rather a contractual obligation, like any other obligation, being a legal concept cannot, of course, have location in space although it may be convenient to ascribe to it such a location. Moreover there is nothing especially sacred about the last act or event in a transaction as distinguished from the first or any prior act or event equally essential among the component elements, except that when it occurs all the required elements can be said to be present. Offer and acceptance are equally important. In continental countries like significance is sometimes given to the "first" act, e. g., that of signing an instrument. Such a test as that spoken of, may, however, be useful as a device by which to uniformly apply a rule such as the so called rule that the law of the place where the contract is "made", determines the validity of a contract, a rule which works as well, perhaps, as any other would. However, it is preferable not to say, for example, that a contract is "made" or is "binding" in the place *where* such last act occurs for to do so is to assume a conflict of laws rule of that place to exist, by which a contract is recognized as binding—it is to assume the answer to the question you are asking. You cannot say that a

³⁸ *Supra*, n. 36, at p. 377.

contract or rather that an agreement is binding (as a contract) anywhere until you know the conflict of laws rule of that place. The court also says:³⁰ "If the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person or sends an agent or writes a letter across the boundary line between the two states. * * * So if a person residing in this state signs and transmits either by a messenger or through the post-office, to a person in another state, a written contract which requires no special forms or solemnities in its execution and no signature of the person to whom it is addressed, and it is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other state or wrote and signed it there." Further on, the court continues: "The contract between the defendant and the plaintiffs was complete when the guaranty had been received and acted on by them at Portland and not before. It must therefore be treated as made and to be performed in the state of Maine."

Notice that the language of the court is that the "*contract*" was "*made*", and of course if what is meant is the word "*contract*" in its technical legal sense as distinguished from the term "*agreement*" then the court is assuming the answer to the question in controversy, for that question is whether or not there is a "*contract*" as to this married woman so as to *bind* her upon her guaranty *agreement*.

The other feature of the decision striking to us after the analysis which we have attempted to make of the fundamental problem in conflict of laws cases, and this no doubt has been apparent in what has already been said, is that the court did not once distinguish the problem involved from such a problem as would have arisen had all of the facts in the case happened in Massachusetts. The court, apparently, did not recognize any difference between a conflict of laws case and a domestic case, as to the applicability of domestic rules—the very point above all, which the court should not fail to see but which perhaps oftener than any other, the courts do overlook. The court in this case seems never to doubt, but, on the other hand, to take it for granted that the local decisional rules and local statutes of Maine and Massachusetts, or those of one of the two states, are as applicable as if everything had happened in Maine or in Massachusetts. No limitation is spoken of or even visioned so far as can be discerned, to the effect that the Maine stat-

³⁰ *Supra*, n. 36, at p. 376.

ute or the Massachusetts statute may merely express a local or domestic rule, having intra-territorial facts in mind, and therefore be clearly inapplicable. If the legislature of Maine or the legislature of Massachusetts had in view that the statutes respectively should apply to cases wholly or partly extra-territorial in their facts, so that the statutes were declarations of conflict of laws rules of the respective states, no such distinctive feature of the statutes is mentioned by the court for it says simply, "The law of Maine authorized a married woman to bind herself by any contract as if she were unmarried. Pub. Laws Me. 1866, p. 31, c. 52; *Mayo v. Hutchinson*, 57 Me. 546. The law of Massachusetts as then existing, did not allow her to enter into a contract as surety or for the accommodation of her husband or of any third person." Gen. Stats. 1860, c. 108, p. 3. *Nourse v. Henshaw*, 123 Mass. 96." Both *Mayo v. Hutchinson* and *Nourse v. Henshaw*, cited by the court, were cases involving purely domestic facts. To use Professor Cook's expression, the court apparently did not "sense the actualities of the situation." What these "actualities" are in regard to this case he explains most clearly:⁴⁰

"First let us notice that the usual way of stating the problem cannot be taken literally. If the statement that "by the law of Massachusetts, W lacked capacity to bind herself" means that by law *this married woman*, W, lacked capacity to bind herself *by this transaction to this P in Maine*, we need go no farther, The case is decided for a Massachusetts Court. The statement thus literally interpreted means that under Massachusetts law this defendant, W, is not bound to this plaintiff, P; but that is just what we are trying to find out and by hypothesis do not know. If the statement means anything, it must therefore not be taken literally. *What we really start with is a knowledge of the Massachusetts law applicable not to this W but to another W, in a hypothetical case similar to this but differing in that all the facts are, so to speak, Massachusetts facts.* In other words, all we know is the Massachusetts "domestic rule", using that phrase in the sense already defined.

"Is the statement made, be it noted, in stating the problem raised by the case—that "by Maine law W had capacity to bind herself", to be interpreted differently? We may give it a literal meaning, but I venture to think that that is wrong, in the sense that it does not describe accurately what the Massachusetts court knew. Let us look at the facts. Did the Massachusetts court really know at the outset—when stating the problem for solution—what rights this plaintiff would have been recognized by the Maine Courts as having against this defendant? Note that for

⁴⁰ Cook, *op. cit. supra*, n. 13, at pp. 471-473.

the Maine Court as well as the Massachusetts Court this case presents a problem in the conflict of laws. Note also that merely by knowing that Maine has a statute "removing the disabilities of married women" we do not know how a Maine court would deal with a Massachusetts woman all of whose acts took place in Massachusetts, even though her letter was read and acted upon by a Maine plaintiff in Maine. To know how a Maine court would decide *this very case necessarily* involves a study of the Maine rules as to the conflict of laws. I find no evidence that the Massachusetts court had such knowledge *either when it stated the problem before it or later when it decided the case*. I find no evidence that it ever tried to get it. Had the Massachusetts court embarked upon this arduous and perilous adventure (of trying to learn how the Maine Court would treat this married woman domiciled in Massachusetts and whose only actions were done there), it might have found—treating Maine for the moment as a name standing for any other state than Massachusetts—that the Supreme Court of the other state would say that its statute removing the disabilities of married women applied only to married women domiciled in its own state or to married women entering into agreements while actually within the state or that the capacity of a married woman to contract is governed by the "law" of her domicile or some other "law". Note that if, on finding that the cases in the other state said that the capacity of W was to be settled by the "law" of her domicile, the Massachusetts court were to interpret "law" to mean the rule which W's domicile (Massachusetts) would apply to *the very case*, it would become involved in a discussion of the interesting game of international lawn tennis known as the "*renvoi*."

"If, as seems clearly to be the case, the Massachusetts court in fact contented itself with ascertaining the Maine "domestic rule," applicable to a purely Maine group of facts, it could not of course know whether by the law of Maine this defendant, W, was under a contractual duty to this plaintiff, P, or not, and so could not know whether there was a Maine-created right for it to enforce."

In *Freesman's Appeal*⁴¹ an Illinois bank forbore action on a debt of an Illinois partnership, on receipt of a written guaranty agreement signed by Mrs. Mitchell in Connecticut, where she and her husband, who was one of the partners, were domiciled, and by the members of the firm in Illinois. The guaranty agreement was signed by the partners in Illinois, taken by Mr. Mitchell from Illinois to his wife in Connecticut, where she signed it and returned it to him. He mailed the guaranty instrument in Connecticut, to one of the partners in Illinois and the latter delivered it in Illinois to the bank. The bank brought action against Mrs. Mitchell on the

⁴¹ *Supra*, n. 37.

guaranty agreement. By the local law of Connecticut, a married woman was under legal disability from executing a contract of this kind. By the local rule of Illinois there was no such disability. The court held that there could be no recovery against Mrs. Mitchell on the alleged guaranty contract, applying the domestic rule of Connecticut to the case as if it were a conflict of laws rule and without recognizing the difference between the two.

The court (per Baldwin J.) declared the issue to be whether or not Mrs. Mitchell under the law of Connecticut had the legal power to authorize her husband to take the guaranty instrument in that state and deliver it to the creditor in Illinois and thereby give it legal effect, saying "Had Mrs. Mitchell been within the State of Illinois when she signed the guaranty, it may be that her personal presence would have so far made her a resident of that state as to subject her to its laws in respect to acts done within its jurisdiction. But, as whatever was done in Illinois to bind her to the bank was done under an agency constituted in Connecticut, it is the law of Connecticut which must determine as to the authority of the agent and so as to the validity of the obligation which he, as such, undertook to impose upon her by the delivery in Chicago of the paper signed by her in Bristol."⁴²

In the first place the court seems to fail to distinguish that there is a conflict of laws problem requiring any more for consideration than taking the choice of two domestic rules purporting to relate only to intra-state groups of facts. Secondly, the court decides the case on the basis that the Connecticut domestic rule, that of the place where the agent, the husband, was given his authorization by the married woman permitting him to enter into an agreement for her in Illinois, was imposed on the case as on a *a priori* principle as if by some supra-legal compulsion, failing to realize that there was any Connecticut conflict of laws rule to apply or to work out for the case, distinct from what we have spoken of as the *domestic rule*.

That in *Freeman's Appeal*⁴³ the court assumes that the Connecticut domestic rule as to the capacity of a married woman to make a contract of the kind in question determines the issue (whether a married woman in Connecticut has the legal power, through her agent, to make a contract imposing a guaranty liability upon herself as to her husband and others in Illinois) as an inflexible *a*

⁴² *Supra*, n. 37, at p. 541

⁴³ *Supra*, n. 37.

priori principle without recognizing that conceivably the domestic rule referred to might not necessarily apply since some operative facts in the case happened in another state and without recognizing that the Connecticut conflict of laws rule for this very case might possibly not be the same as the domestic rule (bearing in mind that if all the operative facts had occurred in Illinois the Illinois domestic rule would apply and would declare that such a contract as was attempted to be made could be made by a married woman there) is strongly indicated by the fact that the court makes a territorial division of the operative facts in the case, dividing them into two parts, the authorization group of facts in Connecticut and the guaranty contract group of facts in Illinois (if we may so designate these as separate groups) and treats the former as being governed by the Connecticut rule as to capacity as separate and distinct from the latter, which (except for the legal effect already stamped upon the Connecticut group of facts by the Connecticut rule, as the court looks at the matter) it treats as thereafter governed by the Illinois rule. The court says that the Connecticut rule determines the validity of the authorization given in Connecticut; then if the authorization is a valid one, the Illinois rule (or rules) determine whether (from other standpoints) there is a valid contract; if the authorization is not valid by the Connecticut rule then it is not legally possible for a contract to be entered into in Illinois through the intended agent. We have noted that in *Milliken v. Pratt*⁴⁴ the Massachusetts court assumed that all facts in the case (some of which occurred in Massachusetts and some in Maine) were governed by the Maine (domestic) rule. Here the court assumes that part of the facts (those of the authorization) were governed by the Connecticut domestic rule so that there could be no valid contract in Illinois, and that as to those facts which occurred in Illinois, the Illinois local rules (apart from the authorization facts) would govern them. May we not ask at this point: Is it at all clear that if this case of Freeman's Appeal, taking the facts as they actually were, had come up for adjudication in Illinois, the Illinois court would be required to hold that Connecticut law had already stamped the character of legal ineffectiveness or inoperativeness on the authorization which had occurred in Connecticut so that it, the Illinois court, could not hold the agreement which was consummated in Illinois, a valid contract binding on the married woman who had sent the signed guaranty instrument from

⁴⁴ *Supra*, n. 36.

Connecticut by her intended agent? If what the court appears to express as the *ratio decidendi* is correct, it would seem that our question would have had to be answered by saying that no different decision could have been rendered had the case come up in Illinois, for the Connecticut court says: "The agency by virtue of which the delivery was made, was created, if at all, in Connecticut. But to create an agency is to enter into a contractual relation.⁴⁵ Mrs. Mitchell had no capacity to make any contract whereby her legal position in respect to all or any of the other members of the community would be varied. It would have varied it in respect to her husband could she have constituted him her agent to put her, by the delivery of an instrument of guaranty, in the situation of a surety for his debt to a third party. He therefore derived no authority from her to make the delivery to the bank, and, as to her, the instrument never was delivered. It is true that the guaranty, if a binding contract, was a contract made in Illinois. It might also be assumed, so far as concerns the law of this case (although this is a point as to which we express no opinion), that it was one to be performed in Illinois, and that as to the principals in the transaction, it was fully an Illinois contract, and to be governed by the law of Illinois, as respects any question as to its validity. By that law, a married woman was free to enter into such an engagement, and to constitute an agent for that purpose. But the *lex loci contractus* is a rule of decision only when there is a contract, so made as to be subject to that law. It is a *petitio principii* to say that, because the guaranty was delivered in Chicago, it is therefore to be held effectual or ineffectual, as against Mrs. Mitchell, by the law of that place. The underlying question is, was it, as to her, ever delivered at all? It was not so delivered unless delivered by her authority; and by the laws of Connecticut, where she assumed to give such authority, she could not give it."⁴⁶

The domestic rule as to capacity of either Illinois or Connecticut and its conflict of laws rule as to capacity in this case may be identical in scope (analogous) but need not be necessarily. A different problem, as to which purely domestic cases are not precedents, is presented in the conflict of laws case for it is the very inapplicability of the domestic rules of either jurisdiction or of all the jurisdictions in which one or more of the operative facts have taken place, which creates a *conflict of laws problem*.

⁴⁵ The relation of principal and agent may, of course, exist without any contract between principal and agent, *e. g.*, the agency may be entered upon gratuitously as it apparently was in this case.

⁴⁶ *Supra*, n. 37, at p. 540.

It may have been, however, that the court in our present case, merely gave artificial or mechanical reasons for a decision which was actually based upon its desire (or rather the desire of the law as interpreted by the court) not to permit a woman domiciled in Connecticut to make a contract of guaranty in behalf of her husband in a conflict of laws case any more than in a domestic case, that is, upon policy against permitting a Connecticut married woman sending an agent to engage in such a contract for her in Illinois to accomplish what she would not be allowed to effectuate under the domestic rule of Connecticut if the ultimate agreement of guaranty were engaged in, by her personally or through an agent, right in Connecticut. If that is what the court really had in mind, then it did mean to lay down a conflict of laws rule analogous or homologous to the Connecticut domestic rule, although it may not have been conscious of that fact. That such is the real *ratio decidendi* of the decision may be indicated by the following language of the opinion: "Engagements which coverture prevents a woman from making herself she cannot make through the interposition of an agent, whom she assumes to constitute as such in the state of her domicile. If this were not so, the law could always be evaded by her appointment of an attorney to act for her in the execution of contracts. No principle of comity can require a state to lend the aid of its courts to enforce a security which rests on a transgression of its own by one of its own citizens, committed within its own territory. Such was in effect the act by which Mrs. Mitchell undertook to do what she had no legal capacity to do, by making her husband her agent to deliver the guaranty to the bank. He had no more power to make it operative by delivery in Chicago to one of his creditors in Illinois than he would have had to make it operative by delivery here, had it been drawn in favor of one of his creditors in Connecticut. It is not the place of delivery that controls, but the power of delivery."⁴⁷

In *Miliken v. Pratt*⁴⁸ no such question of policy was involved for the Massachusetts court, which said: "In Massachusetts, even at the time of the making of the contract in question, a married woman was vested by statute with a very extensive power to carry on business by herself, and to bind herself by contracts with regard to her own property, business and earnings: and, before the bringing of the present action, the power had been extended so as to in-

⁴⁷ *Supra*, n. 37, at p. 542.

⁴⁸ *Supra*, n. 36.

clude the making of all kinds of contracts, with any person but her husband, as if she were unmarried. There is therefore no reason of public policy which should prevent the maintenance of this action."⁴⁹

The assumption that a domestic rule of a given jurisdiction is necessarily its conflict of laws rule also and inexorably attaches where the facts of a case are similar but contain one or more extra-territorial elements is dealt a heavy blow by those decisions which on the ground that to do so would defeat established policy of the forum, refuse to recognize as super-imposed and binding upon the forum or as obligatory or as necessarily appropriate, the rule which is the established domestic rule of another jurisdiction, within which one or more of the operative facts in the case have taken place, although not denying and sometimes even admitting that such rule might be obligatory or necessarily applicable if it were not for some special consideration of public policy (of the forum) involved in the case.

It would seem that if the rule which happens to be the domestic rule of a foreign jurisdiction in a case which is in all respects similar except that the case is a domestic one, must necessarily be applied in other conflict of laws cases which do not involve this special consideration of policy as a matter of supra-legal compulsion or *a priori* appropriateness, based on the geographical distribution or incidence of the events which are the operative facts in the case, it would have to be applied notwithstanding the objection to it by the court of the forum, based upon policy. If the solution of the problem is merely mechanical, depending upon the territorial or geographical incidence of the various phenomena which make up the operative facts in the case, as between the respective jurisdictions in which those events or facts have occurred, then it would seem that neither this or any other consideration or objection based on policy would prevent the mechanical principle from determining the decision. If "policy" is not to be considered in other types of cases, why should it be in this type of case? If vital in this particular kind of case, why may it be ignored in other cases and where should the line be drawn? It does not seem possible to draw such a line anywhere if "policy", that is, a social reason or object, is conceived to be the foundation of every rule of law. When a court has a case before it which raises a conflict of laws problem which has never been raised before in that jurisdiction,

⁴⁹ *Supra*, n. 36, at p. 383.

must it not always decide from every standpoint of the "policy" of the forum what it shall determine the conflict of laws rule for that jurisdiction to be for this particular problem? To say that in some types of cases there is an *a priori* principle which dictates that a certain rule which happens to be the domestic rule of a foreign jurisdiction must be applied by the forum without question is to say that in such cases any and all matters of so-called "policy" of the jurisdiction in which the court sits are eliminated so that the court cannot consider them. Such a statement is obviously untrue.

A representative decision in which the court in its view of the problem refrained on the ground of established policy of the forum from applying the domestic rule of another jurisdiction was *First National Bank v. Shaw*.⁵⁰ The question was whether the defendant, a married woman domiciled in Tennessee should be held liable on a promissory note signed by her in Tennessee, made payable in Ohio to an Ohio bank and sent by her to the bank by mail after execution. The Tennessee domestic rule at that time was that the contracts of a married woman were voidable; the Ohio domestic rule was that such contracts were valid. The court said: "The first question, of course, to be determined is whether, upon the facts found, this is a Tennessee or an Ohio contract. * * * We think it quite plain that the note in suit is an Ohio contract, notwithstanding it was signed by Mrs. Harley in Tennessee, it having been delivered and consummated in Ohio, and is payable in that state, as the place of performance.

"The next inquiry is whether the plea of coverture to a note made in Ohio, valid and enforceable against a married woman in that state, is available in a suit on said note in this state, where such a contract is voidable at the election of the married woman."⁵¹ The court (McAlister, J.) pointed out that in *Milliken v. Pratt*⁵² the Massachusetts court had held binding on a married woman domiciled in Massachusetts, an agreement of guaranty for her husband's benefit regarded by the court as having been made in Maine, although at that time under the Maine local rule such an agreement by a married woman was invalid, but that the latter rule had since been changed by statute, that decision was not at all inconsistent with the Massachusetts policy at the time of the trial, in regard to the agreements of married women domiciled in

⁵⁰ 109 Tenn. 237, 70 S. W. 807, 59 L. R. A. 498, 97 Am. St. Rep. 840 (1902).

⁵¹ *Supra*, n. 50, at p. 239.

⁵² *Supra*, n. 36.

Massachusetts. The Massachusetts court in that case had itself made that differentiation saying in conclusion: "There is therefore no reason of public policy which should prevent the maintenance of this action."⁵³ The Tennessee court, after making the above observation, went on to say: "But in Tennessee the contracts of a married woman are voidable, and will not be enforced against her when there is a plea for coverture. It would be a strange anomaly to hold that such a contract made by a married woman in Tennessee would not be enforced by our courts, while the same contract, if made in another state, would be valid and enforceable. As stated by Mr. Justice Gray, in *Milliken v. Pratt*, *supra*: 'As the law of another state can neither operate nor be executed in this state by its own force, but only by the comity of this state, its operation and enforcement here may be restricted by positive prohibition of statute. * * * It is possible, also, that in a state where the common law prevailed in full force, by which a married woman was deemed incapable of binding herself by any contract whatever, it might be inferred that such utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state for the protection of its own citizens that it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract.'"

"While it is true, as construed by counsel in his very able argument, that the tendency of legislation in Tennessee is to enlarge the contractual power of married women, yet such power is very limited and circumscribed, and the settled policy of this state is to declare negatory contracts made by her whenever her plea of coverture is interposed."⁵⁴

Perhaps the best demonstration that the courts are never actually bound in any way to take the domestic rule of a foreign jurisdiction and apply it in a conflict of laws case is that when they feel disinclined on what they consider a serious enough ground, which they usually speak of as an objection of public policy, they do not feel compelled to take the rule and apply it in the case, but without their power to refrain from doing so being seriously doubted by anyone, they successfully refrain from applying the rule.⁵⁵

⁵³ *Supra*, n. 36, at p. 383.

⁵⁴ *Supra*, n. 50, at p. 242.

⁵⁵ See Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L. J.* 736, 747: "If some power other than that of state A prescribes for A the rule that is to govern 'on principle', if that rule is obligatory upon state A, how can state A deny effect to such rule in a particular case? If state A is bound to recognize the exclusive power of state B to attach legal consequences to certain operative

In *Armstrong v. Best*⁶⁶ decided in accord with the Tennessee case just discussed, Shepherd, C. J., said:⁶⁷

"The contract then, being a Maryland contract, it is next insisted that it is one which a *feme covert* could have made in that state, and therefore enforceable in the courts of North Carolina. We are by no means certain that the present contract is a valid one, according to the laws of Maryland, as the statute of that state seems to recognize the legal capacity of a married woman only to the extent of contracting with reference to property acquired by her 'skill, industry, or personal labor.' Assuming, however, that it is a valid contract in Maryland, we will proceed to the examination of the question whether it should be enforced by the courts of this state."

"It is well settled that the law of one state has, *proprio vigore*, no force or authority beyond the jurisdiction of its own courts, and that whatever effect is given to it by the courts of foreign countries or other states is the result of that international comity (more properly called 'private international law') which is the product of modern civilization. *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. Rep. 721. It is left to each state or nation to say how far it will recognize this comity, and to what extent it will be permitted to control its own laws. It has, however, been very generally settled that all matters bearing upon the execution, the interpretation, and the validity of a contract are to be determined by the law of the place where the contract is made, and, if valid there, it is valid everywhere. *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. Rep. 138."

"An exception is maintained by some of the continental jurists as to the capacity of a contracting party, and they generally hold that the capacity of the domicile attaches to and follows the person, wherever he may go. We remarked in *Taylor v. Sharp*, *supra*, that this was not considered by Mr. Justice Story (Conf. Law, 103, 104) as the doctrine of the common law; and we also stated the conclusion of Gray, C. J., in *Milliken v. Pratt*, *supra*, that the general current of the English and American authorities is in favor of holding that a contract which, by the law of the place, is recognized as lawfully made by a capable person, is valid everywhere, although the person would not under the law of the domicile, be deemed capable of making it. The proposition, though denied by Dr. Wharton as to infants and *femes covert* (Conf. Laws, 112, 118), seems to be generally

facts, how can the courts of state A nullify the effect given to such operative facts, by state B? If state B had the power to create 'vested rights', so far as state A is concerned, why should such rights not be entitled to recognition if called in question in state A? Is it not strange to argue in the first place that state A has no choice in accepting the original rule and then to admit that it has the power to set aside the effect of that rule whenever it pleases on the plea that such recognition or enforcement would violate its public policy?"

⁶⁶ 112 N. C. 59, 17 S. E. 14, 25 L. R. A. 188, 34 Am. St. Rep. 473 (1893).

⁶⁷ *Supra*, n. 56, at p. 60 *et seq.*

accepted in this country, in so far as it relates to the enforcement of contracts in courts other than those of the domicile. If, for example, the plaintiffs were suing upon the present contract in the courts of Maryland, the defendant could not, it is thought, avail herself of the incapacity of her domicile, but the *lex loci contractus* would prevail."

"But quite a different question is presented when the action is brought in the forum of the domicile. In such a case a very important qualification of private international law is to be considered; and this is that no state or nation will enforce a foreign law which is contrary to its fixed and settled policy. In *Bank v. Earle*, 13 Pet. 519, Chief Justice Taney, speaking for the court, said: 'The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests.' To the same effect is the language of Story,—that no state will enforce a foreign law if it be 'repugnant to its policy, or prejudicial to its interests.' Conf. Law, 37. That this qualifying principle is applicable to cases like the present is manifest, not only by reason and necessity, but also by the decisions of other courts. Even in *Miliken v. Pratt*, *supra*, in which the *lex loci contractus* is pushed to the extreme limit, it is suggested that where the incapacity of a married woman is the settled policy of the state, 'for the protection of its own citizens, it could not be held by the courts of that state to yield to the law of another state, in which she might undertake to contract.' In *Robinson v. Queen*, 87 Tenn. 445, 11 S. W. Rep. 38, the contract was made by the *feme* defendant in Kentucky, where she resided, and under whose laws she was capable of contracting. An action was brought in Tennessee, and the court held, as we did in the similar case of *Taylor v. Sharp*, *supra*, and *Wood v. Wheeler*, 111 N. C. 232, 16 S. E. Rep. 418, that the plaintiff was entitled to recover. The court, however, said: 'If this were a suit against a married woman, a citizen of this state, on a contract made out of the state, there would be much force in the insistence of the defendant.' In *Johnston v. Gawtry*, 11 Mo. App. 322, it was held that where a married woman, having a separate estate in land in Missouri, makes a contract in another state, her capacity to make the contract, and its validity, are to be determined by the law of Missouri, in a suit in a Missouri court to enforce such contract."

"In *Bank v. Williams*, 46 Miss. 618, the contract was made in Louisiana, where it would have been valid against the *feme* defendant. The suit was brought in Mississippi, the place of her domicile, and under whose laws the contract was void by reason of her coverture. * * * The court said: 'It is the prerogative of the sovereignty of every country to define the conditions of its members—not merely its resident inhabitants, but others tem-

porarily there—as to capacity and incapacity. But capacity or incapacity, as to acts done in a foreign country, where the person may be temporarily, will be recognized as valid or not, in the forum of his domicile, as they may infringe or not its interests, laws and policies' * * * the enforcement of the present contract is wholly repugnant to our domestic policy, as well as prejudicial to the interests of our citizens. It is not pretended that the defendant has attempted to charge her separate estate in any manner provided by our laws; and to hold that she may subject it to execution upon a personal judgment, by reason of a promise made during a short visit to another state, or, as in this case, by a simple order for goods, would afford an easy method of charging her property, in contravention of the public policy and laws of the domicile.”

The last two cases discussed in the above quotation, were ones in which the domicile of the married woman, whose contractual capacity was to be determined, was in the state of the forum, the agreement having been made or treated by the court as made elsewhere. In *Robinson v. Queen*,⁵⁸ the domicile of the married woman concerned was in Kentucky, where she had signed as surety for a firm of which her husband was a member, certain promissory notes which were payable in Kentucky, where the makers and payees as well as she, herself, were domiciled. The domestic rule of Kentucky at this time was that a married woman was under no disability from making such a contract; that of Tennessee was to the contrary. Here the only element distinguishing this from a purely domestic case was that the forum was not that of the state in which the operative facts took place. It could not be called a conflict of laws case in the sense that part thereof had occurred in two different jurisdictions. The local rule of Kentucky in regard to the contractual capacity of a married woman would certainly seem to be inescapable of application by the court in the sense of being “binding” i. e., compulsory, if the local rule of one jurisdiction is ever binding upon another. Yet we know that Kentucky would be powerless to prevent the Tennessee court from deciding contrary to the Kentucky domestic rule and in accord with the Tennessee domestic rule. It would be, and was in this case, purely a matter of volition on the part of the Tennessee court as to what rule it would apply. Kentucky could not impose its local rule on the Tennessee court and certainly the Tennessee local rule did not apply to this case, which comprised events happening entirely in

⁵⁸ 87 Tenn. 445, 11 S. W. 38 (1888).

Kentucky, for Tennessee could not impose its local rule on Kentucky. The proposition simply was what decision should be made, what rule for Tennessee should be laid down, by the court in this case. Counsel contended that as the promissory note of a married woman was void under the local laws of Tennessee, and as it was the fixed policy of Tennessee to throw around married women the shield of disability the court should not even under a supposed obligation of comity, allow a recovery based on such an agreement. But the court upheld the contract of the married woman without using language carrying the conception that a Kentucky rule of law could be binding on a Tennessee court, saying: " * * * It may now be said to be settled law, that the validity of a contract, the obligation thereof, and capacity of the parties thereto, is to be determined by the *lex loci contratus* (in the sense of the place of performance) unless there is something in the contract which is deemed harmful to the good morals, or injurious to the rights of its own citizens, by the laws of the state or country whose courts are called upon to enforce the contract made in a foreign state or country."⁶⁰ The only implication that that might be possible seems to be in the following statement made by the court (which apparently carried the assumption that there may really be a conflict between the Kentucky and Tennessee domestic rules). The court said: "If this were a suit against a married woman, a citizen of this state, on a contract made out of the state, there would be much force in the insistence of the defendant. But here the law of the domicile is the same as the law of the contract and the law of the forum"⁶⁰ Now we have seen above that there cannot possibly be a conflict, for a Kentucky rule cannot be "law" for a Tennessee court. The problem here, as usual, simply is: there being two opposite local rules, each of which might be applicable, if the facts were different, what conflict of laws rule should be laid down as "law" by the forum, since neither of the opposite local rules applies as *law* in the case?

That is a question, the answer to which, as in the solution of all legal problems, should be based fundamentally on "policy."⁶¹ "Perhaps," says Mr. Justice Holmes,⁶² "one of the reasons why

⁵⁹ *Supra*, n. 58, at p. 446.

⁶⁰ *Supra*, n. 58, at p. 447.

⁶¹ LORENZEN, *op. cit. supra*, n. 55, at p. 748: "The correct mode of approach to this subject would strip it of all fictions and deal with all phenomena *a posteriori*. Thus viewed we find that each sovereign state can determine the rules of the Conflict of Laws in accordance with its own notions of what is just and proper, and so far as the individual states of this country are not bound by some constitutional provision, they have the same power."

⁶² 8 HARV. L. REV. 1, 9.

judges do not like to discuss questions of policy, or put a decision in terms upon their views as law-makers, is that the moment you leave the path of mere logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion nevertheless. Views of policy are taught by experience of the interests of life.’’