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CONFLICT THEORIES AND LIFE INSURANCE SETTLEMENTS

By

PERLIE P. FALLON*

Since an urge for useful adaptation of the law creates the problems in the conflicts field, an instinct for adaptation plays a larger part in the solutions than scientific exactness or theoretical excellence, qualities, which help in the problems only when they create a finer capacity of adaptation resulting in either an improvement in the administration of justice or an extension of beneficial commercial activity, and we expect to find in this field of the law, therefore, many counsels of perfection, the disregard of suggested changes, and a progress arising from tentative action as in the history of equity.

The day to day transactions of a life insurance business that is national in scope require an inherent capacity of adaptation to varying law. Life insurance operates upon a sectional if not a national geographical basis; the corporate powers that the state of incorporation granted to the company are exercised in many states. The operation of the business thus becomes a continuous crossing and recrossing of state lines. The application may be written in the state of the applicant's residence and transmitted to the home office, which is usually in the state of origin of the corporation, and where the insurer issues the policy and sends it out for delivery. The relevance of state lines does not end when the process of writing the insurance is completed; the people who are interested move about. They cross state lines; when policies mature beneficiaries and holders of options may reside in a different state from that in which the agent wrote the application and different from that of the insurer's place of incorporation. The thesis which I have stated may, therefore, be examined in relation to life insurance with the expectation that comparisons and contrasts invite.

I propose to develop the thesis by these steps:

1. A brief reference to the precedents and theoretical thought in the general field.
2. A resume of the theoretical thought in the insurance field.
3. A reference to the elements that are peculiar to insurance.
4. A reference to the case law in the insurance field.
5. A reference to a group of cases relating to the nature of insurance settlements.

The thesis may not be explicit in reference to the process of adaptation. If we speak of altering the law, adjusting the law, or qualifying the law, we fly in

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the face of certainty. An attempt has indeed been made to settle the problems by approaching the law in terms of fixations through the process of finding the sovereign which fixes the law. "Qualification," however, is a synonym for adaptation and qualification is a word that is not unknown in the conflicts field. Adaptation has a deep root here since it looks on law as a social value that is useful for the purpose of reconciling interests. Adaptation is a good word, therefore, if we think in terms of the material out of which the problems arise and the objective toward which we strive. The phrase "choice of law" suggests a certain freedom. It has in it the idea of adaptation. Adaptation gets away from implacable standards that allow no free play for what we discover through trial and error. John Dewey has spoken somewhere of the omnipresent necessity of vital adaptation.

The precedents in the conflicts field hardly ever accept an exclusive theory of decision; even where they alight rather than hover, they are never narrow. There is never any fixed standard of approach. If we disregard some exceptions, which are found in the federal decisions after *Erie R. Co. v. Tompkins*,¹ we may say that the courts in the conflicts field avoid the mechanical. The vital spirit of continuous readaptation requires the plastic rather than the immutable and the process of finding the law in this field, recognizing the plastic as essential to its function, retains an inherent power of adaptation as a key for the unlocking of the problem.

The material over which the conflicts process works in the field of contract law and to a large extent in the field of torts is that of commercial activity. Commercial activity is inherently a process of adaptation. Law is a form of order and foresight which makes beneficial commercial activity possible. It was Chief Justice John Marshall who saw the rivers of the younger nation as the highways of an empire; it was Chief Justice Stone who regarded the processes of the conflict of laws as growing pains.²

The basic case precedents in the general conflicts field are malleable—they are susceptible of being fashioned; they are ductil—they are capable of being continuously drawn out; they are plastic—they are capable of being molded; they are pliable, impressionable.

In *Robinson v. Bland*,³ Lord Mansfield after referring to the place of making and to the place of performance gave special emphasis to the law which the parties had contemplated at the time they made the agreement. In that case a bill of exchange given in Paris for money lent and money lost at play was payable in England. The law of both France and England made the agreement void in re-

¹ 304 U. S. 64, 58 Sup. Ct. 817, 82 L.Ed. 1188 (1938). The rule was extended to insurance in *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 58 Sup. Ct. 860, 82 L. Ed. 1290 (1938).

² Paul A. Freund: *Chief Justice Stone and The Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).

³ 2 Burr. 1077, IWBL 234, 256 (1760). A discussion of the influence of this case is found in Beale, CONFLICT OF LAWS, § 332.5.

spect to the money lost at play but each recognized the validity of the obligation for money lent. Since the bill covered both money lent and money lost it was void as security; however the counts for money lent were good. The test of the parties' intent was the least mechanical of the possible approaches; it gave the greatest possible play to the judicial process.

In *Carnegie v. Morrison*,⁴ Chief Justice Shaw was dealing with more than a conflicts issue—the case suggested a contract for the benefit of a third person. The agent of the defendants who were residents of England gave a letter of credit in Boston to Bradford to enable Bradford to pay a debt which he owed to the plaintiffs who were resident in Sweden. The plaintiffs drew a bill on the defendants and the latter declined it alleging there was no contract obligation. The law of England did not recognize any right in a third party. Chief Justice Shaw excluded a reference to the law of the place of performance by using Lord Mansfield's theory in respect to the parties' intent. "There is no reference, tacit or express, in this instrument, to the laws of England, which can raise a presumption, that the parties look to them as furnishing the rule of law, which should govern this contract." The law of Massachusetts was followed.

In *Seeman v. Philadelphia Warehouse Company*,⁵ Chief Justice Stone in deciding whether the usury statute of New York or that of Pennsylvania controlled the transaction in which the parties had engaged, placed the decision on the ground that the parties had contemplated the law of Pennsylvania. The Circuit Court of Appeals had reached the same result on two grounds, namely, that the last act, the delivery of the note, was done in Pennsylvania which thereby became the place of the making of the contract; and on the further ground that the note was payable in Philadelphia which thereby became the place of performance.

In *Slater v. Mexican National Railroad Company*,⁶ the widow and children of a switchman employed by the defendant, killed in Mexico through the defendant's negligence, sued the defendant, a Colorado corporation, and in an action for death, in the United States Court for the District of Texas. The plaintiffs relied upon the Mexican law. Justice Holmes overruled the objection that the action was not transitory and refused to allow the plaintiffs the benefit of the Texas remedy, namely, the payment of a lump sum, on the ground that it was broader

⁴ 2 Met. 381, 43 Mass. 381 (1841). The plaintiff claimed the benefit of a contract made by others—a concept of vast interest in insurance law. W. R. Vance, *The Beneficiary's Interest in a Life Insurance Policy*, 31 YALE L. J. 343 (1922). R. Donald Taylor, *Developments in Life Insurance*, LA REVUE DU BARREAU, Tome 4, No. 6, Montreal, Juin 1944. *Deckert v. Prudential Life Ins. Co.* (1943) O. R. 448, (1943) 3 D. L. R. 747, 10 I. L. R. 158, confirmed on appeal 10 I. L. R. 211. There was an amendment of the statute which is: (1946) c. 42, s. 4 adding a new subsection (numbered (2)) to sec. 153 of the Ontario Insurance Act. There were similar amending acts in the other provinces excepting Quebec. *French v. French*, 161 Kan. 327, 167 P.2d 305 (1946). *Kansas City Life Ins. Co. v. Rainey*, 353 Mo. 477, 182 S.W.2d 624 (1944). *Mutual Benefit Life Ins. Co. v. Ellis*, 125 F.2d 127, (2nd. C. 1942). *Feine v. State Mutual Life Assurance Co.*, 152 Misc. 897, 274 N. Y. S. 344 (1934).

⁵ 274 U. S. 403, 47 Sup. Ct. 626, 71 L. Ed. 1123 (1927).

⁶ 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900 (1904). *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837 (1916). *Louchs v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918).

than the remedy which the Mexican law allowed, namely, a terminable pension. "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." The obligation, however, did not operate mechanically; it was subject to equitable considerations. Therefore, a broader remedy than that flowing from the obligation was refused.

When we pass to the cases concerning the constitutional conceptions of due process and full faith and credit do we find anything different from the plastic quality of the general cases? Do the constitutional cases follow a process of adaptation? The insurance cases that involve the due process and full faith and credit clauses show a plastic quality.

We may trace the changes in the constitutional ideas by the insurance cases alone and without regard to the matrimonial and employer liability cases that the non-judicial authorities have discussed more intensely than the insurance cases.

In early cases in the United States Supreme Court the applications provided that the insurance would not take effect until the first premium had been paid. *Equitable Life Assurance Society v. Clements*⁷ is an example. These cases gave momentum to the place of making as a decisive fact. Although *Hooper v. California*⁸ indicated clearly that a state contact with an insurance transaction might be enough to make the local law applicable—there the use of a broker within the state by a resident of the state for the purpose of closing a marine insurance contract with an insurer in New York was held enough to subject the transaction to state control—the latter case of *Allgeyer v. Louisiana*⁹ placed special stress upon the fact that the contract of insurance was made without the state—a citizen of Louisiana placed marine insurance with a New York insurer by a letter—and the emphasis thus given was of such a degree that the place of making seemed to have emerged as a definite standard although the litigation respecting premium notices, *Mutual Life Ins. Co. of New York v. Hill*¹⁰ being an example, indicated that the place of performance and even the law contemplated by the parties might be important.

New York Life Ins. Co. v. Dodge,¹¹ involving a policy loan upon a Missouri policy where the court found evidence of making in New York, *Aetna Life Ins. Co. v. Dunken*,¹² where the state of Texas was refused the right to apply a penalty statute to a policy which had been exchanged according to the terms

⁷ 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497 (1891). *Mutual Life Ins. Co. of New York v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181 (1900).

⁸ 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (1895).

⁹ 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832 (1897).

¹⁰ 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788 (1904).

¹¹ 246 U. S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772 (1918).

¹² 266 U. S. 389, 45 Sup. Ct. 129, 69 L. Ed. 342 (1924).

of a policy issued in Tennessee, and *Mutual Life Ins. Co. of New York v. Liebing*,¹³ where a policy loan was found to be a Missouri contract either as the acceptance in Missouri of an offer in the policy or as the acceptance in Missouri by the Company of a proposal for a loan, each and everyone of these cases, went on the basis that the place of making was the decisive factor. A tradition was apparently being established in the court that the due process clause might be resolved in insurance cases by reference to the place of the making of the contract.

Today the place of making plays a large part in the solution of the problems which arise under the due process clause but the adaptation which is inherent in the conflicts process has long since given the place of making rule a coordinate rather than a controlling power. *Home Insurance Company v. Dick*,¹⁴ where Texas was denied the power to apply its statute of limitations to a fire policy written in Mexico, *Hartford Accident and Indemnity Co. v. Delta Pine Co.*,¹⁵ where Mississippi was denied the right to nullify the short statute of limitations in a fidelity bond written in Tennessee, *Connecticut Mutual Life Ins. Co. v. Moore*,¹⁶ where the State of New York was permitted to treat as abandoned property the proceeds of policies issued upon the lives of persons resident in New York where the insured continued to live in New York and the beneficiary was a resident of New York at the time of maturity; all of these cases are under the influence of the older tradition of the court that the place of making is important. In none of these cases, however, does the court rest the decision upon the place of making alone; and in the opinions we find new and different thoughts expressed. In the *Dick* case,¹⁴ the opinion states that no question of public policy is involved since the insurers have not invoked the aid of any Texas processes; in the *Delta Pine Co. case*,¹⁵ the opinion refers to the interest which Mississippi had in the contract as being slight; in the *Moore* case,¹⁶ the majority and dissenting opinions discussed the meaning of "contact" with the transaction.

These concepts, differing from that of the place of making, which thus appear in the cases have an historical background. In *Compania General De Tabacos v. Collector*,¹⁷ a premium tax was allowed where the insured property was at some time within the territorial power of the Philippine Islands which laid the tax; *Boseman v. Connecticut General Life Ins. Co.*¹⁸ found that a group policy was made in Pennsylvania and controlled by that law but it was first necessary to eliminate the Texas statute of limitations by so construing another Texas statute as to find that the insurer was not doing business in the state; *Osborn v. Ozlin*¹⁹ found a relationship between the state of Virginia's interest in insurance con-

¹³ 259 U. S. 209, 42 Sup. Ct. 467, 66 L. Ed. 900 (1922).

¹⁴ 281 U. S. 397, 50 Sup. Ct. 338, 74 L. Ed. 926 (1930).

¹⁵ 292 U. S. 143, 54 Sup. Ct. 634, 74 L. Ed. 1178 (1934).

¹⁶ 333 U. S. 541, 68 Sup. Ct. 682, 92 L. Ed. 641 (1948). 58 Yale L. J. 628 (1949).

¹⁷ 275 U. S. 87, 48 Sup. Ct. 100, 72 L. Ed. 177 (1927).

¹⁸ 301 U. S. 196, 57 Sup. Ct. 686, 81 L. Ed. 1036 (1937).

¹⁹ 310 U. S. 53, 60 Sup. Ct. 758, 84 L. Ed. 1074 (1940). *Fidelity and Deposit Co. of Maryland v. Tafoya*, 270 U. S. 426, 46 Sup. Ct. 331, 70 L. Ed. 664 (1926).

tracts and its statutory restrictions on the activities of non-resident agents; and in *Hoopston Canning Co. v. Cullen*²⁰ where the power of New York to regulate reciprocals which wrote their contracts in Illinois was upheld, the place of making was described as heresy arising from "conceptualistic discussion," and the place of performance fared no better. Thus adaptation working its way against the earlier trends in the court became the means of settlement of the problems arising under the due process clause.

The cases arising under the full faith and credit clause concern statutes. The place of making appears here again as a tradition and again disappears. In *John Hancock Mut. Life Ins. Co. v. Yates*,²¹ Section 58 of the New York Insurance Law was given full faith and credit in Georgia after the court had reached the statute by fixing the place of making in New York. In *Order of United Commercial Travelers of America v. Wolfe*²² where an Ohio beneficiary Society had issued a certificate in South Dakota to a citizen of that state the short statute of limitations in the Society's certificate of incorporation prevailed over the limitations statute of South Dakota where the contract was made. The place of making was absorbed in the larger interest of the administration of a common fund; the Ohio law became controlling.

Renvoi, because it rests on a mechanical reference to a foreign law and a consequent mechanical reference back to the law of the forum, is criticized. It is ridiculed, *Re Duke of Wellington*²³ is an example. The English courts were asked to construe the will of a British subject domiciled in England that had been executed for the purpose of conveying lands in Spain. The court referred to the Spanish law, since the lands were situated in Spain, and found that the Spanish law followed the law of the domicile of the testator and thereby referred back to English law. *University of Chicago v. Dater*²⁴ is a further example. A married woman, resident in Michigan, signed a note in Michigan and sent it to Illinois where a mortgage was placed on land in Illinois as security. In a suit upon the note the Michigan court referred to the law of Illinois, the place of contracting, and the Illinois law referred the matter to the place of the execution of the note which was Michigan.

The *renvoi* process rests upon an attempt to set up standards. The standard which most often emerges is the conflicts rule of another jurisdiction. *Erie R. Co.*

²⁰ 318 U. S. 313, 63 Sup. Ct. 602, 87 L. Ed. 1722 (1943).

²¹ 299 U. S. 178, 57 Sup. Ct. 129, 81 L. Ed. 106 (1936). *Morris v. Jones*, 329 U. S. 545, 67 Sup. Ct. 451, 91 L. Ed. 488 (1947).

²² 331 U. S. 586, 67 Sup. Ct. 1355, 91 L. Ed. 1687 (1947).

²³ (1947) Ch. 506, (1948) Ch. 118. J. H. C. Morris, *Renvoi*, 64 L. Q. Rev. 264 (1948). Note, 61 Harv. L. Rev. 1055 (1948). *New York Life Ins. Co. v. Waterman* 104 F.2d 990 (9th Cir. 1939). *Blair v. New York Life Ins. Co.*, 40 C.A.2d 494, 104 P.2d 1075 (1940). *Braun v. New York Life Ins. Co.*, 46 C.A.2d 335, 115 P.2d 880 (1941). Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165 (1938).

²⁴ 277 Mich. 658, 270 N. W. 175 (1936).

*v. Tompkins*²⁵ develops a like situation, and since the process is mechanical it often nullifies the intent of the parties. In *Duskin v. Pennsylvania Central Air Lines Corporation*,²⁶ an air pilot's contract of employment contained a clause that the employer's liability for death by accident would be controlled by the law of Pennsylvania. The Federal court referred to the Pennsylvania conflicts rule which followed the law of the place of the tort and the law of Alabama thus became the law of the case.

The plastic quality of the conflicts process seeks to distinguish the renvoi principle. Thus the conflicts rule of the foreign jurisdiction is often disregarded. In *New York Life Ins. Co. v. Waterman*,²⁷ the court avoided the statutory conflicts rule of the forum as an arbitrary standard by finding a possibility of performance within the forum. Thereby the issue respecting the validity of an incontestable clause in respect to reinstatement was controlled by the law of California where the contract had been partly performed and not referred to the law of New York by reason of the conflicts rule set out in the California Civil Code only to have the New York conflicts rule refer the matter back to California.

To Mr. Cook and to Mr. Lorenzen the conflicts process is a process of adaptation.

Mr. Cook, rejecting the territorial test, moves from standardization to adaptation. Although he often overlooks the difference between statute and case law, and at times drifts back to territorial thought, his basic approach is nevertheless, that of adaptation in that it is through the consideration of the data of each new situation. He notes that all of the acts of the parties hardly ever take place in one state and suggests that two states may have joint jurisdiction—a point that recalls two decisions. The first is Justice Stone's opinion in *Seeman v. Philadelphia Warehouse Co.*,²⁸ where the court held that the parties had a choice between the usury laws of New York and Pennsylvania. The second case is Chief Justice Taney's decision in *Andrews v. Pond*,²⁹ where a plea of usury was raised in respect to a note delivered in New York and payable in Mobile and the court held that while the law of the place of performance was usually followed, yet if there is evidence of an intent to evade the law of place of making, that law would control and the issue must be determined by a jury. In the field of life insurance the point is illustrated by the regulation of the Missouri Insurance Department whereby a coupon application that rests upon acceptance in another state must when taken in Missouri carry an endorsement that the resulting contract is subject to Missouri law.³⁰ Mr. Cook does not allow always for the part

²⁵ Note 1.

²⁶ 167 F.2d 727 (6th Cir. 1948). Note 16 U. OF CHI. L. REV. 157 (1948).

²⁷ Note 23.

²⁸ Note 5.

²⁹ 13 Peters 65, 10 L. Ed. 61 (1839).

³⁰ *Columbian National Life Ins. Co. v. Keyes*, 138 F.2d 382 (1st. Cir. 1943). Cert. den. 64 Sup. Ct. 521.

which statutes may play in this field of the law. (See his discussion of *Commonwealth v. Macloon*, 101 Mass. 1.)³¹ A statute may grant a right, as Justice Holmes pointed out in *Mulball v. Fallon*.³² In the field of insurance we have *Brassell v. John Hancock Mutual Life Insurance Company*³³ where the New York court was asked to assume that New Jersey had a non-forfeiture statute similar in effect to Section 208 of the New York Insurance Law, and the court declined to make such an assumption with respect to a statutory enactment. Thus a statute or the absence of a statute makes a difference. Mr. Cook sometimes overlooks the part that intent may play (see his discussion of *Milliken v. Pratt*, 125 Mass. 374).³⁴ Intent may bring in by implied reference one aspect of the law of another state: In *Milliken v. Pratt*³⁴ acceptance of the offer of guarantee in Maine by the shipment of the goods there made a Maine rule a part of the contract. Mr. Cook saw the conflicts process as one of adaptation; others have sought to standardize his work into a theory of local law whereby the solution of every problem depends upon finding a "conflicts" rule.

Mr. Lorenzen attacks the place of contracting theory; he notes that in practice not a single state consistently follows the rule. He describes "public policy" as merely a negative factor arising from the illusion of the necessity of fixed standards. He points out that while each state may determine its own rule, every state is interested in the proper administration of justice, and he poses the question, "What are the demands of justice in the particular situation?" While noting that the security of local transactions may lead to the use of the place of making as a criterion, he finds that in the case law the courts seek nevertheless to render just decisions and they consider the social interests. In the technical aspects of his work Mr. Lorenzen vested in the court of the forum, with some few exceptions, not only the power to define the facts as either contract or tort, but also the qualification of the connecting factor such as the place of making, and the characterization of substantive and procedural law. There is thus created in the court of the forum a process that is plastic rather than standardized.³⁵

The thought of Mr. Cook and Mr. Lorenzen leads us to the decision in *International Shoe Co. v. The State of Washington*.³⁶ The state had enacted a statute requiring that payments be made into an unemployment compensation fund. It imposed such a tax and sued the petitioner for collection. The petitioner relied upon the due process clause, alleging that it was not within the state either for the purpose of taxation or suit. The court rejected all mechanical applications of either "presence" or territorial power. The place of the decision in the conflicts field becomes apparent when the decision is reduced to its lowest terms, namely,

³¹ *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457 (1924).

³² 176 Mass. 374, 57 N. E. 386 (1900).

³³ 134 Misc. 274, 235 N. Y. S. 195 (1929).

³⁴ Note 31.

³⁵ *Hartman v. Time Inc.* 166 F.2d 127 (3rd Cir. 1948). Cert. den. 68 Sup. Ct. 1495. Note, 48 Col. L. Rev. 932 (1948). *Anderson v. State Farm Mut. Automobile Ins. Co.*, 222 Minn. 428, 24 N.W.2d 836 (1946).

that the petitioner was drawing funds out of Washington from which a state statute required a deduction for the purpose of bearing some part of the social cost. There was a clear relation between the activities of the petitioner in the state and the social cost, and the petitioner was obliged to contribute to the cost. The requirements of the fair and orderly administration of the law prevailed over mechanical standards. The decision is an application of Mr. Cook's idea of joint legislative jurisdiction in a case where a corporation is involved and follows Mr. Lorenzen's test: "What are the demands of justice in the particular situation?"

The balancing of the various contacts in a transaction for the purpose of finding a dominant factor and thereby determining the controlling law assumes that there is one controlling law; and the process of balancing the factors creates an illusion of a mechanical standard that may be reached by weighing. We have found already that the idea of a single controlling law is often illusory. While contact is a value in determining relationship, even a dominant contact is not necessarily the decisive factor. Justice Jackson in *Connecticut Mutual Life Insurance Company v. Moore*³⁷ wrote that the term "contact," "seems taken over from some vernacular other than that of the law." I see the difficulty in a different way. The word "contact," whatever its origin may be, requires qualification. In the life insurance field there are two cases which refer to the process. They are *Jones v. Metropolitan Life Insurance Co.*,³⁸ where the issue was whether the law of New York or New Jersey was controlling in respect to a misrepresentation; and *United Service Life Insurance Co. v. Farr*,³⁹ where the issue was whether the law of the District of Columbia or of Alabama was controlling on a change of beneficiary when a soldier's letter was not delivered to the insurer. In neither case does the court finally rely upon a balancing of the factors as a method of determination. In the field of insurance the method appears awkward and never performs the promise which it holds out. When we consider this method of determination there comes to mind the use which the English courts have made of intention, and in *Compania Transatlantica Centro-Americana v. Alliance Assurance Co. Ltd.*,⁴⁰ where the court refers to a balancing of the factors, the court imperceptibly moves over into the field of intention. Intention allows a freer play to the judicial process. The United States Supreme court emphasized intent as early as *Liverpool and Great Western Steam Co. v. Phenix Insurance Co.*,⁴¹ and while the English courts reached a different result using the same test of intent in *In re Missouri Steamship Co.*,⁴² both of the cases involving clauses excluding negligence in marine risks, nevertheless the respective courts were able

³⁶ 326 U. S. 310, 66 Sup. Ct. 154, L. Ed. 95 (1945). Cf. *Seeman v. Philadelphia Warehouse Co.*, note 5.

³⁷ Note 16.

³⁸ 158 Misc. 466, 286 N. Y. S. 4 (1936).

³⁹ 60 F. Supp. 829 (S. D. N. Y. 1945).

⁴⁰ 50 F. Supp. 986 (S. D. N. Y. 1943).

⁴¹ 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788 (1889).

⁴² 42 Ch. D. 321 (1889).

in each case to make convincing distinctions on the basis of the language that the parties had used in the shipping documents. The process of balancing the factors—a development of using contact as a means of decision—offers a formula that never leads to a result. In the effort to secure a result the court is likely to shift to the test of intent.

Professor Beale took a stand. He singled out the place of making as the test entitled to preference. He selected the place of making as the controlling law because it promoted the ease and certainty of counsel in stating the controlling law to the interested parties. The need of adaptation prevented Professor Beale's theory from ever taking root; and in later work Professor Beale found a change in the general conflicts field which he described as a trend toward "sociological jurisprudence."

In choosing the place of making because of its relation to individual conveniences Professor Beale went on the footing that the true function of the law is to make possible correct prediction of future events—a power to prophesy. The parties could always know the law if they consulted counsel at the place of the making of the contract. All the other methods of approach dulled the power to prophesy—it was already clear from the cases that the intention test would vary with the court; the place of performance if it were accepted as the test would require a prediction by counsel remote from the parties.

The developments in insurance law show that in seeking certainty as a goal Professor Beale had in mind an ideal that the courts were prepared to accept as an essential. The law of the place of making has indeed given a degree of certainty in some aspect of the insurance law and a power to prophesy. When we examine this development in the insurance law, however, we find that the decisive factor was not a preference for the place of making concept but a social determination. The result flows not from an interest in a power to prophesy but from a power of sovereignty. It rests on group interest and never upon personal convenience. Constitutional rules have made some differences. In *Jones v. Prudential Insurance Company*,⁴⁴ a South Carolina statute making all contracts with foreign corporations South Carolina contracts was interpreted to refer to citizens of South Carolina at the time of making, and the court held that the statute was not controlling on an insurance contract made in Massachusetts by a resident of that state who later moved to South Carolina.

Prophecy could not eliminate from the law the essential function of reconciling conflicting interests. Modern communication made the place of making itself often uncertain; the place of making became a matter for determination. Problems arise after the making which are not apparent before the making, and a conflict of sovereignties may be involved as well as a conflict of personal interests.

⁴³ Joseph H. Beale, *Social Justice and Business Costs*, 49 HARV. L. REV. 593 (1936).

⁴⁴ 210 S. C. 264, 42 S.E.2d 331 (1947).

Thus the necessity for adaptation in the conflicts process excludes any standardized approach.

In his later work Professor Beale described the more plastic process which became apparent in the general field as "sociological jurisprudence." The older cases that we have reviewed had already indicated even in the field of contract that there was a power of adaptation in the law whereby it could adapt itself to varying conditions. It is this inherent process which is important and not the results; therefore, the word "sociological" may have referred to a result rather than a means. Professor Beale's theory of the place of making centered attention on the usefulness of certainty, but the process itself, following its basic objectives of adaptation and reconciliation, rejects any standard.

Standardization, we find upon summary, has never been able to make a lasting impression in the conflict of laws process. Mansfield, Shaw, Holmes and Stone, the masters of the common law, emphasized the multiplicity of the possible theories of decision which were present in the conflicts field. In the field of insurance law the United States Supreme Court at an early date relied upon the place of making concept for the solution of the problems under the due process and full faith and credit clauses of the Constitution; but that court in the lapse of time came to reject "conceptualistic" theories both of the place of making and of the place of performance. Mr. Cook followed Justice Holmes in rejecting the idea that legislative power is territorial and proposed to examine the data of each new situation. Mr. Lorenzen, after giving a more plastic quality to the process by requiring definition through characterization and qualification, came to the test of the proper administration of justice. Chief Justice Stone, in *International Shoe Company v. Washington*,⁴⁵ made an application of this theory to commercial facts. Professor Beale, who accepted early the place of making since it was most consistent with the convenience of the parties, recognized at the end what he described as a "sociological jurisprudence." There is only one point at which the mechanical standard has been present, and the resulting standardization has come not through the conflicts process but from an entirely different source. The rule in *Erie Railroad Co. v. Tompkins*⁴⁶ compels the federal courts to follow the state law; a continuous search for state law is thereby set in motion. The federal courts have thus come, in the solution of problems in the conflicts field, to search for a state conflicts rule; and they have thereby brought into the conflicts field some of the elements of renvoi. The conflicts process in and by itself had been able to reject the renvoi theory. The process that controls the conflict of laws is a plastic process which finds a capacity for adaptation necessary to the function it serves in the law.

⁴⁵ Note 36.

⁴⁶ Note 1.

At the beginning of the opinion in *Carnegie v. Morrison*,⁴⁷ Chief Justice Shaw noted the importance of the case in the world of commerce; the case "involves questions of much difficulty and of great importance to the mercantile community."

The cases that we meet in the conflicts field are concerned mostly with commercial transactions. Commerce among the states gives rise to the problems in the conflicts field. Beneficial commerce requires a certain capacity of adaptation—if adaptation is not the very means by which commerce operates. Commerce is never mechanical; it never becomes standardized; it expands; it develops. Commerce is a continuous act of adaptation. The subject matter over which the conflict process works is malleable and plastic.

Commercial expansion compelled readjustment in both the Roman and English legal systems. Commercial expansion in the Mediterranean world led Roman praetors to accept the *jus gentium* that signified the rules accepted as binding by all peoples. Sir Henry Maine tells us that the *jus gentium* was originally in part a market law and grew out of commercial exigencies and that the Roman praetors assumed jurisdiction in disputes to which the parties were either foreigners, or a native and a foreigner, half by way of exercise of a police power, and half in the furtherance of commerce. Sir Frederick Pollock states that because the growing power of Rome had brought merchants and traders from all parts of the Mediterranean, the needs of business demanded some practical solution, and therefore, the *jus gentium* was accepted. In English commercial development the custom of merchants, which Sir Frederick Pollock has defined as the actual usage of the European commercial world, was first treated as matter of fact that might be submitted to a jury for determination and later, in the eighteenth century, was treated as established law of which the English judges had knowledge and which could no longer be treated as an issue of fact. A high degree of adaptation was required to accomplish these purposes; Blackstone and Mansfield were contemporaries.⁴⁸

The law wins its place as a social force by an inherent power to create order in commercial affairs; and the power which it exercises there is neither a static force nor the duress of arbitrary command. When Sir Frederick Pollock speaks of the genius of the law, he refers to a capacity for creating order which in the artistic world is called composition, a process by which several different elements are drawn together so as to make a whole and to the mutual advantage of all the elements, while preserving the individual freedom of each of the parts. The conflicts of law process is one of the means by which the genius of the law works. So great a power as this in the performance of so important a function is necessarily imaginative in character.

⁴⁷ Note 4.

⁴⁸ Sir Henry Maine, *ANCIENT LAW*, John Murray, London, (1906).

Having searched the conflicts field in its broader scope and having found that the standardized and the mechanical have made no impression there, we come now to the narrower field of insurance law, where the material is less voluminous and we may trace the development of conflict theories in decided cases. In the insurance field we shall refer first to the theoretical thought which has developed, and then we shall mark the smaller insurance field off from the larger field by noting conditions which are peculiar to the insurance field. We shall then determine if the plastic quality of adaptation is present in the insurance field by a reference to the cases that have risen in the various fields of insurance practice. We shall close by an analysis of eleven cases concerned with insurance settlements.

The theoretical approach to the conflicts problems in the insurance field has all of that discontent which disturbs those who are forever seeking standards. Professor Griswold makes the following statement in his work on spendthrift trusts:⁴⁹

"In a review of the first edition of this book, the foregoing language was quoted with the following comment: 'Does Mr. Griswold join me in throwing up his hands?'²³ It may be observed that American conflict of laws in the contracts field is in such utter confusion, both in doctrine and in decision, that it affords virtually no guide to student, practitioner, or judge. Mr. Beale set up a system which had considerable merit in terms of workability. He tried to show that it was logically necessary as well, and on this ground met serious attack. Those who conducted that attack with such vigor may well consider the result of their handiwork."

The suggestion which Professor Griswold offers is federal legislation similar to that which fixes the liability of carriers and telegraph companies and which controls radio communication.

Guy B. Horton writing in the Cornell Law Quarterly on: "*What law governs the disposition of insurance proceeds?*" refers to "*The Maze and Suggested Ways Out.*"⁵⁰

The solution which Mr. Horton suggests is a greater emphasis upon the domicile of the beneficiary.

A note in a recent volume of the Harvard Law Review discussing the validity of spendthrift restrictions in life insurance settlements finds that the inevitable problem in the conflict of laws arises in an acute form when the optional settlement is with a company incorporated in one state, the insured domiciled in another, the beneficiary living in a third, and finally suit brought in a fourth state, all with different substantive laws; and after reviewing the cases the note reaches the conclusion that the court of the forum should follow the law of the

⁴⁹ Erwin N. Griswold, SPENDTHRIFT TRUSTS, 2d. Ed., § 113 *The Conflict of Laws*. New York (1947).

⁵⁰ 25 CORN. L. Q. 169 (1940).

domicile of the insured or the beneficiary, thereby following "significant claims" rather than "factual connections." The note defines "significant claims" as "securing protection for those who may become public charges or create social maladjustment in the homes of relatives . . ." ⁵¹

Each of these discussions has a common factor; each seeks standards. The suggested standards will not serve; they will not stand up under analysis. They are already inconsistent with experience.

We cannot go back to Professor Beale's theory of the place of making now. A solution through federal legislation is not only too large a task, it is too removed. The experience with the Hartner Act and the Carmack Act Amendment and the Communications Act is too narrow to serve as a precedent for the complex statutory structures on which insurance now rests. The proposal is revolutionary in the sense that it invites too vast a change.

The use of the law of the domicile of the beneficiary will not save the beneficiary from becoming a public charge. The recent case of *Tate v. Hain*⁵² is sufficient to show that. There the Virginia Court was required to go to the law of New York, a state where neither the insured nor the beneficiary resided, in order to preserve and carry out the settlement.

The contact resulting from the residence of the beneficiary or assignee has never reached that dominance in the insurance conflict field which the courts had once given to the place of making. In *Washington National Insurance Company v. Shaw*,⁵³ where an Illinois insurer doing business in Texas resisted payment upon a policy which it had issued in California because of a misrepresentation in the application respecting the insured's health, the court rejected the suggestion that the issue should be controlled by the law of Texas where the beneficiary and assignee resided. Intention was dominant in the court's mind—"the contract was not in fact made or entered into with reference to the laws of Texas;"—"the insured was given the right to have the beneficiary changed at any time upon request, irrespective of the place of residence of such beneficiary."

We have found already many references to social ends. Mr. Cook and Mr. Lorenzen emphasized the point. Professor Beale referred in his later work to "sociological jurisprudence." The Harvard Law Review note reemphasized social ends in defining significant claims—"those whom the insured considered it wise to restrain should not through their ignorance or profligacy be permitted to be public charges."

If we place to one side the definition of social ends which are desirable we find it necessary to fix the processes of the law with which we are here con-

⁵¹ *Validity of Spendthrift Restrictions in Life Insurance Settlements: Choice of Law*. 61 HARV. L. REV. 687 (1948).

⁵² 181 Va. 402, 25 S.E.2d 321 (1943).

⁵³ 180 S.W.2d 1003 (1944).

cerned; if we look at the case of *Black v. New York Life Insurance Co.*,⁵⁴ decided nearly half a century ago, where the court held that the insured's widow might assign her rights in the settlement arrangement and the assignee could collect the forty semi-annual installments of \$250, and where the word "trust" first entered the discussion, and if we look at the later development of Section 15 in the New York Personal Property Law, which created a power in the insured to prevent such an assignment, something more appears necessary than social ends in order to give settlement agreements validity. Social ends then appear as results rather than means. The law must retain a certain plastic quality and power of adaptation whereby it can serve ends which may be desirable. The life quality rests in this capacity. If we standardize we deprive the law of the inherent capacity by which it may attain desirable results.

In the field of conflict of laws the insurance problems are a part of a larger group; they are a class with its own peculiarities. There we are dealing with species rather than genus.

Insurance is a process that crosses and recrosses state lines continually. Interstate action is not peculiar to insurance; many forms of business and industrial activity are of interstate nature. The peculiarity of the insurance process rests in interstate action and something more. While insurance is interstate in action it is local in character; the combined interstate and local nature is the distinguishing mark.

We must examine therefore the local character of insurance further. Insurance rests on statutory law that originates in the states. The states give effect to local statutory systems by a process that, while falling short of local incorporation, gives much the same result. The local law gives the interstate activity an ever varying local character. For example—the effect of suicide may depend on a state statute; in Missouri there is a direct statutory provision,⁵⁵ in New York the statute fixing the standard provisions plays a part.⁵⁶

The presence of statutes affects the conflicts rule. Statutes directed to internal law may be decisive. A Missouri statute that controls the issuance of extended insurance may become a part of the contract.⁵⁷ A policy payable to a citizen of Texas, issued by a company doing business in Texas, is a Texas contract regardless of a provision in the contract to the contrary.⁵⁸ The statutory systems are supplemented by presumptions. The law in Pennsylvania presumes that a policy was delivered at the insured's residence.⁵⁹ In the absence of proof respecting

⁵⁴ 126 N. Y. S. 334, (1910). The legislature amended § 15 so as to let in insurance arrangements at the next session. Ch. 327, L. 1911.

⁵⁵ Mo. R. S. Ann., 1939, § 5851.

⁵⁶ *Franklin v. John Hancock Mutual Life Ins. Co.*, 298 N. Y. 81, 80 N.E.2d 746 (1948).

⁵⁷ *Smith v. Equitable Life Assurance Society*, 232 Mo. A. 935, 107 S.W. 2d 191 (1937).

⁵⁸ *Vernon's Civil Stats. Art. 5054 (4950)*. See *Onstad v. State Mutual Life Assur. Co.* 226 Minn. 60, 32 N.W.2d 185 (1948) for the application of a similar rule in Minnesota.

⁵⁹ *Pierkowskie v. New York Life Ins. Co.*, 147 F.2d 928 (3rd Cir. 1945). *Faron v. Penn. Mutual Life Ins. Co.*, 176 F.2d 290 (3rd Cir. 1949).

the law of a foreign jurisdiction, a presumption may arise that it is no more favorable than the local law.⁶⁰ Where a statute is lacking, the courts may create a statute by a process of analogy. The New Jersey courts were able in that way to sustain a spendthrift trust provision in an option settlement; the court there referred to an existing statute limiting the rights of creditors in respect to the income from trusts.⁶¹ A statute validating the spendthrift trust restrictions that an insured places in an option settlement may be extended by construction so as to include an option settlement that a beneficiary elects after the insured's death.⁶² There is a prevalence of statutes in the insurance field; there is a tendency to fall back on statutes. Statutes in the insurance field have a plastic influence on the law. There is not present there a tendency found in other fields of the law, where progress by statute is restrained by a continuous reference to the preceding case law and which Roscoe Pound illustrates by noting the difference between the civilian lawyer and the common lawyer in the interpretation of a code, namely, that a civilian lawyer starts with the statute and the common lawyer starts with the interpretations that the courts gave to the statute prior to the change.

Mr. Lorenzen referred to the concept of public policy as a negative product of the urge to fix standards. Public policy is not only present in the insurance conflicts field but it is often potent there. In *Lieberthal v. Glens Falls Indemnity Company*,⁶³ the Supreme Court of Michigan in determining an action for personal injuries sustained in an automobile accident in Wisconsin held that the action must be dismissed in view of a Michigan statute forbidding the Michigan courts to entertain actions that made the insurer a party defendant. A dissenting opinion rested on the point that the Wisconsin law, Wisconsin being the state where the policy was delivered and where the accident happened, could create a substantive right in the plaintiff; it distinguished the public policy standard by pointing out that the Michigan law treated the act of joining the insurer as *malum prohibitum* rather than *malum in se*.

The expression "public policy" has emotive power. The words are emotional. The federal courts have used the expression in such a manner as to combine the emotional nature of the words and the negative nature of the concept. *Rublin v. New York Life Ins. Co.*⁶⁴ put the rule of *Erie R. Co. v. Tompkins*⁶⁵ in force in the insurance field. *Griffen v. McCoach*⁶⁶ brought to insurance transactions the rule laid down in *Klaxon Co. v. Stentor Co.*,⁶⁷ namely, that the federal courts

⁶⁰ *Pink v. A. A. Highway Express*, 191 Ga. 520, 13 S.E.2d 337, aff. 314 U. S. 201 (1941).

⁶¹ *Chelsea-Wheeler Coal Co. v. Marvin*, 134 N. J. E. 432, 35 A.2d 874 (1944).

⁶² *Provident Trust Co. v. Rothman*, 321 Pa. 177, 183 A. 793 (1936).

⁶³ 316 Mich. 37, 24 N.W.2d 547 (1946). See *Anderson v. State Farm Mut. Automobile Ins. Co.*, note 35. But see *Ritterbush v. Sexmith*, 41 N.W.2d 611, (Sup. Ct. Wis. 1950) where a "no action" clause was found void in Massachusetts, the place where the parties contracted.

⁶⁴ Note 1.

⁶⁵ Note 1.

⁶⁶ 313 U. S. 498, 61 Sup. Ct. 1023, 85 L. Ed. 1481 (1941).

⁶⁷ 313 U. S. 487, 61 Sup. Ct. 1020, 85 L. Ed. 1477 (1941).

are obliged to ascertain the state conflicts rule; and in making this application of the law the Court referred to the public policy of Texas and stated that in conflicts issues the federal courts could not enforce a cause of action that was contrary to the public policy of the state. Public policy was there used as a generalized reference to a peculiar rule of the Texas law that requires that an assignee have an insurable interest. The policy was delivered in New York; the beneficial interest arose from a form executed in Texas that the insured sent to the assignees in New York and that the assignees sent to the insurer in New Jersey. The Court made no application of either the conflicts or insurance rules to the facts but brought in the Texas law by finding that the federal courts must respect the public policy of Texas—" . . . a state is not required to enforce a law obnoxious to its public policy." This reference to public policy has exerted an influence in the conflicts field. In *Tuthill v. Fidelity & Deposit Company of Maryland*,⁶⁸ and in *United Commercial Travelers v. Meinsen*,⁶⁹ the insurer pleaded a short statute of limitations in the insurance contract. The defence thereby put in issue sec. 3351 of the Missouri statutes that bars contractual limitation of the time in which suits may be brought. In the *Tuthill* case the St. Louis Court of Appeals decided for the insurer on the ground that the contract had been made in Illinois where the provision was valid. In the *Meinsen* case the United States District Court, sitting in Missouri, found that the benefit certificate was an Ohio contract and held nevertheless that the court could not enforce the contract limitation in view of the public policy of Missouri as expressed in the statute. The court noted that the plaintiff was a resident of Ohio suing in the Missouri courts. In the *Tuthill* case the plaintiff was a resident of Illinois operating a filling station in Missouri. Later in *Asel v. Order Of United Commercial Travelers*,⁷⁰ the Supreme Court of Missouri found that a benefit certificate was an Ohio contract and that the limitation was valid under the law of Ohio; but the court refused to enforce the limitation on the ground that it was in conflict with the public policy of Missouri. The plaintiff was a resident of Missouri; in defining public policy the court wrote: "The protection of our citizens is one of the objectives." Thus the definition of public policy, which Mr. Lorenzen described as a negative standard, is capable of infinite variation and thereby public policy not only loses the quality of a standard but the concept becomes a mere revival of the comity theory in a negative form. It is a rule of law however; and it must be taken into the account.

The insurance forms create a peculiarity. The influence of the forms, although they were drawn without reference to the conflict rules, has been important. The doctrines of warranty and representation are essential safeguards in the insuring process; they create conditions in the contract based upon time.

⁶⁸ 119 S.W.2d 468 (1938).

⁶⁹ 131 F.2d 176 (8th. Cir. 1942).

⁷⁰ 193 S.W.2d 74 (1946), aff. 197 S.W.2d 639 (1946).

The physical condition of the applicant at the time of delivery is a material fact. Gradually there developed in the applications provisions that the policy did not become binding unless the policy had been delivered to the insured while in good health and unless the insured had paid the first premium. The courts often gave these final steps in the insuring process the character of "last acts" in the concept of the law that looked to the place of the making of the contract. The Supreme Court of the United States in earlier cases followed this analysis and I have cited some of these cases in discussing the full faith and credit and due process clauses. The development of the rule in the states is illustrated by *Metropolitan Life Insurance Company v. Haack*,⁷¹ *Laventhal v. New York Life Insurance Company*,⁷² and *Levy v. Mutual Life Insurance Company*.⁷³

The coupon application was a variation of the forms and led to a different result; it contemplated an act by the insurer in accepting the application. This form shifted the place of making to the state where the insurer had its home office since generally the underwriting act was completed there. The law of the state where the insurer was incorporated then became controlling. *Fields v. Equitable Life Assurance Society*,⁷⁴ is an example among the cases. The insurance departments of some states have sought by regulation to create a two state contact when the coupon application is used. The law of the place of the residence of the insured is thereby made controlling. In *Columbian National Life Insurance Company v. Keyes*,⁷⁵ the court followed the Missouri suicide statute in determining the liability of the insurer for a death by suicide where the policy had been issued upon an application the insured signed in Missouri and the insurer accepted in Massachusetts, the application containing a notation that the policy, if issued, would be a Missouri contract and construed under the laws of that state.

Since intent is an important factor in contract relations it is quite natural that the courts not only treat those steps as final acts which the application characterizes as the essential steps in the insuring process, but also look there for the declaration of the intent in respect to the controlling law. The forms did not thereby become standards of action. Flexibility was present. Thus the coupon application created a different result since it indicated a different intention. When the states through their regulatory bodies took a fuller control of insurance they sought to create a two state contact by an endorsement on the application.

The earlier forms had given insurance a local character that its interstate character has never been able to remove. Mr. Justice Black, while applying

⁷¹ 50 F. Supp. 55 (W. D. La. 1943).

⁷² 40 F. Supp. 157 (E. D. Mo. 1941).

⁷³ 56 N.Y.S.2d 32 (1945). The last act rule has determined the applicable law in insurance trust. *Jackson v. Tallmadge*, 246 N. Y. 133, 158 N. E. 48 (1927).

⁷⁴ 118 S.W.2d 521 (1938).

⁷⁵ Note 30.

the commerce clause to the insurance field, in *United States v. Southeastern Underwriters* noted that insurance is ". . . intimately related to local welfare. . ."⁷⁶

The rule requiring the states to give full faith and credit to the statutes and decisions of the state authorizing a fraternal benefit society appears at first glance to create a special rule in respect to fraternal benefit societies, quite apart from the usual conflict rules in the insurance field; but upon analysis the conflict rules respecting beneficial societies become an application of the tradition that insurance is local in character. The rationale of the conflict rules respecting beneficial societies is that the state that authorizes and controls a corporation issuing insurance of this type must be left free to manage the internal affairs of the society. Justice Holmes stated the rule in *Modern Woodmen of America v. Mixer*,⁷⁷ and it has been consistently followed but not always understood. The "indivisible unity," the "complex and abiding relation" and "the common fund" are factual relations that warrant the application of a single law. The application of the law is in the reference to the state of incorporation. *Asel v. Order of United Commercial Travelers*,⁷⁸ that I have mentioned above in discussing public policy, must be considered overruled in so far as it held that the public policy of Missouri barred the Order from using a six months limitation period in the certificate of insurance. In *Order of United Commercial Travelers v. Wolfe*,⁷⁹ the Order had issued in Ohio and delivered in South Dakota to a resident of South Dakota a certificate of insurance covering death by external, violent and accidental means. The insured died after the administration of a local anaesthetic and the beneficiary, a resident of South Dakota, assigned her interest to a resident of Ohio who sued the Order in the South Dakota courts. The Order, relying upon the six months limitation provision in the certificate, proved that the provision was a part of the constitution that the society had adopted under an Ohio statute, and showed that the Ohio courts had held the restriction valid. A South Dakota statute made all limitations of suit by way of contract void; the South Dakota courts applied that statute and gave judgment for the claimant. The Supreme Court of the United States reversed. The majority opinion rested upon the point that the members of the Order had vested the control of the Order's affairs in a representative government created by the laws of Ohio. The dissenting opinion rested upon the point that South Dakota was exer-

⁷⁶ 322 U. S. 533, 548, 64 Sup. Ct. 1162, 88 L. Ed. 1440 (1944).

⁷⁷ 267 U. S. 544, 45 Sup. Ct. 389, 69 L. Ed. 783 (1925). *Smith v. Commercial Travelers Mut. Acc. Ass'n.* 158 F.2d 65 (7th Cir. 1946). *Cnaada Southern R. Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020 (1883). *Supreme Council of the Royal Arcanum v. Green*, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089 (1915). *Hartford Life Ins. Co. v. Ibs*, 237 U. S. 662, 35 Sup. Ct. 692, 59 L. Ed. 1165 (1915). *Hartford Life Ins. Co. v. Barber*, 245 U. S. 146, 38 Sup. Ct. 54, 62 L. Ed. 208 (1917). *Broderick v. Rosner*, 294 U. S. 629, 55 Sup. Ct. 589, 79 L. Ed. 1100 (1935). *Sovereign Camp, W. O. W. v. Bolin*, 305 U. S. 66, 59 Sup. Ct. 35, 83 L. Ed. 45 (1938).

⁷⁸ Note 70.

⁷⁹ 331 U. S. 586, 67 Sup. Ct. 1355, 91 L. Ed. 1687 (1947). 57 *YALE L. J.* 139 (1947). 15 *U. OF CHI. L. REV.* 409 (1948).

cising a sovereign power over a matter of local law. Each of the opinions approached the problem in terms of local law. The majority conceded that South Dakota might have compelled the Order to conform to the South Dakota statute under pain of exclusion from the state; the minority feared that the full faith and credit clause as applied by the majority might give complete power over the activities of an insurer to a single state. The majority believed that the limitation provision in the certificate was an essential part of the benefit provision since the plaintiff's claim rested upon Item 4 and the defence upon Item 11 of the same article IV of the constitution of the Order. The point concerned the internal affairs of the society. The case was thus decided upon the tradition of local law which has played such a large part in the insurance field.

Justice Holmes pointed out that the act of applying the law is an act beyond the characterization of the activities as pertaining to a common fund. The point respecting the common fund is factual. For example, in *U. S. v. Southeastern Underwriters* Mr. Justice Black was able to apply the Federal commerce power on the ground that individual policyholders living in different states ". . . have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies."⁸⁰ In *New York Life Ins. Co. v. Gravens*,⁸¹ the power of the State of Missouri to regulate the computation of extended insurance prevailed over the insurer's contention that the exercise of such a power by a state conflicted with the insurer's power as administrator of a fund collected from policyholders that lived in different states. The common fund theory, when established, goes no further than to suggest the necessity of a single controlling law. It does not indicate the controlling law. In *Order of United Commercial Travelers v. Wolfe*,⁸² the court made a choice between two conflicting theories of local law by giving the preference to that which related to the orderly administration and the solvency of the society. The law of the state that incorporated the society became the law of the case.

After summarizing the peculiarities which distinguish insurance from the general conflicts field we may ask if these peculiarities tend toward standardization or create a capacity for adaptation. We have found that the insurance process crosses and recrosses state lines; that the process is subject to statutes that extend into codes; that the statutory systems are not static since the courts give amendments the force of new law; that the federal courts in pursuing the theory of *Erie R. Co. v. Tompkins*,⁸³ search for state public policy; that the insurance forms adopted in respect to the internal law concerning warranties and representations have given insurance a local character; that the tradition of local control created the conflicts rule in respect to beneficiary societies. Have these peculiarities

⁸⁰ Note 76, p. 541.

⁸¹ 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116 (1900).

⁸² Note 79.

⁸³ Note 1.

led to standardization or left the vital capacity for adaptation free? The answer is that the capacity for adaptation in the insurance field is equal if not greater than that in the general field. The local character given to insurance has never been able to dominate the conflicts pattern; it has never been able to give primacy to the place of making concept. Twenty years ago the New York Court of Appeals stated the diverse factors that give the courts a broad freedom in the insurance conflicts field. *Sliosberg v. New York Life Ins. Co.*,⁸⁴ raised an issue of constitutional law which required an analysis of the possible sanctions that the State of New York gives in respect to a contract of insurance. The insurer had issued and delivered a policy of insurance in Russia payable in rubles. The Revolution had declared all private insurance illegal. The insured, a Russian citizen, resident in Paris, sued in New York for the cash surrender value of the policy. The insurer applied for a stay under a statute enacted in 1926 authorizing a court to stay any action based on an insurance policy issued prior to the Russian Revolution by an insurer organized under the laws of a state of the United States and payable in rubles. The stay, if issued, continued until thirty days after the future recognition of a government in Russia by the Government of the United States. The insured urged that the statute impaired the obligation of the contract. The court, approaching the problem on the concept that a contract arises by force of law and not by the will of the parties—Chief Justice Shaw had made the point in *Carnegie v. Morrison*,⁸⁵—noted that the insurer's authority to make the contract flowed entirely from New York law since New York had incorporated the insurer; that there was some evidence of an act of acceptance in New York; finally that the suit was laid against the insurer as debtor in New York where the insurer was domiciled. The court held that the statute would be invalid if it were applied as the insurer desired.

The power of the state of incorporation that we found emphasized in the *Wolfe* case,⁸⁶ appears in the *Sliosberg* case.⁸⁷ The presence of the point in the *Sliosberg* case,⁸⁸ illustrates the scope of the adaptation in the insurance conflicts field.

The place that adaptation has in the insurance conflicts field becomes transparent in reviewing a group of cases having a common subject matter. The common nucleus brings out by contrast the variations in the use of the conflicts concepts.

Creditors

Here conflict concepts give way to two judicial impulses.

⁸⁴ 244 N. Y. 482, 155 N. E. 749 (1927).

⁸⁵ Note 4.

⁸⁶ Note 79.

⁸⁷ Note 84.

⁸⁸ Note 84.

The first impulse is the tendency to protect local creditors. The court then reaches its objective by asserting the supremacy of the sovereign power of a state over a corporate entity.

The second impulse is to follow the insured's intention in conflicts of interest among local creditors. The court there searches for an indication of the intention in either statute or an agreement; and the court will use the concept of contract in order to execute the intention when discovered, whereby a contract between the insurer and the insured arises and with it the sanction that contracts may not be impaired. The concept of contract has been a decisive help to beneficiaries when creditors have challenged settlement agreements.

Respecting the first impulse: The insurer's qualification in a state as a foreign corporation will draw the insurance proceeds into that state for the purpose of applying them to a debt if the sole equity is that of a local creditor. Thus in *Pierce v. Pierce*,⁸⁹ the Oregon courts permitted a resident creditor to attach monies due on an account book and on annuity policies belonging to a debtor residing in Nebraska although the moneys were payable in New York City. That the debtor could have sued the insurer in Oregon was the decisive point—an echo of *Sliosberg v. New York Life Insurance Company*,⁹⁰—the emphasis being placed upon acquired domicile. The tradition is similar to that of ancillary administration—the power to apply property to the satisfaction of local creditors.

The power which the states thus exercise has the benefit of the full faith and credit clause; in *Morris v. Jones*,⁹¹ the liquidator of an Illinois insurer that had qualified in Missouri was directed to give full faith and credit to the amount and nature of a claim as determined by a Missouri court in proceedings concurrent with the liquidation.

Respecting the second impulse: A provision in the insurance arrangement indicating an intention to prefer the beneficiary will draw in the law of the place of performance in order that the insured's intention may be carried out. In *Annis v. Pilkewitz*,⁹² the Michigan Supreme Court sustained the right of a local beneficiary against the claim of a local creditor of the beneficiary, the court accepting the provision in the settlement agreement that payments be made in New York City subject to Section 15 of the New York Personal Property Law which bars transfers or commutation and, therefore, executions. In *Tate v. Haine*,⁹³ the Virginia Supreme Court preferred a local beneficiary over a Virginia creditor of the beneficiary where the insurance arrangement forbade an assignment and such an arrangement was valid under the law of New York where the payments were being made. In *Manufacturers Trust Co. v. Miller*,⁹⁴

⁸⁹ 153 Or. 248, 56 P.2d 336 (1936).

⁹⁰ Note 84.

⁹¹ 329 U. S. 545, 67 Sup. Ct. 451, 91 L. Ed. 488 (1947).

⁹² 287 Mich. 68, 282 N. W. 905 (1938).

⁹³ Note. 52.

⁹⁴ N. Y. L. J., 6-27-41, p. 2875, aff. 262 A. D. 1016, 288 N. Y. 534, 41 N.E.2d 935 (1942).

the New York courts preferred a Connecticut beneficiary over a Connecticut judgment creditor which was a New York corporation where the insurance arrangement used the language of Section 15 of the New York Personal Property Law and the insured and the insurer were both domiciled in Connecticut.

The courts will not refer to the law of the insurer's domicile if the law of the forum prefers the beneficiary as a local creditor of the insurer over other local creditors. The domicile of the insurer counts if the law there supports the beneficiary's claim and if there is an indication of a preference either by agreement or statute; see *Chelsea-Wheeler Coal Co. v. Marvin*,⁹⁵ *Pool v. New England Mutual Life Insurance Company*.⁹⁶ In *Mullen v. Trolinger*⁹⁷ the court applied the law of Missouri where the insurer was domiciled in order to support a spendthrift restriction against the attack of an Idaho judgment creditor. In *Barry v. Equitable Life Assurance Society*,⁹⁸ the New York courts upheld a wife's claim to the proceeds because of the insurer's domicile in New York where the contract had been made and where the Married Woman's Act supported the claim.

The nature of the property right which the insured acquires under the policy will be referred to the law of the place of making. In *Columbian National Life Ins. Co. v. Welch*,⁹⁹ the United States District Court in determining the right of the United States to distrain for taxes referred to the law of Ohio where the policy had been delivered in order to fix the insured's right in the proceeds as superior to the right of the beneficiaries.

The capacity of the parties to make the contract depends upon the law of the place of making; thus the power of the insured's wife to apply family income to the payment of premiums for insurance on her husband's life does not depend upon the law of New York, when New York is the forum, if the contracts were made in Ohio, a state that has different statutory limits with respect to the amount of money that a wife may apply to insurance; see *United States Mortgage and Trust Co. v. Ruggles*.¹⁰⁰

A court will not apply local statutes to external matters; and it will not draw to itself statutes of other states that pertain to procedure. A Rhode Island statute permitting persons injured in automobile accidents to sue an insurer will not be applied in Rhode Island to an insurer qualified in that state if the policy was issued and the accident occurred in Massachusetts; see *Corderre v. Travelers Ins. Co.*¹⁰¹ The Georgia courts will not follow a Florida statute whereby the designation of the insured's estate as beneficiary makes the insurance payable to his wife

⁹⁵ Note 61.

⁹⁶ 123 A. D. 885, 108 N. Y. S. 431 (1908).

⁹⁷ 237 Mo. A. 939, 179 S.W.2d 484 (1944).

⁹⁸ 59 N. Y. 587 (1875).

⁹⁹ 15 F. Supp. 177, aff. 88 F.2d 333 (1st. Cir. 1937).

¹⁰⁰ 258 N. Y. 32, 179 N. E. 250 (1932).

¹⁰¹ 48 R. I. 152, 136 A. 305 (1927). See *Equitable Life Ins. Co. v. McRee*, 75 Fla. 257, 78 So. 22 (1918).

and children where the insured resided in Florida at the time the policy issued, and removed later to Georgia and while resident there changed the beneficiary to his estate; see *Fenn v. Castelanna*.¹⁰² The Rhode Island courts refused to give the Rhode Island statute effect outside of the state; the Georgia courts refused to draw into Georgia the administrative procedure of another state.

Penalties

Here the conflict theories are subordinate to substantive right and in a much lesser degree to regulatory power.

Statutes that impose penalties on an insurer for vexatious delay in making payment are not yet considered part of a state's regulatory practice. Up to now penalty statutes have been given the status of substantive right; see *Aetna Life Insurance Co. v. Dunken*,¹⁰³ in view of *People of Sioux County v. National Surety Co.*,¹⁰⁴ and *Missouri State Life Insurance Co. v. Jones*.¹⁰⁵ In the *Dunken* case a term policy, delivered in Tennessee, permitted a conversion to twenty payment life. The insured, having moved to Texas, converted the policy. In an action on the converted policy the Texas courts allowed the statutory penalty. The Supreme Court of the United States reversed the judgment on the ground that the basic contract had been made in Tennessee where no penalty was allowed. This reasoning refers the allowance of the penalty to the place of making. It is the general rule. In *Lowry v. Fidelity-Phenix Fire Insurance Co.*,¹⁰⁶ Missouri enforced the Kansas penalty statute. In *Prudential Insurance Co. of America v. Carlson*,¹⁰⁷ the Tenth Circuit Court of Appeals held that the Kansas penalty statute did not apply in view of a finding that the policy was a New Jersey contract.

Martin v. Mutual Life Insurance Co. of New York,¹⁰⁸ presents the penalty statutes in a different aspect. There Missouri applied its local penalty statute to a claim on a life policy that was an Indiana contract. The court followed the place of performance test there on the ground that vexatious delay concerns performance and the law at the place of performance controls the recovery of penalties. This impulse is an assertion of the state's regulatory power.

Texas exercises its regulatory power by a statute making insurance contracts written by an insurer doing business in the state payable to a citizen or inhabitant of Texas subject to Texas law. The statute contemplates a place of performance test. The Supreme Court of the United States has held, however, that a group insurance contract made in Pennsylvania is not subject to Texas law when the delivery of a certificate under the policy is the only act done in Texas. In *Boseman*

¹⁰² 196 Ga. 22, 25 S.E.2d 796 (1943).

¹⁰³ Note 12.

¹⁰⁴ 276 U. S. 238, 48 Sup. Ct. 239, 72 L. Ed. 547 (1928).

¹⁰⁵ 290 U. S. 199, 54 Sup. Ct. 133, 78 L. Ed. 267 (1933).

¹⁰⁶ 219 Mo. A. 121, 272 S. W. 79 (1925).

¹⁰⁷ 126 F.2d 607 (10th Cir. 1942).

¹⁰⁸ 190 Mo. A. 703, 176 S. W. 266 (1915).

v. *Connecticut General Life Insurance Co.*,¹⁰⁹ a group policy that was delivered in Pennsylvania and the premium there paid provided that the arrangement would be controlled by the law of Pennsylvania. The policy fixed sixty days for a notice of disability; the Texas statute allowed a period of ninety days. The Texas courts followed the local statute. The United States Supreme Court reversed the judgment on the ground that the insurer was not doing business in Texas since the certificate is not a part of the insurance contract. Prior to the *Boseman* decision the Texas courts had applied the penalty statute to group contracts of the type the *Boseman* case describes. In *Metropolitan Life Insurance Co. v. Wann*,¹¹⁰ the Texas Commission of Appeal overruled the prior decisions and adopted the decision in the *Boseman* case as controlling sending the case back nevertheless for a further trial in order to determine if the insurer was doing business in the state.

The impulse to treat penalties as substantive rights has thus prevailed over the impulse of regulation; the place of making has prevailed over the place of performance.

Time has added other elements, however. The Supreme Court of the United States later laid down the rule of *Erie R. Co. v. Tompkins*,¹¹¹ whereby the final word on the construction of an insurance contract rests with the state courts. Congress in the enactment of Public Law 15,¹¹² has placed a new emphasis on not only the right of the states to regulate insurance but on the necessity of the full exercise of the state power in order that the power of the Federal government may not be called into being. These elements may yet throw the emphasis in penalty cases back to the place of performance since neither Pennsylvania nor New York can regulate the actions of an insurer in Texas.

Interpretation

Intent is here the decisive factor, the impulse of decision. The courts use the various conflict theories to create flexibility in the execution of the intent.

The law of a particular state may have factual significance in the search for the intent. It may point to the intent and create, by itself, a rule of decision.

Distinctions in selecting the law vary with the issue—depend upon the issue. The law of the place of making is relevant if the interpretation of the policy is in issue; thus the Missouri courts determined the coverage of an accident clause by referring to the law of California, where the contract had been made, and whereby death, resulting from a hemorrhage caused by breaking the module from a tumor while the insured was playing golf, was not an accident.¹¹³

¹⁰⁹ 301 U. S. 196, 57 Sup. Ct. 686, 81 L. Ed. 1036 (1937).

¹¹⁰ 109 S.W.2d 470, 115 A. L. R. 1301 (1937). See *John Hancock Mutual Life Ins. Co. v. Stanley*, 215 S.W.2d 416 (1948).

¹¹¹ Note 1.

¹¹² 59 Stat. 33, 34; 15 U. S. C. 1011-1015. See *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 66 Sup. Ct. 1142, 90 L. Ed. 1342 (1946).

¹¹³ *Campbell v. Aetna Life Ins. Co.*, 283 Mo. 63, 222 S. W. 778, (1920).

The policy may, however, show by its provisions a clear intent to refer interpretation to the place of performance; thus the United States Supreme Court considered the law of England in interpreting a marine insurance policy in which the parties contemplated performance in England according to English usages; see *London Assurance Co. v. Compania De Moagens DoBarreiro*.¹¹⁴

Where the insured's intent is in issue—for example if the court is interpreting a designation of beneficiary—the law of the insured's domicile may be important. In *Knights Templars and MasonicMut. Aid Association v. Greene*,¹¹⁵ a resident of New York who directed an Ohio insurer to change the beneficial designation to his "heirs" was deemed to have used the word "heirs" with the meaning that the New York law gave to the word.

Where the insured's intent cannot be carried out except by a reference to the law of the place of performance the courts will follow that concept of the law if they realize thereby the insured's intent. In *Re Hewitt*,¹¹⁶ the Ontario courts had three choices of law—Manitoba, British Columbia, and Ontario. The last will and testament that the insured soldier made, before sailing for France where he fell, and whereby he sought to transfer the beneficial interest to his wife, was ineffective for the purpose in British Columbia, the insured's last domicile. The policy was payable at the insurer's home office in Ontario. The Ontario law, which permitted the change to be made by will, was followed. Manitoba where the insured resided when he took the policy was eliminated on the ground that its statute made the policy payable there only if the insured lived there and the soldier's last domicile was British Columbia.

Intent rather than conflict theories control interpretation; and the courts exercise a free choice among conflict concepts in carrying out the intent.

Representations and Warranties

Issues of material misrepresentation relate to the process of contracting; they generally draw in the application either for the insurance or for the reinstatement of the insurance.¹¹⁷ The courts have found little occasion to go further than to determine the place of making. The one attempted diversity has given firmer support to the place of making rule. The Supreme Court of the United States in *John Hancock Mutual Life Insurance Co. v. Yates*,¹¹⁸ extended the full faith and credit clause to a statute defining misrepresentation at the place of making.

¹¹⁴ 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113 (1897).

¹¹⁵ 79 F. 461 (C. C. Ohio 1897).

¹¹⁶ 43 D. L. R. 716 (1918).

¹¹⁷ The law controlling reinstatement is discussed in the following cases among many: *Bottomley v. Metropolitan Life Ins. Co.*, 170 Mass. 274, 49 N. E. 438 (1898). *Chambers v. Metropolitan Life Ins. Co.*, 235 Mo. A. 884, 138 S.W.2d 29 (1940). *Harris v. New York Life Ins. Co.*, 33 A.2d 154 (1943). *National Life & Accident Ins. Co. v. Vaughn*, 32 S.2d 490 (1947).

¹¹⁸ 299 U. S. 178, 57 Sup. Ct. 129, 81 L. Ed. 106 (1936).

In *Washington National Insurance Co. v. Shaw*,¹¹⁹ the Texas courts held that the representations and concealments that occurred in the negotiation of a policy in California were subject to the law of California respecting representation and concealment and that the residence of the beneficiary in Texas did not bring the policy within the Texas statutes. *Columbian National Life Insurance Co. v. Lanigan*,¹²⁰ referred the effect of a medical examiner's entries on an application that the insured had signed without reading to the law of Massachusetts where the policy had been delivered and in the absence of proof of the Massachusetts law the Florida court applied the Florida law.

In the *Lanigan* case the effect of an agent's act is present. The attempt to create a variation in the misrepresentation cases where the issues concerned an agent's act had already failed in the *Yates* case.¹²¹ There the trial court in Georgia submitted to a jury an issue respecting the entry of false answers on the application by the agent and charged that if the agent had knowledge of facts that would have made the policy void the insurer could be deemed to have waived the existence of such facts. Since the policy had been delivered in New York, and since the agent's power concerned the making of the contract, there was little if any need of departing from the law of the place of making. The Georgia courts saw a distinction, however, since the effect of the agent's act depended upon a jury finding on the facts and held that the point at issue related to the remedy and, therefore, to the law of the forum. The Supreme Court of the United States reversed. Finding that the New York statute, as interpreted by the New York courts, charged the insured with knowledge of the application, if a copy had been annexed to the policy, the Supreme Court of the United States gave the New York statute the benefit of the full faith and credit clause.

Administration

A contract of insurance may be enforced in various forums since the insurer becomes a debtor resident in many states by having qualified as a foreign insurer. An issue respecting jurisdiction over assets appears to be no longer open under the authorities.¹²²

A policy may be payable or by circumstance may become payable to the insured's estate. If the obligation is to be promptly discharged some forum must designate an officer—an administrator—to receive the proceeds. Different states may appoint administrators and two demands for payment may result. The insurer's obligation rests solely in contract. The ambiguity arises apart from the contract; it arises from the appointive power of different jurisdictions—there thus arises by diverse claims of jurisdiction a literal conflict of laws.

¹¹⁹ Note 53.

¹²⁰ 154 Fla. 760, 19 S.2d 67 (1944).

¹²¹ Note 118.

¹²² *New England Mutual Life Ins. Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379 (1884).

The difficulty arises from a failure to relate one of the administrative powers to another. Although *Equitable Life Assurance Society v. Vogel's Executrix*,¹²³ is a testate proceeding it makes a perfect analysis of the problem, and finds a solution in reconciliation of the respective state powers as dominant and ancillary; and Judge Peckham suggested this solution as a reconciliation in *Suliz v. Mut. Res. Fund Life Association*.¹²⁴

Professor Beale sought to solve the conflicting claims of the respective states by treating the policy as a mercantile specialty whereby the policy acquires a situs at the place where it is found. The instrument is thereby given a situs that determines the controlling law. *Weissman v. Banque De of Bruxelles*,¹²⁵ is an example of the rule. There a check deposited in a Bruxelles bank by a resident of New York carried notice of a diversion of corporate funds when later collected in the District of Columbia because such was the presumptive law of the place of the situs of the check at the time of collection.

Although this doctrine plays a part in the majority of the insurance cases the courts have not accepted it with the unanimity necessary to create commercial certainty. Perhaps the courts feel that the doctrine is an attempt at standardization and does not release a necessary adaptive capacity.

If we apply the mercantile specialty doctrine we thereby obtain a situs but a situs varying with circumstances. And situs, when taken by itself, is not an ultimate. The courts at the situs must still point the payee out; see *Riley v. New York Trust Co.*¹²⁶ Situs thus creates in the insurance arrangement a variable factor that the parties never contemplated.

*Mayo v. Equitable Life Assurance Society*¹²⁷ does not reject situs as the test since there the policies had been left in Mississippi for safe keeping and the custody related back to the insured's domicile in Virginia.

An early New York case indicated that the presence of the policy fixed the situs. *Holyoke v. Union Mutual Life Insurance Co.*¹²⁸ and *Steele v. Connecticut General Life Insurance Co.*¹²⁹ suggested, however, that the insured's domicile is the situs of the policy. There a Connecticut insurer was required to pay the proceeds of policies to a New York administrator when it had already paid the proceeds to an ancillary administrator in Connecticut. The court held that the situs of the policies was at the insured's domicile in New York and that the policies were assets

¹²³ 76 Ala. 441 (1884).

¹²⁴ 145 N. Y. 563, 40 N. E. 242 (1895).

¹²⁵ 254 N. Y. 488, 173 N. E. 835 (1930).

¹²⁶ 315 U. S. 343, 62 Sup. Ct. 608, 86 L. Ed. 885 (1942). Edwin W. Briggs, *The Jurisdictional*

¹²⁶ 315 U. S. 343, 62 Sup. Ct. 608, 86 L. Ed. 885 (1942). Edwin W. Briggs, *The Jurisdictional Choice of Law Relation In Conflicts Rules*. 61 HARV. L. REV. 1165 (1948).

¹²⁷ 71 Miss. 590, 15 So. 791 (1894).

¹²⁸ 22 Hun 75, *aff.* 84 N. Y. 648 (1881).

¹²⁹ 31 A. D. 389, 52 N. Y. S. 373, *aff.* 160 N. Y. 703, 57 N. E. 1125 (1899).

in New York since the insurer could be sued there—the policies were in the insurer's possession in Connecticut as security for a loan.

In *Sulz v. Mut. Res. Fund Life Association*,¹⁸⁰ where the policy was in Tacoma, Washington, the insured's residence at the time of his death, the court refused to allow the insured's widow, who had New York letters, to proceed with a suit in New York after an administrator appointed in Washington had already sued. Here there was a reconciliation of the administrative process in the two states. In *Equitable Life Assurance Society v. Vogel's Executrix*,¹⁸¹ the Alabama courts, finding the policy in Alabama, preferred the executrix of an insured resident in Alabama over the suggested powers of an administratrix in New York, and reconciled the respective powers by pointing out that the New York process was necessarily ancillary.

The courts have not been fortunate in adapting the conflict rules to administration; they have not subordinated the conflict concepts to the reconciliation of conflicting claims of power. The comparative lack of success here is perhaps due to the conflicting claims of sovereign power.

The Harvard Law Review Note

In summarizing the discontent in theoretical thought I referred to a recent note in the HARVARD LAW REVIEW, *Validity of Spendthrift Restrictions in Life Insurance Settlements; Choice of Law*,¹⁸² now I shall review that note for the purpose of drawing together in a summary way some of the current problems in this field. The author of the note found only eleven cases of the spendthrift trust type that involved conflict issues and found that but five of the cases gave the conflicts problem careful consideration.

I shall review the note by arranging the eleven cases cited by the note in a different pattern. The pattern I use comprises three categories: the rule in

¹⁸⁰ Note 124.

¹⁸¹ Note 123.

¹⁸² Note 51. An analysis of the legal background of an option in respect to the payment of insurance proceeds has been made in many of the cases. I set out a few here. Contract or trust: *McLaughlin v. Equitable Life Assur. Soc. of the United States*, 112 N. J. Eq. 344, 164 A. 579 (1933); *Pierowich v. Metropolitan Life Ins. Co.*, 282 Mich. 118, 275 N. W. 789 (1937). Federal Income Taxation: *Commissioner v. Winslow*, 113 F.2d 418 (1st. Cir. 1940); *Commissioner v. Pierce*, 146 F.2d 388 (2nd. Cir. 1944); *Thornley v. Commissioner*, 2T. C. 220 (1943); *Hess v. United States*, 74 F. Supp. 135 (Minn. 1947); G. C. M. 21666—1940—4—10148—Rev. Act. of 1934—C. B. 1940—1 page 16, modified by T. D. 5684 (1949). The cases are set out here for the light they throw on insurance arrangements and not for the purpose of stating the tax rules. State Taxation: *Commonwealth of Pennsylvania v. Beisel*, 338 Pa. 519, 13 A.2d 419 (1940); *Bronson v. Glander*, 77 N.E.2d 471, 149 O. S. 57 (1948). Power to exercise: guardians—*Latterman v. Guardian Life Ins. Co.*, 280 N. Y. 338 Pa. 519, 13 Atl. (2d) 419 (1940); *Bronson v. Glander*, 77 N. E. (2d) 471, 149 O. S. 102, 19 N. E. (2d) 978 (1939); Kentucky, Ch. 111, Laws 1944, 1 (j); *Committee—Pendas v. Equitable Life Assur. Soc. of United States*, 129 Fla. 253, 176 So. 104, 112 A. L. R. 1051 (1937); *Trustee—First Trust Co. of Saint Paul v. Northwestern Mut. Life Ins. Co.*, 204 Minn. 244, 283 N. W. 236 (1939); *New York Life Ins. Co. v. Valz*, 141 F.2d 1014 (5th. Cir.) (1944). Rule against perpetuities: *Holmes v. John Hancock Mut. Life Ins. Co.*, 288 N. Y. 106, 41 N.E.2d 909 (1942).

Matter of Nires, spendthrift trusts, and conflict cases. Only three of the cases will emerge from my pattern as conflict issues since I use a more comprehensive approach.

Two of the cases that the note cites, *New York Life Insurance Co. v. Beebe*¹³³ and *Miller v. Massachusetts Mutual Life Insurance Co.*,¹³⁴ are within the rule of *Matter of Nires*,¹³⁵ namely, that the insurance arrangement is a contract.

Professor Scott has expressed the opinion that any distinction between contract and trust is subordinate to other objectives; the note pursuing this thought urges the necessity for recognizing the "significant claims."

The courts do not seek in these cases, however, idealistic results; they seek a solution on more immediate data and especially the insured's intention; see *New England Mutual Life Ins. Co. v. Harvey*.¹³⁶ It is the weight that is given to intent that makes the concept of contract important here.

The courts will use various concepts including that of trusts if first of all there is the necessary basis for an intention. Thus in the *Beebe* case,¹³⁷ the parties after engaging in the litigation of rival claims to the proceeds of an option arrangement and settling their differences sought to compel the insurer to accept their settlement agreement in the place and instead of the arrangement the insured had made with the insurer. The situation in the *Miller* case,¹³⁸ was similar; the primary and secondary beneficiaries had settled their litigation respecting the successive designations that the insured had made. The respective courts rejected the proposal of the litigants in each of the cases upon the rule in the *Matter of Nires*.¹³⁹

Six of the cases that the note cites, namely, *Roth v. Kapowsky*,¹⁴⁰ *Holowaty v. Prudential Insurance Co.*,¹⁴¹ *Mullen v. Trolinger*,¹⁴² *Provident Trust Co. v. Rothman*,¹⁴³ *Manufacturers Trust Co. v. Miller*,¹⁴⁴ and *Tate v. Hain*,¹⁴⁵ were

¹³³ 57 F. Supp. 754 (D. C. Md. 1944).

¹³⁴ 183 Md. 19, 36 A.2d 517 (1944).

¹³⁵ 290 N. Y. 78, 48 N.E.2d 268 (1943); 145 A. L. R. 1368; 56 HARV. L. REV. 1147, 1152 (1943); 29 CORN. L. Q. 120 (1943); 42 MICH. L. REV. 344 (1943); 18 ST. JOHNS L. REV. 68 (1943). Nine years before the *Nires* case the court had decided *Crossman v. Rauch*, 263 N. Y. 264, 188 N. E. 748 (1934). § 17 of the New York Personal Property Law was amended in 1945 so as to permit the application of interest in certain instances to an infant's needs. Ch. 828, L. 1945. 59 HARV. L. REV. 629 (1946). The effect of § 15 on claims for taxes is discussed in *Matte v. Rosenberg*, 269 N. Y. 247, 199 N.E.2d 206 (1935). *Matter of Genesee Valley Trust Co. v. Glazer*, 295 N. Y. 219, 66 N.E.2d 169 (1946) discusses withdrawals from the fund.

¹³⁶ 82 F. Supp. 702 (D. C. Mass. 1949).

¹³⁷ Note 133.

¹³⁸ Note 134.

¹³⁹ Note 135.

¹⁴⁰ 393 Ill. 484, 66 N.E.2d 664 (1946).

¹⁴¹ 282 Ill. A. 584 (1935).

¹⁴² Note 97.

¹⁴³ Note 62.

¹⁴⁴ Note 94.

¹⁴⁵ Note 52.

cases where the spendthrift trust concept was in issue and creditors were claiming rights in the insurance proceeds. In some of these cases we find the courts using a trust concept for the purpose of executing a contract. Thus in the *Holowaty*¹⁴⁶ and *Mullin*¹⁴⁷ cases the court carried out the directions of the insured given in the insurance arrangement and preferred the payees named in the contract by using the trust concept as an analogical reference. In the *Roth*¹⁴⁸ and *Rothman*¹⁴⁹ cases the courts had the benefit of a statute directed to restrictions in insurance arrangements. In *Manufacturers Trust Co. v. Miller*,¹⁵⁰ and *Tate v. Hain*,¹⁵¹ the New York and Virginia courts respectively reached into New York to find statutory authority for executing the insured's direction that the payee have preference. In the *Miller* case,¹⁵² the insured was a resident of Connecticut; in *Tate v. Hain*,¹⁵³ the insured was a resident of South Carolina. Yet in each case the process the court used in reaching a decision was a search for the insured's intent and thereby the decisive issue became a question of fact.

Three cases of the eleven cited in the note passed upon a conflict of laws—*Chelsea-Wheeler Coal Co. v. Marvin*,¹⁵⁴ *Foley v. Foley*,¹⁵⁵ and *Annis v. Pilke-witz*.¹⁵⁶ The court in the *Marvin* case affirmed the holding of an intermediate court that the law of the state where the policy had been delivered rather than the law of the state of the insurer's domicile determined the validity of the payee's assignment of the proceeds. The court found the restraint in the settlement arrangement valid by referring to a statute permitting a like restraint in trust arrangements. In *Foley v. Foley*,¹⁵⁷ a New York judgment creditor, the insured's wife, was allowed to garnishee in New York the available surrender values of policies that had been delivered in Pennsylvania to a resident of that state. The court held that exemptions depend on the law of the forum since exemptions concern the remedy. In *Annis v. Pilke-witz*,¹⁵⁸ the court did not relate the exemptions to the law of the forum because the insurance arrangement expressly referred the performance of the contract and the remedy to the law of New York.

In *John Hancock Mutual Life Ins. Co. v. Yates*,¹⁵⁹ the place of making drew in the New York statute, relating to the application, to determine an issue of

¹⁴⁶ Note 141.

¹⁴⁷ Note 142.

¹⁴⁸ Note 140.

¹⁴⁹ Note 143.

¹⁵⁰ Note 94.

¹⁵¹ Note 52.

¹⁵² Note 94.

¹⁵³ Note 52.

¹⁵⁴ Note 61.

¹⁵⁵ 290 N. Y. 424, 49 N.E.2d 511 (1943); N. Y. L. J. 3—24—38 Page 1432, 173 Misc. 1031, 19 N.Y.S.2d 502, 257 A. D. 154, 12 N.Y.S.2d 85, 263 A. D. 605, 33 N.Y.S.2d 917, (2d) 917.

¹⁵⁶ Note 92.

¹⁵⁷ Note 155.

¹⁵⁸ Note 92.

¹⁵⁹ Note 118.

misrepresentation; in *Annis v. Pilkewitz*,¹⁶⁰ the place of performance drew in the New York statute, relating to insurance, trust, or other arrangement to determine title to the proceeds.

Adaptation creates not a simple but a severe code. This severer code remains a code; adaptation does not signify the absence of form. The selection of principles in relation to facts that have been analyzed as to relevancy, and in the light of considered consequences, does not result in chaos. The emphasis is on the application of knowledge. The use of the tools in a creative way exceeds the value of the knowledge of the tools alone. Adaptation in the conflicts field of the law is the counterpart of character, responsibility, skill, courage and initiative in an order of free enterprise.

¹⁶⁰ Note 92.