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A CRITIQUE OF THE CHOICE-OF-LAW PROBLEM

FOR the commentator on the conflict of laws, it is an article of faith, attested by works if not avowed in words, that its proper study will disclose rules or principles which, like the hazel wand of the diviner, will indicate the "appropriate" jurisdictions whose laws are to determine those controversies that, in one way or another, have failed to respect state lines. But what that "proper study" may be has long been matter for dispute, and the methods championed by the disputants have produced fruits so diverse that pragmatic appraisal is impossible. Moreover, as the quest for jurisdiction-selecting rules continues, there steals upon one who finds his zeal flagging before this diversity the suspicion that perhaps it points not to the need for the task but to the futility of its doing. A suspicion so subversive will not easily down. Doubt breeds inquiry, and inquiry is the mother of monographs.

I

To students of the conflict of laws, Dicey's dichotomy wherein he opposes the "theoretical" to the "positive" method is familiar. In his hand, the distinction seems to depend on nothing more significant than the relative proportions of "ought" and "is" in the blend of both that is characteristic of legal thought in this and every other field of law.¹ That dichotomy, as employed

¹ Dicey describes as "two common characteristics" of devotees of the "theo-

by Cook and Lorenzen, gains sharpness. The theoretical method becomes a survival of scholasticism; the positive method is identified with experimental science.² To the distrust of deductions from "self-evident principles of right" and the need for constant reference to the decisions of the courts, stressed by Dicey, there is added Professor Cook's determination "to adopt the procedure which has proved so fruitful in other fields of science, *viz.*, to observe concrete phenomena first and to form generalizations afterwards".³ And Professor Lorenzen has asserted, "The cor-

retical" method the views (1) that rules for choice of law constitute "in some sense 'a common law' tacitly adopted by all civilized nations", from which "deviations ought to be avoided", and (2) that "the object of a writer on the conflict of laws is to discover the principles which either do or should determine this common law of Europe". DICEY, *CONFLICT OF LAWS* (5th ed. 1932) 11. However, it is conceded that their method "is normally based upon careful investigation into the rules as to the conflict of laws which in fact prevail in given countries". *Id.* at 13. (This concession was not made until the fourth edition of his work, and its authorship remains uncertain. See note 53, *infra*.)

The writers of the "positive" school "make it the object of their labors to ascertain what is the law of a given country with regard to the extra-territorial recognition of rights. . . . When they have done this, they may proceed to formulate the fundamental principles on which the rules in question avowedly or tacitly rests". *Id.* at 13-14.

² Professor Cook notes the distinction in the physical sciences between "the deductive method of ascertaining truth" and "the inductive method of modern science" to which the former has given way and observes that Dicey's theoretical and positive methods "correspond exactly to the two methods" whose rivalry in the physical sciences he describes. Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 *YALE L. J.* 457-58. Lorenzen, too, identifies the theoretical method with that of a *priori* deduction. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 *YALE L. J.* 736.

Neither Professor Cook nor Professor Lorenzen have remained content with the narrow rôle allotted by Dicey to the positivists. See, e.g., Cook "Substance" and "Procedure" in the *Conflict of Laws* (1933) 42 *YALE L. J.* 333; Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 *YALE L. J.* 655, 672 (where the author concedes in regard to a proposal made by him, "no case has gone quite so far as this"). Nor do they repudiate the virtue which Dicey ascribes, at p. 13, to the theoretical method, namely, the belief "that the choice of one system of law rather than of another for the decision of a particular case is dictated by reasons of logic, of convenience, or of justice". Cf. Cook, *The Logical and Legal Bases of the Conflict of Laws*, *supra*, at 486 *et seq.*; Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, *supra*, at 748.

³ Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 *YALE L. J.* 457, 460. The "concrete phenomena" chosen for observation are "what [the] courts have *done*, rather than . . . the description they have given of the reasons for their action". *Ibid.*

rect mode of approach to this subject would strip it of all fictions and deal with all phenomena *a posteriori*".⁴

The immediate contributions attributable to these resolutions to be positive have thus far been negative, but they are important nonetheless. The notion that the law applicable to a given controversy might be deduced from principles of the territoriality of law, embodied in the common law, was the first point of attack. Both Professor Cook and Professor Lorenzen, heeding Dicey's admonition to look to the cases, found that American and English were not consistently consonant with any such principles. Their conclusion, reached with evident satisfaction, was that no such principles existed in the common law.⁵ The second point of attack was the "vested rights" theory which had been regarded as essential to explain the paradoxical apparition of a territorially-limited rule of law in a foreign forum. Proceeding from the assumptions that "law" is a prophecy of what courts will do and that "rights" are hypostases of that prophecy, Professor Cook demonstrated⁶ that courts in conflicts cases were not engaged "in the recognition and enforcement of foreign created rights",⁷ the conception of their function basic to that explanation. Professor Cook's conclusion was, of course, no sounder than those assumptions,⁸ but the wide acceptance that they enjoy today has served to establish his position firmly as the view of at least a substantial minority. Indeed, one may now wonder how any juristic construct such as "right" could have been accepted

⁴ Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws* (1924) 33 YALE L. J. 736, 748.

⁵ Cook, *supra* note 3, at 484; Lorenzen, *supra* note 4, at 743. In a recent article, Professor Cook subjects Story's propositions as to the territorial limitations of law to analytical scrutiny, demonstrating that if Story meant what it seems reasonably clear he did not mean, then he would have been still more clearly wrong. See Cook, *The Jurisdiction of Sovereign States and The Conflict of Laws* (1931) 31 COL. L. REV. 369.

⁶ Cook, *supra* note 3.

⁷ Beale, *Summary of the Conflict of Laws in 3 CASES ON THE CONFLICT OF LAWS* (1902) 501. Cf. Dicey's reference to the conflicts of laws as "the part of the law of England which regulates the extra-territorial recognition of rights". DICEY, *CONFLICT OF LAWS* 14.

⁸ Professor de Sloovère has attacked their utility in the conflict of laws. See de Sloovère, *The Local Law Theory and Its Implications in the Conflict of Laws* (1928) 41 HARV. L. REV. 421.

as fundamental in the explanation of any important aspect of judicial activity.⁹

The refusal to recognize as binding the limitations which the territorial theory and its corollary had fastened upon those important problems in the conflict of laws designated by the phrase, "choice of law",¹⁰ effected their emancipation from deductive methodology. Indeed, in the eight years which have followed the publication of the articles in which these views were voiced, scepticism as to the fruitfulness of all deductive methodologies has become endemic among American legal scholars. One would, accordingly, have anticipated that this freedom would have been used to considerable advantage by scholars in this branch of conflicts. Generally speaking, such has not been the case. This is in part attributable to the fact that the lines of conduct out of which springs the litigation presenting this problem are not well defined. The opportunity for any form of institutional approach to a question which owes its existence to the accidental interposition of state lines and to the equally accidental differences in state laws is definitely limited. There is, however, another obstacle to the profitable employment of the positive method which is not inherent in the subject but which is a heritage of the theoretical method, deriving as much from the "vested rights" as from the territorial theory. It is with that obstacle that this article is concerned.

II

A change in methodology invites a re-inspection of the problem to be attacked, for the formulation of a problem is likely to be as much the product of an approach as the approach is the product of the problem. A positive methodology applied to a problem which for it, at least, is false will not yield a fair return; and the

⁹ The elliptical nature of the term is too frequently forgotten in doctrinal discourse. Its usefulness for descriptive purposes does not justify resort to it in explanation of that which it describes.

¹⁰ The problem of defining in a phrase the fact situations presenting choice-of-law problems is insuperable, since what the operative facts are depend on the rules for choice of law adopted. Until these rules are definitely ascertained, who can be sure that a given case is wholly "domestic"? An alternative approach is the procedural. This again is not susceptible of succinct statement in view of the variety of methods by which the question as to the appropriate law may be raised.

situation disclosed by the state of authority in cases involving a choice of laws is symptomatic of a false problem.

Where a problem which courts have set themselves is false, one of two results is inevitable. The courts may adhere consistently to a broad principle beneath the shelter of which a variety of results will be concealed, or they may take refuge in a diversity of doctrines.¹¹ Whether in either event the decisions themselves may be subsumed under some inarticulate premises is another matter. Complete optimism on this count would point the superfluity of much legal study. Since the courts will usually escape the check of criticism directed to these premises, one is justified, perhaps, in suspecting the worst. We have been too ready, I suggest, to trade the dogma of the automatic and inflexible rule for the myth of the rule freely and deliberately manipulated by the courts.

In American conflicts cases, the alternative of diversity in doctrines has probably been resorted to the more frequently. This is in part due to the coincidence of the development of the federal union with the rapid expansion of international and interstate trade. These events brought to the courts an influx of conflicts cases for which adequate authority did not exist. Story's treatise, designed to meet this need, brought to their attention the works of Continental jurists, adepts of the theoretical method, from whose writings Story had selected those views most consonant with his own. But no embargo could be laid on future imports, and when, subsequently, the hard pragmatism of common law jurisprudence could not be reconciled to the result dictated by one of Story's principles, another doctrine was ready to the judge's hand. Rules proliferated, each fashionably tagged with its appropriate Latin phrase. *Lex loci contractus*, *lex loci solutionis*, *lex rei sitae*, *locus regit actum*, *mobilia sequuntur personam*,— each phrase bears testimony to our common law judges' dalliance with civilian doctrine.

All this is an old story. More significant is the fact that the conditions of whose origin it offers some explanation have persisted to the present time. Lines of decision have hardened here and there, but the article on a conflict of laws topic which does not deplore a current "confusion of authority" is still a rarity.

¹¹ Cf. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction* (1930) 40 YALE L. J. 53.

And to account for its origin does not explain its continuance. That same pragmatism of the common law has effected many times before this the absorption of those elements of an alien theory which were congenial to it while it rejected the rest. Why has a century not worked this result in the conflict of laws? The explanation, it is submitted, lies in the nature of the problem which a choice of law case is thought to pose.

When a case arises in which a foreign law is offered in evidence or in which the applicability of the law of the forum is denied, a court faithful to the conventional approach will turn in search of a conflicts of laws rule to determine the *jurisdiction* whose law should govern the question at issue. The conflicts rule indicates in which jurisdiction the appropriate law may be found. Assuming the law offered to be from that jurisdiction, the court will then proceed with the case, employing that law as a rule of decision. Not until its admission for that purpose does the content of that law become material. Both the territorial and the "vested rights" theories sanctioned its disregard. So long as deduction from territorial postulates could indicate only one jurisdiction as a source of law in a given case, the content of that law would be logically irrelevant. Again, so long as the court was in search of a "foreign-created right", it would seek an appropriate jurisdiction, not an appropriate substantive rule, for metaphorical consistency demands that the creation or non-creation of rights be attributed only to states and not to their legal rules. That rules for the determination of the appropriate jurisdiction would ignore the content of its law may not be inevitable as a matter of logic; actually it has seemed inescapable.

With the reaction against the restrictions of theory, there has come a recognition that considerations of justice and social expediency should be, and in many cases have been, the dominant determinants of problems in this field. Yet these considerations are still harnessed to the old task of devising (or justifying) rules for selecting the appropriate jurisdiction whose law should govern a given case. Like the forms of action, in Maitland's telling phrase, the territorial and vested rights theories rule us from their graves,¹² and this dominion is maintained by the problem which they have set and with which we have not broken.

¹² It may be objected that this constitutes premature burial. The territorial

A willingness to convert the positive methodology to the uses of the old problem is evident even in the writings of Professor Lorenzen. He concludes an uncompromisingly realistic depiction of the court's task in a "choice of law" case with this statement: "The general problem is, therefore, always the same: What are the demands of justice in the particular situation; what is the controlling policy?" But the succeeding sentences suggest that he, too, sees the problem in terms of rules for choice of jurisdiction.

"If the situation is one admitting of the application of 'foreign' law, the choice of the rule to be applied will be determined again in many instances by general social or economic considerations. For example, if the question relates to capacity, a state may conclude that the principal interest involved is the protection of its citizens or of persons domiciled within its territory, wherever they may be. If this be so, it will probably say that the *lex patriae* or the *lex domicilii* governs 'capacity'. On the other hand, it may conclude that its principal interest in the matter is the security of local transactions. In this event it will say that the *lex loci contractus* governs capacity".¹³

This passage, insofar as it is not merely descriptive of judicial practice, may not be representative of its author's present views.¹⁴ However, in its acceptance of the conventional formulation of solutions to choice-of-law problems, it is characteristic of most current comment on case law in this field, however restive the commentators may be under the limitations which this search for the appropriate jurisdiction places upon judicial realism. What those

and vested rights theories seem to constitute the theoretical basis of the American Law Institute's Restatement and are accepted by the author of the most recent treatise in the field. See GOODRICH, *CONFLICT OF LAWS* (1927) 11. The figure employed above must, therefore, be restricted in its application to those who disavow allegiance to these theories.

¹³ Lorenzen, *supra* note 4, at 748.

¹⁴ Thus, in his more recent *Tort Liability and the Conflict of Laws* (1931) 47 L. Q. REV. 483, 490 Professor Lorenzen states: "Much may be said in favor of greater elasticity in the rules of the conflict of laws. Just what the qualifications to the *lex loci delicti* should be it is difficult to say. What is wanted are decisions that appeal to one's sense of justice". But the *obligatio* theory remains the villain of the piece. Nowhere does he seem to have dealt explicitly with what to me seems the insuperable obstacle to their satisfactory formulation, the disregard of the content of the law chosen. *Cf.*, however, his proposal with respect to contract cases involving conflicts of law, discussed pp. 182-83.

limitations are may be made more evident by the use of a hypothetical case.

A salesman induces a married lady, not yet 21, in state *A* to order several feet of *belles lettres*. Her order is received and accepted by the publishers at their office in state *B*, and they express the books to her residence in state *A*. After reading through two inches and paying for six, the customer repents of her bargain. The publishers sue in state *A*. The lady pleads want of capacity to contract. If the problem is to find a rule to determine the law of what state governs capacity to contract, the fact that the law of state *A* is reminiscent of those days when husband and wife were one is no more material than the fact that the law of state *B* mirrors the latest views of the National Woman's Party on sex equality before the law. It is equally immaterial that in state *A* infants' protection may, in Professor Chafee's phrase, cause infantile paralysis, while in state *B* married minors are emancipated. The court is seeking a rule which, if it already has the pedigree of precedent, may have arisen in a case where the competing domestic laws were, with relation to the facts of the transaction, the reverse of those now before it. Moreover, the court must contemplate the use of its decision in the instant case as a precedent for the decision of some subsequent "capacity" case which will present still another pattern of local laws. Now, however pragmatic the considerations may be which move the court in its determination of the rule for choice of law, the fact remains that as to this case, and all subsequent cases in which that rule will be involved, the court is employing the divining rod, or, to use a more modern metaphor to symbolize fortuitous selection, it is engaging in a blindfold test. The court must blind itself to the content of the law to which its rule or principle of selection points and to the result which that law may work in the case before it. The conflicts rule having pointed out the jurisdiction in which the appropriate law may be found, judicial scrutiny of that law, except for the purpose of its application, is henceforth proscribed.

But the fabric of this blindfold is a legal theory. The court will, of course, actually know the provisions of the law proffered to it as the appropriate one and may well be familiar with the content of the competing laws of other jurisdictions. Perhaps the

discipline of authority, where precedent happens to point in a single direction, will effect the insulation of this knowledge from the process of decision. Devotion to a single theory of choice of law may work a similar compartmentation. But where both the state of authority and the absence of cherished principles of conflicts theory leave the court relatively free to determine the applicability of the foreign law, only a judge in whom the legal mind, as defined by Professor Powell,¹⁵ has hypertrophied could exclude from consideration the consequences of the application of the proffered law to the facts of the given case.

That this consideration will determine the issue of the case cannot be predicted. The court, conscious of its duty to formulate a rule applicable equally to situations where the patterns of laws are different, may devise or adopt a rule which in its judgment will accommodate itself most successfully to those various patterns, deploring the while whatever harshness this rule may work in the case at bar. Yet it seems more likely that the court's deliberations will disclose a happy coincidence between the dictates of justice in the instant case and factors decisive of the proper conflicts rule. False problems are not likely to lead to unsatisfactory results when first they are posed. They are more likely to owe their origin to the facile solutions which they afford to embarrassing issues. It is only when subsequent cases arise that the penalty is exacted. The court faced with a new case in which the only variation from its predecessor lies in the pattern of local laws may find the rule, which seemed so persuasive once, compelling it to a decision repugnant to its sense of justice. And this may happen even though the court had employed in the first case a methodology as exactly "positive" as the character of the problem would permit.¹⁶ A "positive" methodology charged

¹⁵ Professor Arnold, in the article cited in note 11, *supra*, at 58, quotes from an unpublished manuscript of Professor T. R. Powell the following definition: "If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind".

¹⁶ It must be remembered also that the opinions of courts are not the only ingredients entering into the composition of legal rules. The opinions of commentators as to what decisions "hold" are often equally influential, and the commentator is not controlled, as are the courts, by the realities of actual controversies which must be decided. Recently the New York Court of Appeals decided the first important American case squarely posing a problem as to the creation of a living trust of personality. The trust in question offended the law of the settlor's domicile on

with ascertaining a rule of law capable of working satisfactory results in two cases wherein facts decisive of the judgments reached (the applicable domestic laws) may be diametrically opposed is set an impossible task.

III

There have been a few avenues of escape from this entanglement which from time to time have been tried by the courts. Among these are the following:

1. The conflict of laws rule may itself be couched in terms of a result regarded as proper in litigation of a given sort. The most familiar example is the rule generally adopted to govern the choice of a usury law. The decline of the defense of usury in judicial esteem has led many courts to uphold any contract alleged to be usurious when it would be valid by the law of any jurisdiction to which the transaction was materially related.¹⁷ It has been suggested by Professor Lorenzen that this rule be ex-

marital property but was valid under the laws of the forum where the trust estate (securities) was situated at the time of its creation, where the trust was to be administered, and whose laws, it seems apparent, were regarded by the parties as applicable. *Hutchison v. Ross*, 262 N. Y. 381, 187 N. E. 65 (1933). In an able opinion by Lehman, J., far more "positive" in character than is usually found in choice-of-law cases, the court (two judges *dubitantibus*) held the New York law applicable. Considerable attention was devoted in the opinion to the conflicting claims of the domicile and the *situs*, but significance was accorded the parties' intention and the policy of the state, as declared in a statute passed after the transaction at issue. I predict, however, that this decision will very generally be taken to confirm § 315 of the Conflict of Laws Restatement that the law of the *situs* governs the validity of an *inter vivos* trust of personalty. This simplification will, I believe, utterly distort the decision, and it is not difficult to imagine cases where, because of the differences in the pattern of laws and "contacts", its application will work results wholly out of harmony with the spirit which informs the opinion. This distortion will be the consequence of the search for a jurisdiction-selecting rule and of the premium placed upon certainty in this field, to which Judge Lehman himself pays tribute. See 262 N. Y. 381 at 389, 187 N. E. at 68. If the case were confined to the circumstances which gave rise to it, its significance as the basis of a rule would be greatly circumscribed. Its significance as an evaluation of the various factors involved therein would, however, remain, and as such its contribution to the law would be of very considerable value.

¹⁷ See GOODRICH, *CONFLICT OF LAWS* 238. This result is generally attributed to the intention of the parties and, therefore, the illustration might be classed with ordinary cases where the parties' intention has been adopted as the proper guide in the choice of law. However, where no intent is expressed, the parties are "presumed to have chosen the law which will sustain the contract". *Id.* at 238-39.

tended wherever the "intrinsic validity" of a contract is in question.¹⁸ This view represents a drastic simplification of the problem and places a low appraisal on the significance of the variations in domestic laws relating to contracts. Perhaps such an estimate is justifiable. In any event, this means of escaping the artificiality of conflicts rules will not be available generally¹⁹ and is itself subject to the qualification implicit in the recognition accorded by its sponsor to the doctrine immediately following.

2. The conflict of laws rule may be disregarded when the foreign law it selects dictates a result repugnant to the public policy of the forum.²⁰ In this situation we have a frank discarding of the blindfold. There is, however, no disavowal of the choice-of-law rule which is preserved for use when the results it produces do not run counter to local standards of justice and policy. The invocation of the doctrine has been deprecated quite generally.²¹

¹⁸ Professor Lorenzen formulates his suggestion as follows: ". . . the intrinsic validity of contracts should be recognized if the local law of any state with which the contract has a substantial connection be satisfied". Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 655, 673.

¹⁹ The rule as to usury is not uniformly followed, and Professor Lorenzen concedes that no case has gone as far as his suggestion. However, the statutes changing common law rules seek usually to effectuate a given result, not merely to furnish a guide for selecting a jurisdiction whose law is unknown. See, e.g., *Uniform Marriage Evasion Act* § 1; *Uniform Wills Act, Foreign Executed* § 1.

²⁰ A valuable survey of cases involving the public policy of the forum is to be found in Note (1933) 33 COL. L. REV. 508, in which it is pointed out that resort is often had to the public policy doctrine without a determination of the choice-of-law problem at issue. *Id.* at 513.

Recourse to the "public policy" escape is facilitated by the doctrine of "comity" which competes in judicial opinions with the "vested-rights" theory as an explanation of the enforcement of a foreign law whose extra-territorial operation is denied. The formula, "comity is not a right but a courtesy", *Ulman, Magill & Jordan Woolen Co. v. Magill*, 155 Ga. 555, 557, 117 S. E. 657, 658 (1923), is the customary prelude to a decision to be discourteous.

²¹ A vigorous criticism is to be found in Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656, approved by GOODRICH, CONFLICT OF LAWS II. Judge Beach over-simplifies the issue by his failure to appreciate the difficulties inherent in a determination of what law "created" the "vested right" whose unquestioning enforcement he urges. Professor Lorenzen, who would leave some scope for the operation of the doctrine (see Lorenzen, *supra* note 18, at 673), charges that the inordinate indulgence in the public policy doctrine has resulted from "the notion that the rules of the Conflict of Laws can be derived from some general formula or theory". Lorenzen, *supra* note 4, at 746. With this charge I agree in part, but I do not share his optimism that this situation may be remedied by devising rules with regard to "general social or economic considerations" so

In certain instances, its employment may be controlled by the Supreme Court.²² Its very facility is its most unfortunate trait. In its somewhat cavalier dismissal of a foreign law, it dispenses with the necessity for close analysis, for an affirmative appraisal of the situation upon which judgment must be passed. On the Continent efforts have been made to systematize the doctrine of public policy, but the variety of circumstances which may evoke its use is such that generality in the principle evolved has been inescapable.²³ This opens the door to a practice, familiar enough throughout our law, of shifting the focus of inquiry from the narrow issue of policy raised by the case at bar to the broad issue of determining with respect thereto the limits of the principle. Its generality compels resort to other and different cases for aid in its definition.

3. The conflict of laws rule may refer the court to the intention of the parties as a guide to the selection of the appropriate law.²⁴ Where this intention has been expressed, as is not infrequent in contracts when at least one party is regularly engaged in interstate

long, at least, as the operation of those rules is to select jurisdictions without regard to the rules of law thereby selected.

²² Cf. *Bradford Elec. Light Co. v. Clapper*, 286 U. S. 145 (1932); *Bond v. Hume*, 243 U. S. 15 (1917). See Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 533, 557.

²³ A Dutch jurist has criticized these efforts as follows: "It is impossible to give an enumeration of the legal rules of public policy; to classify them is difficult and not worth while. . . . Every case must be considered separately". Koster, *Public Policy in Private International Law* (1920) 29 YALE L. J. 745, 756, 758. Westlake, in his *PRIVATE INTERNATIONAL LAW* (7th ed. 1925) 51, has said of the reservation in favor of public order and morals that no attempt to define its limit has ever succeeded.

²⁴ This rule has been resorted to by American courts chiefly in cases involving the validity of contracts. See GOODRICH, *CONFLICT OF LAWS* 235. The difficulty of ascertaining an unexpressed intent, from which the courts have sought to escape by the employment of various presumptions, has laid it open to criticism on the score of uncertainty. See Beale, *What Law Governs the Validity of a Contract* (1910) 23 HARV. L. REV. 260, 264. It has been attacked on the theoretical ground that it "involves a delegation of sovereign power to private individuals". Lorenzen, *supra* note 18, at 656, where the views of Professors Beale and Dicey are presented. Judge Learned Hand in a recent case characterized an attempt to determine by a declaration of intention the law governing the contract as an effort "to pull on one's bootstraps". *Gerli & Co. v. Cunard S. S. Co.*, 48 F.(2d) 115, 117 (C. C. A. 2d, 1931). But this method of levitation actually works in many jurisdictions, both here and abroad.

business²⁵ or in wills and trust settlements of importance,²⁶ the parties themselves will probably have appraised the consequences of an application of the law intended to the controversy in question. If the court is willing unquestioningly to accept their intention as its guide, the blindfold, if preserved, is without consequence. Where, however, the court considers that expressed intent as only one of the factors to be weighed in the selection of an appropriate law, or where the absence of any such expression obliges the court to speculate as to an intention which may never have been conceived, then it should become necessary to take into careful account the results which the competing laws would work in the case at bar. To the extent that the intention rule compels this consideration of the domestic laws, it avoids the anomaly of the blindfold test. To me, this seems a factor in its favor of greater consequence than a preservation of "autonomy of the will," where at least that will becomes well-defined only after conferences with counsel. But the rule trades one false problem for another where intention has not been expressed and is not palpably inferable from the circumstances. A conjectural intent, especially where this is directed to a generality such as "the law of the contract" and not to the consequences of the controversy in litigation, may result in the selection of a different law from that which a considered appraisal of all the factors would have indicated.

4. The conflict of laws rule may make the choice of jurisdiction depend on the "nature" of the domestic law whose application is in question. A significant instance of such a rule is the familiar doctrine that the forum's rules of procedure will always be employed. If a foreign rule of law is found, when offered, to be

²⁵ Such declarations are common in contracts for carriage. New York brokerage house with branches throughout the country provide, frequently, in their form contracts, that New York law shall govern the transactions under them.

²⁶ This practice has been given legislative sanction by a New York statute providing that New York law shall govern trusts of personal property situated in that state at the creation thereof if the parties to the trust instrument, wherever resident, so declare. N. Y. PERS. PROP. LAW § 12a, N. Y. Laws 1930, c. 849. I have elsewhere urged the adoption of such a view in the absence of statute where there is some point of contact between the transaction and the state whose law is thus designated. See Cavers, *Trusts Inter Vivos and the Conflict of Laws* (1930) 44 HARV. L. REV. 161.

procedural in character, it is rejected for the analogous rule of the forum.²⁷ Recently Professor Cook has convincingly revealed the inutility of an approach which seeks to derive a solution to this question from pre-existing concepts of "procedure" and "substantive law".²⁸ But the courts in these cases must at least examine the competing rules of law as a means of determining the appropriate law to be applied. Professor Cook's insistence that this examination include a consideration of the results worked by such rules in the cases²⁹ would make possible, if heeded, a thoroughly realistic handling of the problem.

These devices are either limited in scope³⁰ or, although useful at times, more likely to preserve the situation from which on occasion they afford a means of escape than to lead to its ultimate elimination. If the conflict of laws is to keep pace with the development in other fields of the law, courts and commentators alike must abandon the quest for rules which will work justice equally in two contradictory situations. So long as that is the goal of their inquiry, it may be doubted how significant is the choice between the theoretical and the positive methods. Whatever rules may be worked out will in some cases reach results which seem

²⁷ See GOODRICH, CONFLICT OF LAWS 157.

²⁸ See Cook, "Substance" and "Procedure" in the Conflict of Laws (1933) 42 YALE L. J. 333.

²⁹ Professor Cook's thesis is that in classifying legal rules as substantive or procedural, the courts have failed to consider the purpose for which the classification is made and have tended, as a consequence, to draw without discrimination upon cases posing quite different basic problems wherein the same terminology is employed to designate the classes. In the conflict of laws cases, the purpose of the classification is to relieve the forum of the burden of taking over "all the machinery of the foreign court for the 'enforcement' . . . of the 'substantive rights'". Cook, *supra* note 28, at 343. There being no sharp distinction between the "substantive" and the "procedural", the question is to determine how far the forum can go in importing foreign rules without undue hindrance to itself. This can be answered only by a reference to the situations in which the rules are to be employed. Thus it may "turn out that in some cases the question of the 'form of action' has so little relation to 'substance' that the *lex fori* ought to govern, but that in others the real problem has so much to do with whether the plaintiff shall be given an effective right that the views of the 'place of wrong' or of the 'place of contracting', etc., with reference to the 'form of action' ought to be the decisive ones". *Id.* at 352-53.

³⁰ Thus, the doctrine of public policy, the most comprehensive of the four, is negative in its operation. Reference to the intention of parties is useful only in consensual transactions and, as to some of these, marriage, for example, it is obvious that social interest cannot be subordinated to the desires of the individual.

eminently desirable and just as surely will compel courts in others to call upon hitherto undeclared policies of the state or unsuspected intentions of the parties to extricate them from the necessity of pronouncing intolerable judgments.

IV

How then should a court regard the problem raised by a controversy of which a foreign law or laws are alleged to be determinative? A diagnosis having been advanced, a prescription is called for. In medicine alone have these functions usually been looked upon as sufficiently differentiated to justify a division of labor. It should be evident, however, that the difficulty is one for which no specific stands ready. For this reason it seems more profitable to commence not with the definition of an issue but with the suggestion of a way of attack to a problem no less general than that posed by Professor Lorenzen: "What are the demands of justice in the particular situation; what is the controlling policy?"

The decision of a case of this nature is one of the most delicate of judicial functions. Not infrequently, in the administration of domestic law, there arise situations in which two lines of authority, pointing in opposite directions, seem open to a court. Those situations may at times be clarified by the precipitant of judicial intuition, but more often they bring to the fore the finest manifestations of judicial intellection. They demand a penetrating analysis of the controversy and the transaction out of which it arose, an exacting inquiry into and appraisal of the competing rules, a deliberate weighing of the equities. In such a case there may be consequent on the decision the growth of one rule, the stunting of the other. But regardless of whether this be so, there is very definitely a heightening of the court's responsibility to the parties. The decision cannot be attributed to the wisdom of judges of times past, for it must disregard the wisdom of judges equally dead and equally wise. Compare the situation which a novel conflicts case presents.³¹ Two rules of law are invoked;

³¹ What constitutes a "novel" conflicts case must, of course, depend on the range of facts which the observer deems significant. If the *situs* of personality determines the choice of law in all cases affecting title thereto, then obviously "novel" cases are certain to be infrequent. If other facts in the title-affecting transaction

usually the selection of either will determine the case in favor of the party urging its choice.³² That selection will probably not contribute materially to the development of the rule of law so chosen. In that sense the case differs from its domestic analogue. From the standpoint of the parties, however, is there not a comparable responsibility upon the court? Their transaction, because of its interstate character, has placed them in a position where each may, with some justification, urge the protection of a recognized rule of law. The choice between these rules, even as a precedent for future choices, may not be of great social significance. But does this discharge the court from a painstaking examination of the same factors whose materiality would be admitted were the case a purely local one, together with those additional factors which the interstate character of the transaction raises into prominence?

At present it is customary in a conflicts case to scrutinize the transaction or occurrence from which it springs only to ascertain the existence of those facts which bring into play whatever rules for choice of law may be urged by counsel. For this purpose it may be material to ascertain, in accordance with the laws of the forum, a party's domicile, the *situs* of property at the time of an alleged transfer of an interest therein, the place at which an alleged contract would be regarded as having been created. Sometimes the determination of these questions compels the presentation of much testimony and not a little argument on points of local law, but once the determination is made, its effect upon the choice of law is mechanical.

The alternative approach suggested would require an equally complete depiction of these facts, but to determine what their effect upon the choice of the competing laws should be, would necessitate their careful appraisal with this end in view. To recur to the hypothetical case, the fact that the publisher's agent went

may be regarded as pertinent to the choice of law, then the possibility of encountering significant differences in new cases is correspondingly increased.

³² It seems highly probable that the number of cases involving possible conflicts of law is far greater than the number in which such conflicts are actually considered. The presumption of similarity as to the law of other jurisdictions is doubtless indulged by counsel far more frequently than by the courts. It is a fair prediction, therefore, that when a conflicts point is pressed, its determination will be vital to, or at least of considerable consequence in, the decision of the case.

to the defendant's home would be material. Had she first "clipped the coupon" that fact might be accorded some weight. It might also be material that his sale was part of a sales campaign waged in that state and not an isolated transaction. Certainly such a case presents quite a distinct picture from one where the bargain is struck by mail, either solely as a consequence of correspondence or as a result of preliminary negotiations in the seller's state. The fact that the transaction comprises a sale of books might lead to its being viewed in a different light than if its subject were, on the one hand, shares of stock whose edges alone were gilt, or, on the other hand, some article, a vacuum cleaner perhaps, which barely lay beyond the concept of the "necessary".⁸³

So far the inquiry might be looked upon merely as an attempt to delimit the scope of the decision by selecting for emphasis and inclusion, among the operative facts of the case, certain facts which would be of no significance in the conventional approach to a conflicts problem.⁸⁴ Such discrimination would perhaps be helpful, but it is difficult to see how the facts so selected could be properly appraised except in relation to the provisions of the laws whose application is at issue. The court is not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?

In the hypothetical case, state *A*, where the defendant was resident, is a jurisdiction which persists in classifying together, for purposes of contractual capacity, the married woman, the infant, and the lunatic. Now, to reverse the hypothesis as to the domestic laws, if state *A*'s law had been less indulgent to its minor

⁸³ Such discriminations are not material, it is true, when the domestic law relating to an infant's capacity to contract is at issue. From the great mass of commodities of commerce, we select a few, dub them "necessaries", and accord their sellers favored treatment. The need for further differentiation is not felt. But when the question is whether that domestic law should be applied or whether, instead, a law from which this basic distinction has been eliminated, is that distinction, concededly valid for its purpose, still the only pertinent one?

⁸⁴ Emphasis on the significance of social and economic factors in the construction of rules leads inevitably to the narrowing of issues and the restriction in scope of rules. The categories of life are less sweeping than those of jurisprudence. One might, perhaps, anticipate one rule for insurance contracts, another for negotiable instruments, a third for contracts of employment, and still others for other transactions if the views of the foes of deductive methodology were comprehensively developed.

femes covertas and had recognized their capacity to contract, would there have been any good reason for invoking the stricter law of state *B* to defeat such a contract? Should enterprising publishing houses in state *B* be penalized in their extra-state business, because of the anachronistic legislation of that commonwealth? The rhetorical nature of these questions is evident. Obviously, on this hypothesis, the law of state *A* should be applied, not because it is the *lex domicilii* or the *lex loci contractus* or because all contracts should be sustained if a law can be found to turn the trick, but because its application here so clearly produces an eminently sensible result. But let us return to the original hypothesis as to the domestic laws wherein state *A*'s law is the stringent one. Of what real importance is it now that state *A*'s law should have been applied had its provisions been exactly the reverse of what they are? The fact that now the application of state *A*'s law will defeat the contract confers a radically different aspect upon the problem. The degree to which sustaining this bargain would impair the protection which state *A* insists is due its infant matrons must be measured against the degree to which its avoidance will frustrate the reasonable expectations of business men from without the state. And inasmuch as the courts still dispense justice between individuals as well as enunciate social policies, it becomes important to inquire to what extent this particular lady merited judicial solicitude and whether the plaintiff seller's acts were representative of the type of interstate business to be fostered in cases of conflicting laws. Very possibly the individualization of this decision would seem appropriate, and, if so, this might be effectuated by a stressing, in the court's opinions, of the differentiating facts.

Be that as it may, in the course of this evaluation, the court's opinion as to the desirability of limitations upon the contractual capacity of infants and married women will inevitably enter. Any effort to exclude it would operate only to distort the intellectual processes of adjudication. This factor in the decision may, of course, render of consequence the choice of forum. Judges in state *B* or in state *C*, having laws similar to *B*'s, may not attach the same importance to the limitations on wifely capacity that would be encountered in state *A*. Such differences are inevitable; it is important only that they be frankly encountered. Today, as

in the past, their influence may not appear on the surface of opinions, but, if the uncertain course of decision characteristic of most conflicts problems is evidential, such influence had not been wanting. Moreover, a recognition of the necessity for a thorough understanding and appraisal of foreign law should tend to diminish the parochial "affectation of superiority" which now leads the forum so frequently to reject foreign law.

As one's attention becomes focussed upon the problem of what should be the proper result in a case of this sort, as distinguished from the problem of what rule is the proper one to select a jurisdiction whose law should govern it, the irrelevance of a determination where, as a matter of contract law of the forum, this contract was "made" becomes increasingly apparent. Very possibly, in a case in which the time of making was material, the contract would be found to have been made when the lady's order was accepted by the publishing house in state *B*. But the negotiations out of which it arose took place in both states. Most of the dickering probably took place in state *A*. The solution of the occasionally difficult legal question of when the contract would have been created (if any contract were created) would serve only to divert the court from the sufficiently difficult problem of appraising the effect which the various steps in the transaction should have upon the choice of law. Again, a dispute as to the lady's domicil, which might put in issue the nature of her husband's business connection in state *A* or whether he paid taxes there, would at once be seen to "have nothing to do with the case". Yet the fact of a settled residence, which is also important in the determination of domicil, would be material here. If this lady with intermittent reading proclivities were merely in state *A* on a visit from her home in state *B*, a quite different result might be deemed appropriate.

The necessity for such discriminations can best be appreciated if one considers the new significance with which the suggested approach would invest the "contact". The contact in the conventional choice-of-law problem is, if I may be indulged in still another conceit, the coin which, when inserted in the doctrinal slot machine, produces the appropriate jurisdiction. Now according to the common understanding which the telephone company shares with the mass of mankind, the only requisite of such a coin

is that it fit the slot. So with the conflict of laws contact. One does not have to appraise the significance of the contact in the light of the consequences worked by the law whose application it dictates. The conflicts rule vouches for it; and that rule is the product of efforts, whether theoretical or positive, to allocate legal problems among territorial jurisdictions, not to decide specific cases justly. But if a law is to be chosen with some consideration of the result it effects in a given litigation, then the contact should itself be significant in relation to that result. The fact that legal consequences might in another connection be attached to conduct not in itself important should not alone suffice to render that conduct significant as a contact. The mailing of a letter, for example, may be the act which, in a case where the point was in issue, could be said to "make" a contract, yet the fact that that mailing occurred in a certain place must remain to those not habituated to conflicts doctrine a circumstance of utter triviality.

V

This effort to portray an approach to problems of conflicting laws which would free the courts from the blindfold of a theory which has compelled them to grope for solutions to problems for which perspicacity is peculiarly essential has been argumentative and discursive. At the risk of distorting an idea not susceptible of blackletter statement, I shall hazard this summary:

When a court is faced with a question whether to reject, as inapplicable, the law of the forum and to admit in evidence, as determinative of an issue in a case before it, a rule of law of a foreign jurisdiction, it should

- (1) scrutinize the event or transaction giving rise to the issue before it;
- (2) compare carefully the proffered rule of law and the result which its application might work in the case at bar with the rule of the forum (or other competing jurisdiction) and its effect therein;
- (3) appraise these results in the light of those facts in the event or transaction which, from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke,

link that event or transaction to one law or the other; recognizing

- a) in the use of precedent, that those cases which are distinguishable only in the patterns of domestic laws they present, may for that very reason suggest materially different considerations than the case at bar, and
- b) in the evaluation of contacts, that the contact achieves significance in proportion to the significance of the action or circumstance constituting it when related to the controversy and the solutions thereto which the competing laws propound.

The end-product of this process of analysis and evaluation would, of course, be the application to the case at bar of a rule of law, derived either from the municipal law of the forum or that of some foreign state if proof of the latter law were duly made.³⁵ The choice of that law would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case. But lawyers are a rule-making sect. Would not that decision be the seed from which a rule or principle for the choice of law might spring? And, given sufficient decisions utilizing this approach, would not a commentator in time be able to construct from them a system of rules for choice of law which would certainly be displeasing to other commentators who would in turn construct their own systems? Very probably. The analytical incorporation of the rule chosen into the "local law" would not conceal the all too apparent choice.³⁶ But the activities of the rule makers are not

³⁵ There is, of course, the logical alternative that a rule derived from none of the domestic laws in question should be fashioned for the case. Professor Jitta, a vigorous critic of mechanical rules for choice of law, suggests that this be done wherever "a juridical relation may not belong to the active local life of a society but to the active, international or universal life". The law to be applied in such a situation may be "an independent provision which is derived from a consideration of the local public order and the universal public order". 1 JITTA, *LA SUBSTANCE DES OBLIGATIONS DANS LE DROIT INTERNATIONAL PRIVÉ* (1906) 23, quoted by Lorenzen, *supra* note 18, at 668. Professor Lorenzen dismisses the proposal on the ground that it "leaves the judge practically without any definite guide to go by". *Id.* at 669. Insofar as this comment applies to the concoction of "independent provisions", I am in complete accord. The difficulties incident to the application of the doctrine of *Swift v. Tyson* leave one skeptical of proposals which might lead to further multiplication of rules of substantive law.

³⁶ It is possible, of course, to describe the body of legal rules in a given juris-

deplorable *per se*. Convenience demands a degree of order in the classification of judicial decisions; and, in a land where they proliferate so luxuriantly, summarization may be a necessary tool for the practising lawyer and the busy court. The questions on which their evaluation depends are, first, whether in their inception, inquiry into factors otherwise relevant has or has not been trammelled by pre-existing rules creating artificial limitations upon relevancy and, second, whether, in their employment, they stifle or guide inquiry.

Too frequently legal rules are the product of inbreeding. The considerations out of which they are conceived have been restricted in scope by the operation of other legal doctrines whose own relation to the problem at hand escapes inquiry. This is, of course, the burden of those who deplore a deductive methodology whose postulates create artificial barriers to the exploring mind. Yet such limitations may accompany the employment of a "positive" methodology. They may be less patent since they are concealed in the terms of the problem set for examination, in the case of choice-of-law problems, by the requirement of a jurisdiction-selecting rule.³⁷ The suggested approach, however, places no such limitation upon the range of inquiry other than the requirement that the substantive rule ultimately applied be one found in the domestic rules of the states concerned.

It is equally important that rules, once formulated, do not operate to foreclose inquiry. The mechanical rule radically re-

dition without distributing them between the categories of domestic rules dispositive of local situations and choice-of-law rules directing the court to the dispositive domestic rule of some other state. One may say that a state has one set of dispositive rules for a situation whose facts are wholly local, another for a situation which includes certain foreign facts, and so on. But so long as a court is limited in the framing of its dispositive rules for situations of the latter type to rules which happen to be in force in a foreign state connected with that situation, the actuality of the choice is apparent. It is rendered all the more so by the procedure followed in the proof of foreign law. The absurdity of submitting such proof to the jury should in time lead to the elimination of the practice; but it is open to question whether judicial notice should be substituted for proof of foreign law to the court.

³⁷ To return again to the problem of contractual capacity, if one seeks by a scrutiny of social and economic factors to determine whether the *lex loci contractus* or the *lex domicilii* should "govern", he has ruled from his inquiry a consideration of the fact that in one case the *lex loci* may restrict that capacity, while in the next, it may not. The inquirer would, of course, be aware of this fact but the goal of the inquiry would render it irrelevant.

stricts the range of facts pertinent to its application,³⁸ and only as to problems susceptible of mechanical disposition is its employment justified. Where, as in choice-of-law cases, the problem is essentially complex, the rules developed must contain variables to permit some degree of accommodation to those complexities whose precise nature cannot be anticipated.³⁹ Where those variables comprise the considerations which reach to the nub of a problem — and this result the proposed approach would foster — the rule will have focussed attention on that point toward which inquiry and argument, if they are to be fruitful, must be directed. That there should be disagreement as to the terms which will satisfy those variables is inevitable. To the extent that such disagreement provokes discussion, it may be welcomed, for the critique which discussion affords when properly directed is a tonic with which no legal order can dispense.

Moreover, to him who sees a return to *cadī* justice in the disintegration of rules of the sort that have competed for acceptance in the conflict of laws or even in the gradual development of rules

³⁸ Virtually all rules have this effect to a greater or less degree; whether any exception should be recognized presents a problem in the definition of "rule". There is, however, one form which legal doctrine may take which operates only to emphasize certain factual considerations appropriate to the decision of a type of case without excluding others which may be relevant in any specific case. An example is furnished by the section of the Torts Restatement dealing with proximate cause wherein various considerations recurring frequently in proximate cause cases are enumerated as guides to judicial inquiry. The enumeration is not exclusive, however. See TORTS RESTATEMENT (Tentative Draft, 1932) § 317. It is difficult to regard such an enumeration as either a "principle" or "standard". Unless a new term is to be adopted to designate such monitions, I feel no hesitancy in classifying them as rules.

³⁹ It may well be that room would be left for the development of some mechanical rules in the application of which regard for the content of domestic laws would not be necessary. These would probably be negative in character. Our current rules serve a dual function: they indicate a jurisdiction as a source of law, and in so doing, they also exclude from consideration all other jurisdictions. This exclusionary function may survive. A physician may deliberate long before choosing between two courses of treatment for a given condition and yet be justified in dismissing without hesitation a number of others. Thus, in a problem of choice of law, a court may assert that the mere act of mailing a letter of acceptance in a state would not alone suffice to sustain the application of its law, whatever its content. Such a decision might properly serve as a basis of a rule to that effect. Similarly, the Ross case, discussed in note 16, *supra*, may possibly be regarded as establishing that the domicile of the settlor of a trust of personalty will not alone suffice to justify the application of the *lex domicilii*.

which meet the criteria outlined above, a reminder is due. Nothing in the proposed approach is inconsistent with the continuance of the doctrine of *stare decisis*, properly conceived. Indeed, to borrow Professor Oliphant's phrase for use in a context which seems emphatically to justify its employment, that approach would accelerate "the return to *stare decisis*."⁴⁰ The conflict of laws emerged in Anglo-American law at a time when the *stare decisis* of the common law was being converted into the *stare dictis* of contemporary jurisprudence, and the older conception of *stare decisis* was alien to its civilian heritage. A return to *stare decisis* with its pragmatic limitations on the scope of precedents in lieu of the present recourse to broad rules would implement, not preclude, the utilization of the judgment of the past; and in those choice-of-law problems wherein the patterns of fact and of substantive domestic laws are constantly reduplicated in experience, there is no reason to anticipate a capricious disregard of the solutions propounded for them in the decisions of courts of last resort.⁴¹

Furthermore, the creation and fruitful employment of rules of this sort must be attended by the development of standards for the evaluation of the facts which they render significant. This

⁴⁰ In *A Return to Stare Decisis* (1928) 14 A. B. A. J. 71, 107, 159, Professor Oliphant deplors "the process of logical elaboration" that has led away from the patient particularization of the judges and scholars of the early law, which, partly through the definitiveness of the older system of writs and pleading, insured a correspondence between the classifications of law and experience that is lacking in the general rules compounded by the legal scholars and encyclopedists of today. This tendency has resulted, he finds, in "a shift from *stare decisis* towards *stare dictis*", especially in the domain of legal scholarship, a shift which is leading to abstraction and unreality in the law.

⁴¹ The conflict of laws relating to trusts of personalty affords an example of the stabilizing influence which *stare decisis* may exert where stability exists in the underlying situation. Most of the cases in this field have arisen because of the limitations imposed by the peculiar New York rule against perpetuities. Since all the neighboring states adhere to the common-law rule, the patterns of law cannot be greatly varied and the transactions, testamentary and *inter vivos*, which involve them do not present many significant variations. In a period of not over twenty years, the New York courts in which the bulk of the cases arose worked out solutions to the perpetuities problems which are in general quite satisfactory when their results are appraised in the light of the substantive rules of law involved (see Note (1932) 32 COL. L. REV. 680, 684) but which are difficult to rationalize by one employing the conventional logical apparatus of the conflict of laws (see Cavers, *supra* note 26, at 162-68).

is a problem which the exorcisers of legal conceptualism cannot long ignore. In the conflict of laws it presents a peculiar difficulty since the operative facts in choice-of-law cases have heretofore called for no such appraisal. We have looked for the *situs* of the property, the *locus* of the tort, or the place of performance of the contract with an austere unconcern for the consequences of the discovery. Of recent years there have been pressed the subversive suggestions that what constitutes "domicil" in a voting case may not satisfy "domicil" in a divorce case;⁴² that the "*situs*" of intangibles in an assignment case may not be the same as their "*situs*" for tax purposes.⁴³ In yielding to these insinuations, we have been obliged to appraise the facts alleged to comprise "domicil" in, say, a tax case in the light of the purpose of that litigation and of the laws involved therein. Were the suggested approach adopted, the necessity for such appraisals and discriminations would be present not only in these but in all choice-of-law cases. That this places a heavy responsibility upon legal science cannot be denied; but the consideration of how that responsibility can best be met will be deferred until some objections to the proposal have been discussed.

VI

Certain of the objections which may be anticipated are sufficiently formidable as to be deserving of more extended treatment, although they may have been adverted to above. It seems to me that these objections, though they may be advanced separately, are based on a central assumption and may be knitted into a single argument. The assumption and argument may, perhaps, fairly be set forth as follows:

The suggested approach would preclude the attainment of either certainty or uniformity in the conflict of laws because under it the decision of a case involving a choice of law would depend on the content of the conflicting laws and the relative desirability of their application in the light of the facts of the controversy in

⁴² For an interesting discussion of this view, see (1925) 3 AM. L. INST. PROCEEDINGS 226.

⁴³ See, e.g., Cavers, *supra* note 26, at 171; cf. Lowndes, *Tendencies in The Taxation of Intangibles* (1930) 17 VA. L. REV. 146.

litigation. A decision now depends on the essentially mechanical application of a rule for the selection of an appropriate jurisdiction, irrespective of the substance of its relevant rule of law. Certainty, in the sense of predictability, is peculiarly important in this field because of the growing importance of interstate and international commercial and social relations. However certain the domestic laws of two states in a given field may be, the issue of controversies arising out of transactions in that field is unpredictable if those laws differ and if the relevant conflict of laws rules are not predictable. In many instances, therefore, the consequences of the application of either law are not as important as the predictability of its application. Uniformity in rule is equally important. Where conflicts rules are not uniform, certainty is measurably diminished since the selection of the forum then enters as a factor which may not be predictable. Moreover, it is unjust that the selection of a forum should determine the result of litigation since that empowers the party having control over that choice to select the forum most favorable to him. Finally, certainty and uniformity are necessary as a curb on local bias which leads to the application of the *lex fori*, or a law similar thereto, in preference to a different law whose claims for consideration, objectively appraised, are superior.

Of course, the basic assumption may be challenged. We have neither certainty nor uniformity despite the formulation of rules and principles of the conflict of laws without regard for the substance of the law whose application they dictate. Moreover, that the formal certainty and uniformity which the wide acceptance of a general formula imparts is deceptive is an observation whose corroboration in the law is becoming so comprehensive that all broad rules are now suspect. On the other hand, it must be conceded that the suggested approach would give an impetus to the individualization of cases. This would lead for a time to disagreement both as to the extent to which such a tendency might properly be carried and to the propriety of the results reached in specific instances. But the factors of judgment would be exposed to, not concealed from, the tempering process of criticism. Eventually, there would be a tendency toward stability in those fields at least where the factual pattern was relatively stable. The basic assumption is, therefore, by no means axiomatic. There is,

however, some risk of augmenting for a time at least the current complaints in this field. But may not these complaints be exaggerated?

One distrusts an argument which proceeds from the persistence of a lack of certainty in a field of law to the exigency of the need for it. Granting, with a reservation,⁴⁴ the accelerating increase in interstate and international transactions, nevertheless, the phenomenon is scarcely novel. If the consequences of uncertainty and want of uniformity in the conflict of laws were as intolerable as is often suggested, one would surmise that the problem would have been attacked more vigorously heretofore. One would suppose, for instance, that the first objective of the Commissioners of Uniform State Laws would have been comprehensive legislation enacting statutory rules of the conflict of laws to protect our citizenry during the period that their uniform legislation was being formulated and obtaining acceptance. That this aspect of the problem has been virtually disregarded⁴⁵ suggests that while the conduct of business and certain social activities may be embarrassed by a want of uniformity in the laws of the forty-eight states, that embarrassment springs primarily from the cost and difficulty of ascertaining accurately the content of those laws and not from the admitted difficulty of predicting their territorial application.

The willingness, not infrequently encountered in writings on

⁴⁴ Both the horizontal and vertical integration of industry and commerce tends to reduce the volume of interstate legal transactions. Twenty years ago a large food distributing house located in Washington would enter into contracts with local wholesalers in Virginia, Maryland, West Virginia, and North Carolina. Today it may sell the bulk of its products in Washington to chain store organizations which distribute directly to consumers in all those states. Interstate distribution of those products continues; interstate sales are eliminated. Similarly, a large industrial establishment in Michigan may have iron mines in Minnesota, coal mines in Pennsylvania, and chemical works in Delaware. It can now acquire those materials without resort to interstate contracts.

⁴⁵ Very few Uniform Acts affect choice-of-law problems, and these do not relate to problems of commercial importance. Moreover, the Acts dealing with substantive topics do not embody choice-of-law provisions. Even though the goal of the Commissioners were attained by the adoption of their Acts in every state, still such rules would be of value in international situations. Furthermore, although experience has long since instructed the Commissioners that general adoption can seldom be anticipated, yet such knowledge does not seem to have worked any change of policy in this regard.

conflict of laws topics,⁴⁶ to concede that certainty in rule is of more significance than the rule's content, is more revelatory as an evaluation of conflicts rules than it is significant as a judgment upon the need for certainty in this field. One conflicts rule may point to one jurisdiction as the source of the appropriate law; a second and competing conflicts rule, to another jurisdiction. What consequence the adoption of either rule will have in a given case will depend not on the rule but on the domestic law of the jurisdiction thereby selected. Until a specific case is considered in which the rules work different results, any estimate of their operation must in a large measure be conjectural. Naturally, in such a situation, the importance of certainty will loom disproportionately large. When, instead, the social value of a painstaking balancing of competing considerations to reach just results in specific cases, which the proposed approach would compel, is weighed against the social value of rules to determine such results mechanically, if predictably, the case for certainty becomes dubious. Even though it were conceded that the decisions in many of these cases would not have significant repercussions upon social and economic behavior, the question would remain open. In how many other branches of the law is such a standard set? This indifference to the disposition of individual cases is atypical in the profession and is strongly suggestive of a defense mechanism born of repeated failures to achieve the certainty and uniformity desired.

A more difficult problem which a want of uniformity in conflict of laws rules poses is, of course, the fact that the choice of forum may thereby become determinative of the results of litigation. If all jurisdictions recognized the same conflict of laws rules and applied them without deviation, then the law of only one jurisdiction would ever be invoked to govern a given case. Should the attainment of this ideal be jeopardized by a quixotic seeking after "just results"? Without indulging the tempting *tu quoque*, one may point out that for want of uniformity to render the power to choose the forum of great value to plaintiff or defendant, the decisions of the potential forums must be predictable. Consequently, at least one of the virtues ascribed to the mechanical

⁴⁶ See, e.g., Cook, *supra* note 3, at 488; Lorenzen, *supra* note 4, at 750; CARDOZO, PARADOXES OF LEGAL SCIENCE (1928) 67.

approach will have to have been attained by its alternative before this evil can arise. More important, however, is the consideration that greater individualization of conflicts cases would permit a court to consider whether the result normally reached by it would be equally appropriate in a case where its selection as forum seemed to have been dictated by motives ulterior to the convenience of the parties. With a wholesome disregard for the doctrinal dilemmas and logical subtleties of *renvoi* theory, a court in such a situation might wisely avail itself of *renvoi* procedure.

Still another check on the misuse of the power to determine the forum when different results in conflicts cases may be forecast in different jurisdictions, lies in the development of rules regulating the place of trial. Conceivably, all choice of law problems could be eliminated by the extension of this device and the restriction of the forum to its domestic law. The greater elasticity which makes the method afforded by the procedure now in use much to be preferred should not blind one to the possibilities which a discriminating control of the place of trial may afford.⁴⁷

That parochialism which leads a court to employ its own rule of law where the application of a foreign rule would seem preferable, and to invoke incontinently a "public policy" to reject a foreign law is, of course, a tendency which should be discouraged. But, as has already been pointed out, it represents in no small measure a resistance to the automatic operation of jurisdiction-selecting rules.⁴⁸ A mere refusal by commentators to recognize the rôle of public policy in conflicts cases will not suffice to scotch this tendency. On the other hand, an insistence upon the necessity for a full understanding of the reasons for and operation of the foreign rule as part and parcel of the process of selecting an appropriate law in any given case, would tend to diminish the prejudice which feeds on ignorance.⁴⁹

⁴⁷ These have been persuasively developed in two valuable articles by Professor Foster, *Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217; *Place of Trial—Interstate Application of Intrastate Methods of Adjustment* (1930) 44 HARV. L. REV. 41. Compare the heightened significance of this factor in Roman and Continental law. See WESTLAKE, *op. cit. supra* note 23, c. IX.

⁴⁸ See p. 183, *supra*.

⁴⁹ The neglect of studies in the field of comparative law, especially in this country, is responsible in a measure for that provincialism which students of the conflict

The only alternative is for the Supreme Court to assume the rôle of policeman. This it has already done on occasion, wielding the "due process" or the "full faith and credit" clause to break down the exaggerated insularity of state courts when that seemed to stand in the way of justice.⁵⁰ The Court's tendency has been distinctly selective, and the criterion of selection seems to have been the national character of the interest adversely affected. The rigidity which would be imparted to the process of adjusting controversies involving conflicts of law were the Supreme Court to write into the Constitution in each conflicts case it heard, its then prevailing view as to the proper rule for choice of law renders it important that the Court's intervention in this field should be indulged with circumspection. The reasons leading the Court to intervene might well be set forth more explicitly than has heretofore been the custom. Obviously no rule can be elaborated which could forecast accurately when the Court would apprehend constitutional violations, but for that very reason it becomes important to know the motivation of its action when it does act. It does not suffice to know that a vested right is being preserved from unconstitutional indignities.

Probably the situation wherein the invocation of local policy is least deserving of consideration is that in which the only fact upon which to predicate a conflict of laws is the choice as forum of a jurisdiction other than the one to which all the other facts in the case are related. The problems set by the employment of the forum's procedural machinery are perhaps inevitable here. Again, there may now and then arise a claim whose enforcement would be genuinely repugnant to the moral standards prevailing at the forum. So long as courts are not regarded as machines for the conversion of imported *obligationes* into domestic *feri facias*, some allowance must be made for judicial scruples. But there seems no reason to suppose that the approach proposed would aggravate judicial sensibility. Surely the acceptance of the "vested rights" theory is not requisite to the realization that a

of laws deplore without realizing the extent to which the limitations of their own theories contribute to it.

⁵⁰ For a discussion of the Supreme Court cases in this field, see Dodd, *supra* note 22. The more recent decisions are commented on in Note (1932) 46 HARV. L. REV. 291.

disregard of the *lex loci* in essentially intrastate events or transactions can be justified only by exceptional circumstances.⁵¹

The argument for certainty and uniformity in the conflict of laws based upon the fear of local bias, has an aspect not generally adverted to. We have imported much of our learning in this field from the Continent where such problems have their origin primarily in international rather than interstate events and transactions. In important controversies the interest of the individual may not easily be dissociated from the interest of the nation. "International private law" may thus bear a resemblance to "international public law" in more than name. The application of mechanical rules of law in such a situation may, accordingly, be regarded as necessary to safeguard the alien litigant from xenophobia. Discretion is a safe tool only in the hands of the disinterested. Such disinterestedness may more readily be credited to courts within the bounds of a federal union.⁵² Its exercise by state courts in the United States may be welcomed, not feared, if and when the courts restate not their rules but their problem.

Whether these counter-considerations to the objections based upon a need for certainty and uniformity in the conflict of laws are persuasive must depend ultimately on the temperament of the reader. One cannot marshal data to demonstrate beyond risk of rebuttal in kind the soundness of either position. But the proponent of change has more than the burden of persuasion. There always lurks to strangle his infant idea the serpent suspicion: it is quite academic.

⁵¹ Cf. Cardozo, J., in *Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 113, 120 N. E. 198, 202 (1918).

⁵² In Du Bois, *The Significance in Conflict of Laws of the Distinction Between Interstate and International Transactions* (1933) 17 MINN. L. REV. 361, 378-79, the author reaches the conclusion that "it is an exceptional case that the crossing of an international boundary line has given rise to distinctive treatment in conflict of laws." On the question whether the form choice-of-law rules have taken has been dominated by interstate or international considerations, the author observes, "As a rule, the effects of the international organization of society do not appear to have any considerable influence in determining the expediency of adopting a particular conflict rule." *Ibid.* But influences of this sort are not likely to manifest themselves in judicial opinions, and they seem to have been given very limited consideration by the treatise writers.

VII

All too palpably, the insinuation is correct. Dicey has stated of the theoretical method that "it leads the writers who adopt it to treat as being law what they think ought to be law, and to lay down for the guidance of the Courts of every country rules which are not recognised as law in any country whatever."⁵³ The writer has not, it is true, laid down rules of law "for the guidance of the courts"; but to urge at least the reconsideration, perhaps the abandonment, of all the current rules, and the adoption in their stead of an approach fundamentally different from that which seems generally to have been pursued by the courts, may seem no less presumptuous. Indeed, it would be little short of fatuous to suppose that judges, having these views pressed upon them, would put aside their stock of assorted doctrines to set to probing in that complex of fact and law which is the typical conflicts case.⁵⁴ Quite clearly, the proposal is academic.

Fortunately, however, we have academies, and the nurture of ideas which are quite clearly academic is still a responsibility of theirs. If, then, this conception of the problem basic to choice-of-law cases and the mode of attack which it indicates are not themselves to be barren, it will be because they give direction to the study of such cases. In the law schools alone can ideas of this sort take root; once having rooted there, the process of transplanting them to less sheltered fields may be gradual, but it is sure.

The study of the conflict of laws has been focussed upon rules, not upon decisions.⁵⁵ We can explain, approve, or condemn a

⁵³ DICEY, *CONFLICT OF LAWS* (3d ed. 1922) 18. This charge was withdrawn in the fourth edition, and for it was substituted a statement which, with minor modifications, appears in the fifth edition as follows: "It is not, indeed, open to the objection that it takes no account of laws as they actually exist, for it is normally based upon careful investigation into the rules as to the conflict of laws which in fact prevail in given countries, e.g., France or the United States. But its results are essentially subjective, often diverge widely, and in no case represent faithfully the laws of any given country". DICEY, *CONFLICT OF LAWS* 13.

⁵⁴ This is especially true as to the trial courts which naturally feel the weight of "*stare dictis*" more heavily than appellate tribunals.

⁵⁵ There are few, if any, decisions in which a "narrow" as well as a "broad" issue cannot be isolated. Frequently, the explanation of the former is closely in consonance with the explanation of the latter. Ordinarily, in choice-of-law cases,

given rule, but we can seldom say why a given decision should be reached except insofar as we can attribute that decision to a pre-existing rule. We know only to a very limited extent what the courts have actually done in choice-of-law cases.⁵⁶ Instead of making a searching inquiry into what has happened in cases of conflicting laws, the commentator's chief concern heretofore has been to ascertain what rules for choice of law the courts have adopted. On each question in this field, a poll of the several states has been taken, their votes for the various rules recorded, and numerous instances of plural voting duly noted. The canvasser, after reporting the customary confusion of authority, takes advantage of the license which this situation confers upon him to become the advocate of the rule he finds most appealing. To support it he spins, if this be his bent, theories of the nature of law and of the state, discovers, in any event, pressing considerations of policy which dictate its recognition, points with dismay to the harsh results worked by competing rules, and extenuates as inevitable and occasional those produced by the one he champions. Of course arguments of the same sort can be and are constructed for other rules. The process has grown stale.⁵⁷

Suppose, however, that one were to disregard for a time those rules for which courts and commentators have contended to so little profit. There would still remain the cases. In each of

only the broad issue—what is the proper rule to select the jurisdiction?—is considered. The narrow issue is seldom recognized, much less discussed. If the thesis of this paper is correct, any consonance between the explanation of its solution and that of the solution of the broad issue, will usually be accidental.

⁵⁶ The distinction between what a court "does" in a given case and what it "says" is a difficult one to draw, as discussions of the doctrine of *stare decisis* have made evident. Judicial "doing" might be regarded as confined to the mere rendition of judgments. Obviously the material for the study of cases must be broader than this. The facts of the event or transaction, the conflicting claims of the parties, and their resolution by the courts decision may, very possibly, be isolated with profit from the apologetics which comprise the court's opinion.

⁵⁷ In this regard, I am not without sin. In an earlier article, my approach was much as that outlined above. See Cavers, *supra*, note 26. In seeking to formulate a rule of law to "govern" *inter vivos* trusts of personalty which would not be mechanical in operation, I urged the intention-of-the-parties rule without recognizing its character as an escape devise. An interesting, contrasting approach to an important aspect of the trust problem which, although it does not discriminate between trusts *inter vivos* and testamentary, is directed chiefly toward the character of the substantive rule involved is to be found in Note (1932) 32 COL. L. REV. 680, 684.

them, there is reported a sequence of acts and events leading up to a controversy to whose solution there is applied, as a rule for decision, a rule of law of a state to which some of these facts bear relation. One can usually predict the probable consequences of the application of that rule to the case, or at least compare its effect with the result a competing rule might have worked. Here is material enough for study without, for the time, giving heed to the reasons vouchsafed by the court for selecting the state whose law it applied.⁵⁸ Let all the cases of this character in a given field, say, contractual capacity, be dissected to determine, *inter alia*, what facts accompany decisions admitting rules establishing incapacity, whether there is any correlation apparent between the existence of this rule at the forum and its application, whether the manner in which the transaction was conducted may have been influential, whether any one form of incapacity or of contract seems to have been singled out for special treatment. Possibly such a quantitative analysis of the capacity cases would not be revealing. Where the reported cases in a given field are not numerous, generalization would have to be cautious. One would be constantly handicapped by the reporting of facts inadequately for this purpose. But an inquiring mind asks for a problem, not for a guarantee of "results", and here is a field for inquiry which is virtually untouched. After such studies had been undertaken it would become important to include as well a consideration of

⁵⁸ An appeal for such an approach to all case material was voiced by Professor Oliphant, *supra* note 40, at 161, in which he said: "Our case material is a gold mine for scientific work. It has not been scientifically exploited. The science of mechanics was built up by experimentation, but geology, for example, has had to rely almost solely upon observation. In law we cannot institute suits to test judicial behavior, as the physicists make experiments to test the behavior of matter. But each case is a record of judicial behavior. And there is a wealth of such records equaling that to which geology, for instance, has had access and the individual records are not more fractional or otherwise imperfect. A sufficient number of recorded experiments, all of whose factors are not known but with the unknown factors varying, may be quite as illuminating as a limited number of controlled experiments. Why has not our study of cases in the past yielded the results now sought? The attempt has been made to show that this is largely due to the fact that we have focused our attention too largely on the *vocal behavior* of judges in deciding cases. A study with more stress on their *non-vocal behavior*, *i.e.*, what the judges actually do when stimulated by the facts of the case before them, is the approach indispensable to exploiting scientifically the wealth of material in the cases."

the relation of the facts and correlations revealed to the rules for choice of law which the courts had invoked and to those discoveries of intent and of public policy which they had made and declared determinative. Here again, the significance of the findings cannot be forecast; one can only affirm the need for search.

Such studies might contribute considerably to a technique for predicting judicial action in this field. But of more importance is the training that they would surely afford in the evaluation of significant facts in conflicts cases, the need for which has already been stressed. The legal scholar has long evaded this responsibility. Within the confines of traditional legal dialectic, its assumption has not been necessary. The work of today has been the breaking-down of those confines. The work of tomorrow must be the utilization of the new freedom. But the scope and needs of law teaching have to so large a measure given direction to research in legal problems that it would be idle to hope for the vigorous prosecution of any line of advanced study tangential to the line of law teaching. It is quite evident, moreover, that the proposed approach is not adapted to the subject matter of current conflict of laws courses. Choice-of-law problems in the conflict of laws constitutes perhaps the minor portion of a course which must include many and varied problems of jurisdiction and of the effect of foreign judgments, yet these choice-of-law questions cut across almost every field of domestic law. Any course which purports to deal with all or even most of them is by the force of circumstance confined to a hasty development of the competing rules for choice of law as illustrated by a handful of cases in each field. To pause for a careful and comprehensive analysis of the cases along the lines suggested sufficient to lead the student to delve for the considerations which may or should have been controlling therein, is patently incompatible with an all-inclusive survey.

The alternative which this conflict suggests is obvious enough. Where intensive cultivation of a field of study alone can promise a real appreciation of its problems, then the abandonment of the attempt at its extensive development is clearly indicated. This should be done in the conflict of laws. If students were thoroughly apprised of the intricacies of choice-of-law problems in one or two branches of the law, it would suffice to acquaint them with the verbal formulæ employed in judicial opinions in

the other branches. Thanks to their initiation, they would be put on notice of the superficiality of these formulæ and their susceptibility to manipulation. Faced, subsequently, with a case in such a field, the student thus trained would be far more adept than one who had enjoyed only a necessarily hurried excursion through the case law of conflicts.

The academic implications of this attack on the conventional concept of the choice-of-law problem derive immediacy from the work of the American Law Institute. If we are to elevate certainty and uniformity above all other objectives in this branch of the conflict of laws, it will no longer be fertile soil for scholarship. Study provokes incertitude, poses questions, suggests discriminations, differentiations. What will then be needed is something quite different: agreement on a single set of well-defined rules, to be followed by a period of watchfulness wherein their proponents will be quick to detect and decry deviations therefrom by courts or aberrant scholars. To the extent that the Restatement of the Conflict of Laws in the sections devoted to choice-of-law questions represents such an agreement, it will tend both to foster unanimity in doctrine and to stifle continued inquiry into the sources, use, and consequences of such doctrine.⁵⁹ If, on the other hand, those two objectives are to be revalued, their deflation will carry with it the chief arguments on behalf of mechanical rules for choice of law. The opportunity can then be taken to start anew. If, and only if, we are no longer bound to concern ourselves only with rules for the choice of appropriate jurisdictions without regard for the results their choice entails, can we utilize the methodology and the resources which modern scholarship is exploiting in other branches of legal study. A fresh approach will beget new and truer problems.

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⁵⁹ Professor Beale remarked in the course of the discussion by the American Law Institute of the rule to select the law governing the validity of a contract, "It is not the purpose of the Restatement, as I understand it, to prevent the evolution of a better rule in the course of future decisions". 6 AM. L. INST. PROCEEDINGS (1928) 458. Unfortunately, the Restatement contains no principle of growth and can give no direction to its development. It is a closed system.