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The Effect in Choice of Law Cases of the Acquisition of a New Domicile After the Commission of a Tort or the Making of a Contract

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"Interest analysis, like other methods of approaching choice-of-law, is not perfect. But it has the virtue of recognizing that laws are adopted in order to accomplish social goals and that they should be applied so as to carry out their purposes. Enlightened courts have followed this principle for years in non-conflicts cases . . . ." 

David P. Currie

I.

When judges were expected to decide choice of law cases by manipulating indiscriminate, state-selecting, territorial principles, the problem herein discussed received very little attention; the laws of the parties' domiciles were supposed to have no significance in torts and contracts cases. Though judges sometimes applied a domestic rule of the forum because the parties were domiciled or doing

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This article is, with gracious permission of the Editor-in-Chief, Claudia Brooks, dedicated to David F. Cavers, Fessenden Professor of Law Emeritus, Harvard Law School.


2. See, e.g., Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930), in which the court, in applying Mexican law to a fire insurance policy issued in Mexico, stated: "The fact that Dick's (the plaintiff) permanent residence was in Texas is without significance." See also Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 127 (1903), in which Justice Holmes, speaking for the Court, stated: "As the cause of action relied upon is one which is supposed to have arisen in Mexico under Mexican laws, the place of the death and the domicile of the parties have no bearing upon the case."
business there, they could do so only by classifying the rule as procedural, matrimonial, or as a rule embodying strong public policy. With the advent of policy-determined analysis in the state courts it becomes obvious that the domiciles of the parties would constitute important contacts supporting the application of state policies.

Cases involving a post-transaction change of domicile fall into two obviously different categories: those in which the law of the new domicile would, if applied, enure to the advantage of the changing party and those in which it would enure to the disadvantage of the changing party. Problems of both categories have proven to be singularly intractable. Brainerd Currie discussed those of the first category in no less than six different articles with considerable shift of emphasis in the last two. In a 1968 symposium on the California case of Reich v. Purcell (opinion for a unanimous court by Chief Justice Traynor), six commentators expressed sharply divergent views on problems of the first category. And, in the same year, the New York Court of Appeals divided four to three on the solution to a problem of the second category.

Let us consider first a simple hypothetical case wherein the law


4. See Hancock, Anti-Guest Statutes and Marital Immunity for Torts in Conflict of Laws, 1 Dalhousie L.J. 105, 122-126 (1973). For examples of cases where recovery was allowed solely on the basis of one party's domicile, see Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973); Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968). See also Labree v. Major, 111 R.I. 657, 306 A.2d 808 (1973), where the finding of liability was based solely on the defendant's domicile.

5. For further discussion of these problems, see Weintraub, Commentary on the Conflict of Laws 249-53 (1971); Note, Post Transaction or Occurrence Events in Conflict of Laws, 69 Colum. L. Rev. 843, 865 (1969). This essay does not attempt to examine the various important problems created by a post transaction change of domicile in relation to statutes of limitation. For a discussion of this problem, see Vernon, The Uniform Statute of Limitations on Foreign Claims Act: Tolling Problems, 12 Vand. L. Rev. 971 (1959); Estes, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. Fla. L. Rev. 33 (1962); Note, Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950).


In a series of eloquent and highly persuasive articles written between 1957 and 1963, Professor Brainerd Currie argued vigorously that state courts should adopt "state-interest analysis" in deciding choice of law cases.

7. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

8. See Comments on Reich v. Purcell, 15 U.C.L.A. L. Rev. 551 (1968); Russell J. Weintraub, 556; Eugene F. Scoles, 563; Herma Hill Kay, 584; David P. Currie, 595; Robert A. Gorman, 605; Harold W. Horowitz, 631.

Effect of New Domicile on Choice of Law

of one party’s newly-acquired post-transaction domicile would, if applied, enure to his advantage. Guest, a self-employed real estate agent, was domiciled in state Blue, whose anti-guest statute required proof of wilful or wanton misconduct. On March 1st he entered into a contract of employment with a corporation engaged in land development and marketing in state Red; his services to begin on the following September 1. Soon after, he arranged, through friends, to rent a house in state Red which would provide lodging for himself and his family in late August. On April 1, while Guest was riding (without charge) in Host’s car, Guest was severely injured as a result of Host’s negligent driving in state Blue. Guest incurred heavy medical expenses, and was unable to return to his work until June 15. While he was in the hospital, his wife retained counsel in state Blue who, after investigation, decided to sue Host in that state. In November, three months after Guest and his family had moved to state Red, his counsel discovered that, although state Red had enacted an anti-guest statute in 1928, the statute had been repealed a year before Guest’s accident. Twenty-three months after the accident, at a time when Guest was obviously domiciled in state Red, his counsel advised him to bring suit against Host in that state and the suit was filed there.

Of the several well-known policies that anti-guest statutes are supposed to implement, only one would be relevant to this case: the protection of Host from the embarassment of litigation and the risk of a large judgment against him, resulting in higher future insurance premiums. On the other hand, now that Guest and his family have become domiciled in state Red, that state has an obvious interest in alleviating the financial burden Guest and his family will have to bear if their economic losses are not compensated by the enforcement of state Red’s higher standard of careful driving. This argument, of course, brings us squarely up against what is generally called a true conflict problem, the compensatory policy of state Red favoring Guest and his family conflicts with state Blue’s policy of partially protecting kind-hearted host-drivers from civil damages. How should the state Red court resolve the dilemma pre-

10. The most commonly cited policies that anti-guest statutes are supposed to implement include: (1) to protect host drivers from liability in a situation where they had previously offered the guest a free ride; (2) to prevent the fraudulent assertion of claims by passengers in collusion with the drivers against insurance companies; and (3) to keep down the cost of automobile insurance. These policies are fully discussed in Hancock, Anti-Guest Statutes and Marital Immunity for Torts in Conflict of Laws: Techniques for Resolving Ostensible True Conflict Cases and Constitutional Limitations, 1 DALHOUSSIE L.J. 105 (1973).
sented by two inconsistent rules, each apparently entitled to some consideration?

The problem of resolving true conflict cases is generally regarded as the major difficulty encountered by courts employing state policy analysis. However, with commentarial assistance, courts have managed to resolve true conflict cases in various ways. Sometimes it has been possible to show that the consequences of subverting one state’s law and policy would be much less serious and frustrating than those of subverting the law and policy of the other state. Sometimes it has been possible to show that the courts of one state have, in purely domestic cases, drastically reduced the operative scope of their local rule; this has been held to justify the application of the other state’s conflicting rule in choice-of-law cases. Anti-guest statutes have also been subverted in true-conflict cases on the ground that they are anachronistic and discriminatory laws, hastily adopted at a time when highway traffic deaths and injuries were far less common than they are today, and many drivers were not insured against accident liability.

However, for our hypothetical post-injury change of domicile case, the foregoing techniques of reconciliation are quite unnecessary. Prior to the time when Guest moved into state Red, all the operative facts on which Host’s liability would have depended had occurred in state Blue and nothing happened thereafter that would justify resort to the law of state Red except Guest’s unilateral self-determined act of changing his domicile. Would it not be, in some degree, unfair to Host to allow Guest to deprive him, in this one-sided way of the protection of the law of the state of which both were citizens when their accident occurred there? Moreover, by the same one-sided act of Guest, State Blue’s policy of protecting its citizen, Host, would be subverted in this and all similar cases.

It is submitted that the change of domicile issue can best be viewed in its total perspective by considering the case as a true conflict case in which, at the time of the litigation, a rational argument can be made for the application of each state’s pertinent rule and policy. But because, when the operative facts that would determine Host’s liability occurred, state Red had no contact of concern with those facts, fairness to Host and to state Blue suggest that the conflict can best be resolved by preferring the law and policy of state Blue.

This mode of analysis may be further illustrated by applying it to a slightly more complex hypothetical example. Suppose (without change in the pattern of laws) that both Host and Guest were origi-
nally domiciled in state Red and that it was not Guest but Host who had arranged to change his domicile, from state Red to state Blue. After the arrangements had been made, the accident in which Guest, riding as a non-paying passenger, was injured occurred, not in state Red, but in state Blue. Host proceeded to carry out his plans for moving to state Blue, and acquired a domicile there. Guest then brought suit against Host in state Red.

Had no change of domicile occurred, the state Red court would have encountered a very simple no-conflict, choice-of-law case of a well-known pattern.\textsuperscript{11} State Red would have had a strong and legitimate concern for compensating Guest; no policy of state Blue would have been advanced by applying its anti-guest statute to prevent such compensation. But when Host became a citizen of state Blue that state acquired an undeniable concern that he should be protected from liability for ordinary negligence. Some rational means of resolving this conflict would have to be found. Again we note the unfairness of allowing one party (Host) to acquire a defense by his own unilateral act. Again, it is suggested that, because of this unfairness, the conflict should be resolved by ignoring the change of domicile and so applying the law and policy of State Red.

\textbf{II.}

An alternative suggestion for resolving this peculiar type of true-conflict case should be briefly considered. Some commentators have been impressed by the possibility that a party to a potential lawsuit might purposely change his domicile in order to establish an important contact with a state whose pertinent rule would favor his claim or defense.\textsuperscript{12} (Such deliberate contact creating is often loosely labelled "forum shopping.") The chief difficulty with this approach to the problem is that it would cover only a small fraction of the contact creation cases. In the first of the foregoing hypothetical examples both Guest and his counsel were clearly innocent of any ulterior motive when he moved to state Red; nevertheless, to allow state Red's rule to prevail would have been most unfair to Host and to state Blue. Deliberate creation of favorable contacts should certainly not be encouraged but its actual occurrence is probably rather

\textsuperscript{11} See, \textit{e.g.}, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).

\textsuperscript{12} See, \textit{e.g.}, \textit{Comments on Reich v. Purcell, supra} note 8, at 562 (comment by Weintraub), and at 582 (comment by Ehrenzweig).
rare. How often can a party afford to migrate to another state on the speculative chance that a court there will apply its law to a prior transaction? On the other hand, if a party does change his domicile under suspicious circumstances, can that be held against him if he can show a strong, legitimate reason for having done so? It is certainly not surprising that, although Brainerd Currie wrestled with the problem on several occasions, he never alluded to the danger of deliberate contact creation. However, astute counsel, opposing resort to the law of a state to which one party has recently moved, will not let the judges overlook the possibility of purposeful contact creation.

Brainerd Currie was impressed to an extent that varied from time to time by the usefulness of the analogy between the application of the law of a post-transaction domicile and the application (in a purely domestic case) of a retroactive statute imposing liability where none had existed when the operative facts occurred. If in our first Guest-Host hypothetical example, state Red's ordinary negligence standard had been applied to determine Host's liability, it could be said to have been applied "retroactively" in the sense that at the time of the accident, neither the parties, nor the facts had any contact with state Red. It is trite learning that the retroactive application, in purely domestic cases, of certain types of statutes to transactions occurring before their enactment has been judicially condemned on constitutional grounds.

The analogy of a purely domestic retroactive statute to our first hypothetical choice-of-law example is obvious but, on careful examination, superficial and potentially misleading. Suppose that when the state Red legislature repealed its anti-guest statute (thus reviving the stricter common law standard of ordinary negligence) the repealing statute had further enacted that the common law standard of ordinary negligence should be applied in the future to all litigated cases even though the facts had occurred before the statute repealed the anti-guest statute.


14. The retroactive application of statutes has traditionally been regarded as undesirable by many American lawyers and judges. See Smith, Retroactive Laws and Vested Rights, 6 Texas L. Rev. 409 (1928); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936). However, the Supreme Court has recognized that in spite of serious objections to retroactivity with respect to the due-process
Shortly before the repeal of the anti-guest statute, severe injuries had been suffered by Rider, a guest-passenger in Driver's car as a result of Driver's ordinary negligence in state Red. Both parties were also domiciled in state Red. Immediately after the enactment of the repealing statute Rider sued Driver in a state Red court alleging only ordinary negligence.

Rider's counsel relied upon the provision of the repealing statute giving the statute retroactive effect. But Driver's counsel challenged the retroactive application of the repealing statute as unconstitutional. The Supreme Court of state Red rejected his argument, pointing out that in state Red ordinary negligence had never been legalized. The anti-guest statute had merely conferred a partial immunity on host-drivers because, when it was enacted in 1928, many such drivers did not carry liability insurance. Hence the retroactive imposition of liability for ordinary negligence did not deprive Driver of property without due process of law.

Would the decision of the state Red Supreme Court in the purely domestic case of Rider v. Driver have supported the contention, in the First Guest v. Host hypothetical choice case, that the state Red common law standard should be "retroactively" enforced against Host? Of course not. Certain important conditions supporting the retroactive application of state Red's stricter common law standard in the purely domestic case of Rider v. Driver were totally absent from the First Guest v. Host hypothetical choice case.

First, Rider and Driver were both citizens of state Red, not only when their accident occurred there, but also when the state Red legislature decided that host drivers (such as Driver) guilty of ordi-
primary negligence, should no longer enjoy the indefensible and discriminatory benefit provided by the anti-guest statute. As a citizen of state Red at both material times Driver was clearly subject to its legislative authority with respect to his conduct there, before or after the enactment of the repealing statute. On the other hand, Guest and Host were both citizens of state Blue when the state Red legislature decided to terminate the partial exemption from liability that it had previously conferred on host-drivers. If state Red's statute had been applied to the Guest-Host litigation it would not have been merely applied "retroactively," it would have been applied to a case wherein neither the parties nor the facts had any contact with state Red when those facts occurred.

Second, the only factual contact with state Red at the time of the litigation was Guest's domicile in that state established after all liability-vesting, operative facts had occurred outside that state. This contact had been created by the unilateral decision of one party only, Guest. Third, when, in the Rider-Driver case, the State Red court decided to enforce the post-accident repealing statute that retroactively brought into force the stricter common law standard of ordinary negligence, the court merely displaces, in a purely domestic case, the previously prevailing state Red exemption for Host drivers. But, had that court "retroactively" applied state Red's strict common law standard in the first Guest-Host example (because Guest had moved to state Red) it would have displaced the anti-guest statute of state Blue, which at the time the accident occurred, was the only state having any contact with the case. Because, when the Guest-Host accident occurred, state Blue was the only state with which the parties and the facts had any contact, the displacement of Blue's anti-guest statute might well have constituted a denial of full faith and credit to its "public acts."

In short, if in the first hypothetical Guest-Host case, defendant's counsel had contended that the application of the state Red common law negligence standard would be unconstitutional, the state Red prior decision that the negligence standard should be retroactively enforced in a purely domestic case would not have effectively answered that contention. The issue of retroactivity of the negligence standard in a purely domestic case and the issue of enforcing that standard as the law of a post-transaction domicile, in a choice-of-law case, are two entirely different issues.\textsuperscript{15}

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\textsuperscript{15} For other criticism of Brainerd Currie's suggested analogy, see M. Traynor, \textit{supra} note 13, at 868.
Having eliminated the red-herring issue of domestic retroactivity, we are now in a position to consider whether the application of the law of one party’s post-transaction domicile for his benefit might be regarded as denial of full faith and credit to the law of the only state previously concerned with the transaction.

III.

*John Hancock Mutual Life Insurance Co. v. Yates,* a 1936 unanimous Supreme Court decision, could be construed as a clear indication that the application of state Red’s pertinent rule in our first hypothetical case would be vulnerable to attack as a denial of full faith and credit to the anti-guest statute of state Blue. In Yates’ case the insurance company issued a policy insuring his life, relying upon an application containing false answers to questions concerning his health and recent medical advice. Less than a month after the policy was issued Yates died of cancer. Prior to that time Yates and his wife, the sole beneficiary, were both domiciled in New York where the policy was applied for and delivered. Under the New York statutes, as construed by New York courts, the insured was solely responsible for the truth of statements in the application that had been signed by him. A copy of the application had been delivered to him as part of his policy. Even if he had stated true answers which the agent failed to record correctly (a most unlikely event) the policy would be void for material false representations.

After Yates’ death, his widow-beneficiary established her domicile in Georgia and sued the insurance company there for the full face value of the policy. At the trial, the company’s proof of the New York law and of the falsity of the written answers in the application was not disputed. Nevertheless, the trial judge let the case go to the jury with instructions completely inconsistent with the law of New York. The jury found a valid contract of insurance; a judgment for the widow-beneficiary was sustained by two higher Georgia courts.

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17. Reference to the fact that Yates signed the policy does not appear in the opinion of the United States Supreme Court, but may be found in the dissenting opinion of Justice Gilbert of the Georgia Supreme Court in 182 Ga. 213, 221, 185 S.E. at 273 (1936).
18. If an agent were found to have unilaterally falsified an insurance application, which had been truthfully completed by the applicant, he would undoubtedly lose both his job and any prospects he might have for a career in the insurance business. It is highly unlikely that an agent would risk such a loss for the relatively small commission he would earn on the sale of a policy.
The Georgia courts contended that they were not denying full faith and credit to New York's public acts; they were merely following local rules of procedure. Under the system of territorial, state-selecting principles then in vogue, an extravagant labelling of forum law as "procedural" or "remedial" usually indicated an unstated opinion of the judges that, because one or more of the parties was domiciled in the forum state, its pertinent rules should prevail rather than those that the state-selecting principles would have chosen. Presumably, then, the Georgia judges believed that Georgia's rules concerning false statements in insurance applications should prevail over New York's rules because the widow-beneficiary was domiciled in Georgia at the time when she brought her suit.

In the Supreme Court, Mr. Justice Brandeis devoted most of his criticism of the Georgia Supreme Court's reasoning to demolishing the pretext that only procedural issues were involved. Only briefly did he touch on the possibility that a contact with Georgia, the widow's belated state of domicile, might have brought the case within the range of its domestic rules and policies.

In respect to the accrual of the right asserted under the contract, or liability denied, there was no occurrence, nothing done, to which the law of Georgia could apply. One could wish that Mr. Justice Brandeis had seen fit to add a few words explaining why the domicile acquired by the widow-beneficiary after her husband's death was not "an occurrence . . . to which the law of Georgia could apply." Be that as it may, the Court's decision upon the facts stated in the opinion clearly supports the interpretation that after the material false statements in the insured's signed application had prevented the making of a contract under New York law, the subsequent acquisition by the widow of a Georgia domicile did not give that state a sufficient concern in the matter to justify the displacement of the law of New York.

Some Supreme Court cases, subsequent in time to the Yates case, indicate that a state may always enforce its own law and policy in its own courts in a case whose factual contacts bring it within the legitimate scope of that law and policy. Thus a highly abstract

20. It should be noted that in the Supreme Court of Georgia, two of five judges dissented, stating that the issue was not one of procedure and that the law of New York should govern. See dissenting opinion of Justice Gilbert in 182 Ga. 221, 185 S.E. at 273.
21. 299 U.S. at 182.
22. See Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935); Carroll v.
argument could be made that because, at the time of suit, Georgia had *some concern* for the widow’s welfare, these later decisions of the Supreme Court have, in effect, overruled the *Yates* case. But only *one* of these later decisions involved a post-transaction change of domicile and (as will be demonstrated) the divergent laws and policies of that case were very different from those of the *Yates* case.  

In any event, in the present climate of choice-of-law doctrine, it seems unlikely that any state court (having adopted state policy analysis) and finding itself in the position of the Georgia court in the *Yates* case, would feel strongly inclined to apply its own domestic law. State policy analysis has encouraged judges to consider and compare the effects of each choice they could make between conflicting policies in choice-in-law cases in much the same way that they do in domestic cases. When judges realize that the facts of the case before them bring it within the legitimate range of another state’s law and policy (different from their own) they are usually anxious to find some rational technique of reconciliation. The circumstance of a post-transaction change of domicile will frequently (though not invariably) be regarded as a convincing reason for preferring the law and policy of the only state concerned with the case before the change of domicile occurred.

IV.

The facts of the *Yates* case suggest a variation that is not unusual in contract cases involving a post-transaction change of domicile; the change occurs after the acts constituting the formation (real or alleged) of the contract but *before* the occurrence of significant events giving rise to a duty of performance. Specifically, suppose that in a hypothetical case (the facts being otherwise the same as those of the *Yates* case), Mr. and Mrs. Yates had both moved to Georgia and acquired domiciles there *before* his death. Thus, when he died, he too was a citizen of Georgia.

For those who believe that choice-of-law problems can be felicitously resolved by applying the law of the state having the greatest number of factual contacts, the argument for applying Georgia law

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Lanza, 349 U.S. 408 (1955). A discussion of these two cases with respect to the proposition stated can be found in B. Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 188 (1963).

will doubtless seem well-nigh irresistible; the liability-creating event, the death of Yates, occurred in Georgia at a time when both the insured and his beneficiary were domiciled there. Hence, the widow's loss of economic, moral and psychological support also occurred in Georgia. Moreover, the defendant insurance company was, at all material times, selling insurance in Georgia and enjoying the protection of its government. But if we are realistically discussing a Georgia policy that would permit a sympathetic jury to enforce an alleged insurance "contract" (void for false representations under New York law) in order to help a Georgia widow, what difference does it make whether her husband died in New York or in New Jersey or in Australia? The fact of his death is material; the place is immaterial.

A plausible argument could be made, in our variation of the Yates case, that when Mr. Yates became a citizen of Georgia, he brought himself within the policy scope of Georgia's easygoing and ambivalent rule permitting a jury to validate his insurance "contract" even though he had obtained it by signing an application containing statements he knew to be false. But, apart from this very temporary concern that Georgia could be said to have had for Mr. Yates' hope that his alleged "policy" (obtained in the dubious manner aforesaid) would be sustained in law, the actual case and our hypothetical variation appear to be indistinguishable. While recognizing a degree of conflict between the laws and policies of Georgia and New York, a modern court, committed to state interest analysis, would be unlikely to find in the Yates' unilateral change of domicile a persuasive rationale for overriding the law of New York.  

The foregoing suggestion finds support in the real change-of-domicile case, Bernkrant v. Fowler, a 1961 unanimous decision of the Supreme Court of California, with opinion by Mr. Justice Traynor. In Bernkrant v. Fowler, the plaintiffs, husband and wife, were at all times domiciled in Nevada. They sued the estate of John Granrud, domiciled at the time of his death in California, to enforce his oral promise to cancel, by his will, their debt to him, secured by a second trust deed on the John Granrud garden apartments in Nevada. (At an earlier date Granrud had owned the apartments, but later sold them to the plaintiffs). At the time of his oral "testamentary" promise, Granrud held a second trust deed on the

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24. Granting that a true conflict exists, there is a large degree of unfairness in allowing the insureds' move to another state to breathe life into an otherwise void policy.

apartments for approximately $24,500. He wanted the Bernkrants to refinance his and another trust deed on the property in such a way that he would receive about $13,000 in ready cash. He would also receive a newly executed second trust deed on the apartment building for a lesser sum. As to the debt secured by this trust deed, Grandrud gave his oral promise that by his will he would cancel any debt owing to him by the Bernkrants at the time of his death. At a cost of $800, the Bernkrants arranged the refinancing so that Grandrud received $13,140 in cash. When Grandrud died eighteen months later, the plaintiffs still owed him $6,425 secured by the second trust deed. His will, admitted to probate in California, made no provision for cancellation of this debt.

Since Grandrud had formerly owned the apartment building, had retained a security interest in it, and had made his oral testamentary promise in Nevada, the Supreme Court (in the first part of its opinion) decided the case on the assumption that Grandrud had been domiciled there when he made the promise, but had later changed his domicile to California.

Only this part of the opinion is relevant to the subject of this essay. Under the California statute of frauds, testamentary promises, such as Grandrud's, were specifically invalidated; Nevada law merely required that they be clearly proved. Thus, at the time the contract was made, Nevada had a concern that this contract should be specifically enforced (if necessary) for the benefit of the Nevada plaintiffs. Grandrud, also domiciled there, could not, at that time, bring himself within the policy scope of California's statute. Had the contract's validity been litigated then, only Nevada's law and policy would have been applicable.26

When Grandrud acquired a California domicile, however, he immediately brought himself within the policy-determined scope of the California statute designed to protect testators' expectations, concerning the disposition of their estates, against false or grossly exaggerated claims. In the opinion by Justice Traynor, this interest of California was clearly recognized.27 On the other hand, Nevada's policy of validating the contract for the plaintiff's benefit would not be changed by Grandrud's departure; it would thus come into conflict with California's newly-relevant statutory policy designed to protect Grandrud's estate from dubious claims. Justice Traynor resolved this

27. 55 Cal.2d at 594, 360 P.2d at 909.
very real conflict by stressing the unfairness to the plaintiffs of allowing California law to displace that of Nevada on the basis of Granrud’s unilateral decision to move to California.

“If Granrud was a resident of Nevada at the time the contract was made, the California statute of frauds, in the absence of plain legislative direction to the contrary, could not reasonably be interpreted as applying to the contract, even though Granrud subsequently moved to California and died here . . . . The basic policy of upholding the expectations of the parties by enforcing contracts valid under the only law apparently applicable would preclude an interpretation of our statute of frauds that would make it apply to and thus invalidate the contract because Granrud moved to California and died here.”28 (emphasis added)

It is very important to note that the death of Granrud in California, like the hypothetical death of Mr. Yates in Georgia, added nothing to the claim that California’s invalidating statute should be applied. Regardless of where Granrud died, that claim rested solely upon the fact that he had become a California citizen, a person whom the statute was plainly meant to protect. The fact of his death was important because it brought him and his property within the terms and policy of the statute; the place of his death was not.

V.

State policy analysis has revealed the existence of at least two general types of false-conflict cases. In the simpler type (represented by the second hypothetical example in Part I and analogous real cases there cited), one state has a strong concern that its law and policy should prevail; the other state has little or no concern at all. In the second and sometimes more complex type of false-conflict case, neither state appears to have a strong or even a significant concern (in the usual sense) that its law should be applied. The most obvious solution suggested by such a fact-law pattern would be to dismiss the plaintiff’s action, not because one state had a significant interest in protecting the defendant, but because the facts of the case do not fall within the policy-determined range of either state’s law.

Such a result is by no means absurd. Usually, in such cases, the domestic law of the plaintiff’s domicile would have given him no cause of action and, although there are contacts with another state, those contacts do not place the case within the policy range of the

28. Id. at 594-595, 360 P.2d at 909-910.
other state’s pertinent rules. In **Erwin v. Thomas**, for example, the state of Washington was shown to have adhered to the traditional common law doctrine that, although a husband had a cause of action against a tortfeasor who had injured his wife for the loss of her companionship and sexual lovemaking (euphemistically designated as the husband’s right to “consortium”), a wife had no analogous claim against a tortfeasor who had injured her husband, even though the injury had rendered him impotent. Oregon, on the other hand, had enacted a statute in 1941, conferring such a cause of action upon the wife.

The facts that brought the case before the Supreme Court of Oregon in 1973 were these: Erwin, domiciled with his wife Ruby in Washington, was severely injured there by the alleged negligence of Thomas, domiciled in Oregon. Ruby Erwin brought suit in the Oregon state courts against Thomas and his employer, an Oregon corporation, to recover damages for the loss of her husband’s “consortium.” On demurrer to the complaint, the judge of first instance held that Ruby Erwin was not entitled to the benefits conferred by the Oregon statute. On appeal, the Supreme Court of Oregon recognized the rationality and propriety of the lower court’s decision in these words: “... it is stretching the imagination more than a trifle to conceive that the Oregon legislature was concerned about the rights of all the nonresident married women ... whose husbands would be injured outside of the state of Oregon.” Following this line of reasoning, the court might well have held that since the Oregon consortium statute did not specifically purport to benefit non-resident women whose husbands had been injured outside that state, Ruby Erwin’s suit should be dismissed.

In the closing passages of its opinion, however, the court executed a complete turn-around and decided (by a majority) to confer upon Ruby Erwin the benefits of Oregon’s consortium statute, thus authorizing the trial court to award her damages. The court’s reasons were simplistic, mechanical and unconvincing, but the decision was surely just as rational and fair as a decision to dismiss Ruby Erwin’s suit would have been. In their final decision, the majority took an altruistic approach to the case, noting that, “Washington policy cannot be offended if the court of another state affords rights to a Washington woman which Washington does not afford, so long

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30. 264 Or. at 458-459, 506 P.2d at 496.
as a Washington defendant is not required to respond." 32 As for the Oregon defendants, they were merely being required to pay the same damages that they would have paid had they injured the husband of an Oregon woman. The Oregon court was presumably reluctant to discriminate against Ruby Erwin, even though her case fell outside the normal range of Oregon policy.

Having recognized that there can be false conflict cases in which the court may fairly and rationally adopt either of two alternative lines of reasoning, each leading to a different result, we now return to the major problem of this essay. Suppose that after Erwin was injured in Washington, he and his wife Ruby moved to Oregon and became domiciled there before Ruby's suit for consortium damages was filed. This change of domicile, if taken into account by the Oregon judges, would obviously give Oregon a strong interest (of the usual kind) in having its law and policy applied for the benefit of its new citizen, Ruby Erwin. The primary issue, however, would be whether, as against the Oregon defendants, the Erwins' unilateral change of domicile could fairly be allowed to affect the decision.

The cases discussed in Parts I through IV of this article are not very helpful because, in those cases, the unilateral change of domicile itself created a true conflict problem. In our supposed variation of *Erwin v. Thomas*, there is no conflict at all between the Washington and Oregon rules.

*Erwin v. Thomas* and analogous false-conflict cases have two distinctive characteristics. First, there is absolutely no conflict between the pertinent rule of the forum and that of any other state. Second, the court may adopt either of two equally fair and rational lines of reasoning, although they lead to different results. Under these circumstances, it is submitted that in our hypothetical case, the court *should* take into account a change of domicile such as that supposedly made by Ruby Erwin and her husband. No conflict is thereby created. Oregon, it is true, acquires a concern (in the usual sense) that its law and policy should be enforced for the benefit of its new citizen, Ruby Erwin. But Washington law remains totally neutral. As to the defendants, the court had ample grounds for applying Oregon law (to their disadvantage) even if the Erwins had not unilaterally changed their domicile to Oregon.

VI.

In the cases (real or hypothetical) previously considered in

32. 506 P.2d at 496.
parts I through IV, we have begun with a purely domestic problem or a simple choice-of-law problem where the laws and policies of the connected states were not in conflict. But when one party thereafter changed his domicile to a state that previously had no concern with the controversy, the situation was drastically altered. That state, because of the change of domicile, acquired a concern that its law and policy be enforced for the benefit of its new domiciliary.

We shall now consider the type of case in which a true conflict existed before any change of domicile occurred. Assume, as in Part I, that state Blue had an anti-guest statute, but state Red had none. Guest and Host were both domiciled in state Blue. But in state Red, Guest, riding as a passenger in Host's car, was severely injured by Host's negligent driving. Following long settled arrangements made before his injury, Guest subsequently acquired a domicile in state Red and sued Host in that state.

Prior to the change of domicile, the fact-law pattern was a familiar one that produced an obvious true conflict problem. State Blue had a clear concern that Host should be protected from the unpleasant aspects of litigation and the risk of an adverse judgment resulting in higher future insurance premiums. State Red had a concern, not only for its potential therapeutic creditors, but also because its courts were unwilling to recognize any exemption from its rule that negligent driving on its highways must result in civil liability.

The issue of principal importance for this essay is the effect to be given to Guest's change of domicile. A full examination of the case would require the court, at least as a preliminary to further analysis, to recognize that state Red had a concern that its rule should be applied to insure compensation for the benefit of its new citizen, Guest, and his family. Although any additional consideration given to Guest because of his unilateral change of domicile must be, to some extent, unfair to Host, in this case, unlike the cases previously considered, the court cannot resolve the true conflict problem by excluding the effects of Guest's change of domicile from all consideration. A true-conflict problem was inherent in the case before the change of domicile occurred; the court must turn elsewhere for a means of resolving the conflict.

It is submitted that when one party's change of domicile is not the sole source and cause of a true-conflict problem, the policy implications of that change of domicile may generally be given such

consideration and effect as judges believe they deserve in the light of the policies involved. Of course, judges should take into account the unfairness to the non-changing party, but they should also bear in mind that that change of domicile will not be the sole ground for applying the law of the new domicile (here, state Red). Therefore, the concern of state Red for its new citizen, Guest, as embodied in its pertinent rule of law, should not be entirely excluded from the ultimate decision.

The foregoing suggestion finds support in Haines v. Mid-Century Insurance Co., decided in 1970 by the Supreme Court of Wisconsin. Sara Haines had sued her husband and his insurer for personal injury damages sustained by her while riding in an automobile driven by him in Wisconsin. Though both husband and wife were domiciled in Minnesota when the accident occurred, defendants' counsel conceded that the issue of tort liability should be determined by Wisconsin law under which Mr. Haines would be liable for ordinary negligence. The sole issue, raised by a pre-trial motion for summary judgment for the insurer, was the validity of a clause in the insurance policy excluding from its coverage liability of the insured for bodily injury to a member of his household. A Wisconsin statute declared such clauses unlawful and void; Minnesota judge-made law had held them to be enforceable.

Adopting the same state policy analysis it had used in earlier choice-of-law tort cases, the court treated the following additional facts as significant: Mr. Haines was employed at all material times in the city of La Crosse, Wisconsin, although until after the accident, he was domiciled in La Crescente, Minnesota, "a bedroom suburb almost totally dependent upon La Crosse for its existence." Mr. Haines carried on negotiations for the policy in La Crosse, Wisconsin, and the policy was delivered to him at the insurer's office in that city. Finally, and most important for this essay, the plaintiff's complaint alleged that at the time when she commenced her action she was domiciled in La Crosse, Wisconsin.

The court conceded that the fact of the wife and husband having a common domicile in Minnesota at the time of the accident supported the argument that Minnesota's rule should be applied. On the other hand, the court stated: "Wisconsin . . . would have an interest in seeing that its policy of protecting injured parties, regardless of their relationship to negligent drivers, would be given

34. 47 Wis.2d 442, 177 N.W. 2d 328 (1970).
35. Id. at 449, 177 N.W. 2d at 332.
effect in insurance contracts negotiated and entered into in this state.\textsuperscript{36}

What significance, if any, did the court attribute to Sara Haines' alleged change of domicile after she had been injured? On this issue, the court stated:

However, this [the argument for applying the Minnesota decisional rule because the domicile of the parties at the time of the accident was Minnesota] is offset by the fact that the complaint alleges that the plaintiff at the time of the commencement of this action was a resident of La Crosse, Wisconsin. In such a situation, Wisconsin's policy of \textit{not} recognizing the family exclusion clause becomes more important. Any fear that a plaintiff would purposefully move to this state in order to take advantage of Wisconsin's policy of nonrecognition of family-exclusion clauses is, for the most part, unfounded. It is doubtful that anyone would move from one state to another merely to take advantage of the latter's allegedly more favorable policies.\textsuperscript{37} (Emphasis on \textit{not} is added.)

Having concluded that it was presented with a true-conflict case, the court chose to enforce the Wisconsin statute on the ground that, compared with Minnesota's judge-made rule sustaining the validity of family-exclusion clauses, the Wisconsin statute should be regarded as "the better rule of law."\textsuperscript{38} In support of this conclusion, the court stated: "The argument that Wisconsin has the better rule

\textsuperscript{36} Id. at 450, 177 N.W.2d at 332. The defendant insurer had an office in La Crosse, Wisconsin; presumably it was also licensed to sell insurance in that state. It could thus be argued that, as to policies sold in Wisconsin, it had subjected itself to Wisconsin's law invalidating certain policy clauses.

An even stronger argument for applying Wisconsin law could have been based on the fact that Wisconsin's law conceded imposed liability in tort upon the insured defendant, Mr. Harris. In the case of Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), the plaintiff, domiciled in Louisiana, brought a direct action against the defendant insurer as permitted by Louisiana law, alleging injuries from a cosmetic product manufactured outside Louisiana. The injuries were suffered by her in Louisiana. The insurer, though carrying on business in Louisiana, contended that the liability insurance contract which prohibited such direct actions could not be affected by Louisiana law because it was made outside Louisiana and the manufacturer did not carry on business in Louisiana. Speaking for the Supreme Court, Mr. Justice Black rejected this contention in these words:"Persons injured or killed in Louisiana are more likely to be Louisiana residents, and even if not, Louisiana may have to care for them . . . . Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages." \textit{Id.} at 72.

The court sustained the constitutionality of the Louisiana direct action law, overriding the terms of the insurance contract.

\textsuperscript{37} 47 Wis.2d at 450, 177 N.W.2d at 332.

\textsuperscript{38} Id. at 451, 177 N.W.2d at 333.
of law received tacit confirmation by the Minnesota legislature when it enacted the statute [after Sara Haines was injured] invalidating the family exclusion clause. Thus Minnesota law is now the same as Wisconsin.”

VII.

At this point in the discussion, the well-known case of Clay v. Sun Insurance Office, Ltd. may be appropriately considered. Though it has many features in common with the cases (real or hypothetical) previously discussed, it is significantly different in certain respects, most particularly with regard to the policies and effects of the domestic rules of law involved.

In 1952, Clay, while domiciled in Illinois, purchased from the insurer-defendant a policy described as “Personal Property Floater Policy (World Wide).” It insured his moveable personal property, wherever situated, against all risks of loss or damage for a period of three years. The defendant insurer was a British corporation licensed to do business in Illinois, Florida and nine other states. A few months after purchasing the policy, Clay moved to Florida and established his domicile there. On February 1, 1955, Clay reported to the insurer the loss of moveable property located in Florida that became the subject matter of the lawsuit. Two months later, the insurer denied liability on the ground that the loss was due to the willful injury or misappropriation of the property by Clay’s wife, a loss allegedly not covered by the policy. More than two years after discovery of the loss, Clay brought suit against the insurer in a Florida federal court. The policy contained a time-of-suit clause (not unusual in insurance policies) providing that suit on any claim for loss must be brought within twelve months after the discovery of the loss.

As long ago as 1913, the Florida legislature had enacted the following statute to prevent insurance companies and others from evading the Florida Statute of Limitations.

All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in

39. Id.
41. When the case was certified to the Supreme Court of Florida by the Fifth Circuit Court of Appeals to ascertain the Florida law on this point, the Supreme Court of Florida replied that under Florida law the insurer was liable for the destruction or misappropriation of property by Clay’s wife. This decision completely removed the issue from the case. See Sun Ins. Office Ltd. v. Clay, 133 So.2d 735 (Fla. 1961).
which suits may be instituted under any such contract . . . at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section.\footnote{Effect of New Domicile on Choice of Law.}

In Illinois, where Clay had been domiciled when he purchased his policy, the courts had sustained the validity of similar time-of-suit clauses. Had the loss occurred and the suit been filed in Illinois before Clay moved to Florida, a suit by Clay upon the policy would have been subject to the time-of-suit clause.

Before discussing this fascinating case on its merits, the curious circumstance should be noted that the case never received, from either the federal courts or the Supreme Court of Florida, the penetrating and comprehensive analysis that it deserved. Such an analysis would necessarily have included a careful examination of the policies of the pertinent Illinois and Florida rules, an inquiry as to whether there was a true conflict between them and, if so, a consideration of how that conflict might be resolved. The federal district judge enforced the Florida statute and upheld Clay’s claim, but his reasons for doing so have never been published. The Court of Appeals for the Fifth Circuit reversed on the ground that enforcement of the Florida statute was unconstitutional.\footnote{The United States Supreme Court (by a majority) directed the Court of Appeals to ask the Supreme Court of Florida (through Florida’s statutory certification procedure) whether it would construe the Florida statute as extending to the facts of the Clay case. That court, having held that the questions put to it did \textit{not} require it to consider constitutional limitations, replied that Florida state courts should enforce the statute in all cases over which they had jurisdiction. (So much for thoughtful examination of the policies of Illinois law!)}

The Court of Appeals, adhering to its previous opinion,\footnote{The Court of Appeals, adhering to its previous opinion,} was
reversed by the Supreme Court. 47 For a unanimous Court, Mr. Justice Douglas delivered a short opinion holding that Florida had sufficient contacts and concerns to satisfy the constitutional limitations upon its power to apply its domestic law.

Thus, with relatively little assistance from the judges who participated in this lengthy litigation, we embark upon an examination of the policy range of the Florida statute, to be followed by a similar examination of the Illinois case law. Every law student knows that one purpose of a statute of limitations (or other statutory time-of-suit limitation) is to protect defendants from claims based on “stale testimony” at a late date when important defensive testimony or documents may no longer be available. What is often overlooked by commentators and courts is that a potential plaintiff, on the other hand, needs time in which to decide whether to consult a lawyer and he, having been consulted, needs time to investigate the case and advise his client. Hence, such statutes can quite appropriately be construed as fixing the necessary time to which a plaintiff and his lawyer are entitled in order to make their investigations and decisions. The Florida legislature decided, in 1913, to tell the Florida judges in no uncertain terms, that this policy of the Florida statute of limitations must not be overlooked.

It should be noted that the 1913 Florida statute was not designed merely to limit the power of insurance companies to force a particular kind of clause upon the buyers of a necessary commodity. As its language shows, the statute’s broad purpose was to prohibit and invalidate all contracts that would deny to any person access to Florida courts by fixing a time for suit shorter than that established by the laws of Florida. Who were the intended beneficiaries of this strongly-worded statute? Citizens of Florida and aliens domiciled there would certainly be the subjects of legislative concern. When the loss of Clay’s property occurred, Clay was a member of this protected group.

A second powerful argument justifying the application of Florida’s statute rested upon the circumstance that Clay’s property was destroyed or misappropriated in Florida. In a seemingly contrary vein, the point has been emphasized in this essay that, had Mr. Yates died in Georgia, the occurrence of his death in that state would have added nothing to its concern that its law should be applied. A similar point was made concerning the death of John Granrud (the testamentary promisor of Bernkrant v. Fowler) 48 in

California. But the destruction or misappropriation of Clay's property was almost certainly illegal and tortious under the law of Florida. Florida would therefore have a strong and well-recognized concern that its law, compensating Clay, should be applied against the tortfeasor. Moreover, since compensation had, in Clay's case, been promised by an insurer doing business in Florida, that state would also have a strong concern that its statute, protecting Clay's claim against time-of-suit clauses, should be applied. Even if Clay had remained domiciled in Illinois, at the time his property was destroyed or misappropriated in Florida, a Florida court would have had a strong, rational ground for enforcing the Florida statute invalidating the time-of-suit clause.

The most important (though generally overlooked) factor in the Clay case was the relatively insignificant concern of Illinois for the application of its judge-made domestic rule validating time-of-suit clauses. True, the factual contacts with Illinois were precisely those of the Yates case with New York: A citizen of Illinois had purchased insurance from a multi-state corporation doing business in Illinois, Florida and elsewhere. But the sources and policies of the New York and Illinois laws were very different. In the Yates case, the New York legislators had enacted a statute that (as construed by their highest state court) invalidated all life insurance contracts procured by written misrepresentations in an application signed by the insured. It would have been absurd even to suggest that, given the aforesaid contacts with the State of New York, the statute was not intended to be applied if an insurance contract, so obtained, was sued upon in another state.

The validity of a time-of-suit clause, however, is primarily the concern of the state where the suit has been brought because the clause attempts to deny to one party access to the courts of that state, thereby curtailing their "jurisdiction." Perhaps, if the facts and the litigation have only an insignificant jurisdictional contact with the state of suit (e.g., jurisdiction obtained by service on the defendant while passing through the state or by attaching a debt owed to him by a person subject to suit there), its courts ought to recognize a time-of-suit clause, binding upon the parties under the law of their common domicile or place of business. But in Clay's case, Florida had jurisdiction over the defendant insurer because the insurer was doing business in Florida. Moreover, the tortious

49. See the Watson case cited and discussed in note 36, supra; see also M. Traynor, supra note 13, at 870.
destruction or misappropriation of Clay's property in Florida provided an additional justification for a Florida court to exercise its jurisdiction and to apply its law.

Unlike the New York statute in the *Yates* case, the Illinois decisional rule was not concerned with false representations making an alleged "contract" void. Rather, the Illinois rule dealt with a single clause, in an otherwise valid contract, that would not take effect until twelve months after a loss had occurred, at which time the rule, if valid, would bar a suit on the contract.

At the time when the suit was brought in Florida, the case had no significant contacts with Illinois except that the defendant, a multistate corporation, was doing business there (as well as in Florida and nine other states). The Illinois legislature had neither invalidated nor supported time-of-suit clauses. In an era when opinion in the legal profession tended to favor freedom of contract, and in the absence of legislative guidance, the Illinois courts had sustained the validity of time-of-suit clauses that denied to Illinois citizens access to Illinois courts. There was nothing whatever in those permissive precedents to suggest that any policy of Illinois decisional law would have favored the denial of access to the courts of a sister-state, by a citizen of that state, through the enforcement of a time-of-suit clause for the benefit of a multistate corporation doing business in both states. As Mr. Justice Black observed (in his dissenting opinion):

There are Illinois cases indicating that the contractual provision shortening the Illinois State statute of limitations might be treated as valid in a court of that State. There are no cases, however, indicating that Illinois wanted to project its law into the State of Florida so as to nullify a Florida law invalidating such contractual provisions in Florida courts. (Emphasis added by author.)

Considering the specific policy of the Florida statute, namely, protecting the right of access to Florida courts, considering that this statute took effect only after a loss had occurred in Florida to a Florida citizen, considering that the Illinois cases did not indicate "that Illinois wanted to project its law into the State of Florida so as to nullify a Florida law" (invalidating time-of-suit clauses in Florida courts), and considering that when the Florida statute was enforced, the sole Illinois contact was that of a multistate corpora-

52. 363 U.S. at 216-217.
tion doing business in Illinois, Florida and nine other states, it is submitted that there was no reason to assume that Illinois had declared any policy that would extend to the Clay case in a Florida court. In other words, the pertinent rules of the two states, though different, were not in conflict with one another.

What light does the foregoing analysis of the Clay case shed upon the major problem of this essay? Looking backward over the cases previously considered, the Clay case resembles the Haines case in that, even if no change of domicile had occurred, Florida (like Wisconsin) would still have had a strong concern for the application of its law because Clay's property had been destroyed or misappropriated there. As in the Wisconsin case, the final opinion of the Supreme Court appears to be considering Clay's Florida citizenship as a basis for that state's interest in the application of its law. Our hypothetical example, based on Erwin v. Thomas, is like the Clay case because Illinois had no concern that its rule should be applied, just as Washington had no concern that its rule should be applied. The position of Florida in relation to Clay was very similar to that of Oregon in relation to Ruby Erwin; once the new domiciliary had moved to the new domicile (Oregon, Florida), a strong concern (in the usual sense) arose—and the other state (Washington, Illinois) had no contrary concern that its pertinent rule should prevail.

But Clay v. Sun Life Insurance Office nevertheless remains unique. Its special characteristic is the particular policy and effect of the Florida statute, as directed against the time-of-suit clause it had declared to be invalid. An economist specializing in insurance might well have regarded a time-of-suit clause as nothing more than part of the definition of the risk that the insurer had assumed. But to Florida legislators, lawyers and judges, such a clause constituted an indefensible attempt to deprive a citizen (or domiciled alien) of access to the courts of his own state. Despite its lack of detailed analysis, the bold opinion of the Supreme Court of Florida, confirmed (in the context of the fact-law pattern of the Clay case) by the unanimous decision of the United States Supreme Court, will stand for some time to come as a complete discreditation of the older Supreme Court cases, relied upon by the Court of Appeal,

and a challenge to any attempt to enforce time-of-suit clauses in choice-of-law cases.

VIII.

Brainerd Currie was understandably suspicious of claims based upon an advantageous post-transaction change of domicile. Yet he insisted that a contract between a father and mother, releasing the father from all future claims for their child’s support (even though valid under the law of the three parties common domicile when made) should be subject to invalidation if the child later acquired a new domicile.55 It was assumed that in a purely domestic case in the state of the child’s new domicile, the court would have disregarded such a contract as a defense to a claim against the father for further contributions to the child’s support.

Currie demonstrated this proposition with a hypothetical example based on the facts of the notorious New York case of Haag v. Barnes.56 He assumed that when an intimate relationship developed between Dorothy Haag and Robert Barnes, resulting in her pregnancy, both were domiciled in Illinois. An illegitimate child, father by Barnes, was born there. With each party represented by counsel, an agreement was signed in Illinois, providing that Barnes should pay Dorothy the sum of $1,000 for the future maintenance and education of the child, that Barnes should be released from all future obligations to her or to the child, and that the contract should, “in all respects, be interpreted, construed and governed by the laws of the state of Illinois.”57

After two years, Dorothy changed her domicile (and that of the child) to New York. About a year later she instituted a support proceeding against Barnes in the New York courts. Barnes pleaded the Illinois contract as a complete defense.

Under the then prevailing law of Illinois (in 1961), the father of a bastard child might compromise his legal liability with the mother without the approval of a judge, by paying her any sum exceeding $800. Under New York law, however, such an agreement of compromise made by the father and mother would be binding only when a judge had determined that adequate provision had been made for the child’s support.

56. Id.
57. Id. at 558, 216 N.Y.S.2d at 67, 175 N.E.2d at 442.
As compared to the cases (real or hypothetical) previously considered, the fact-law pattern of this hypothetical example seems clearly unfavorable to the claim of the mother and child. When the contract was made, exonerating the father from all future liability, Illinois was the only state with which the parties or the facts had any connection. Later, the mother, by her own unilateral decision, established a domicile for herself and her child in New York, whose law was much more favorable to them than that of Illinois. Nevertheless, Professor Currie concluded that New York had such a strong and legitimate concern in compelling the father to make adequate provision for his child that its interest should prevail over that of Illinois. In support of his contention he relied upon Justice Stone's powerful and persuasive dissenting opinion in the controversial case of *Yarborough v. Yarborough.* There is no need, in this essay, to quarrel with the majority decision in the *Yarborough* case. There, the father's defense against liability for the support of his legitimate minor child was based *not* upon a mere agreement, but upon the judgment of a Georgia court granting a divorce to him and the child's mother, who had raised the issue of the minor child's future support by her cross-complaint. The judgment purported to immunize the father from all future liability for the support of his minor child upon payment to a trustee of $1750, which obligation he had fulfilled. More than two years after the Georgia court had entered its decree, at a time when the minor child had become domiciled in South Carolina, and the sum paid had been exhausted, a court of that state, on the basis of the child's need as then shown, rendered a judgment directing further payments for her support by her father.

In the context of Currie's Haag-Barnes hypothetical example, Mr. Justice Stone's opinion must be read as supporting New York's concern for the welfare of the minor child domiciled in New York (an unusually vital concern, superior to that of Illinois, which had been the common domicile of Haag, Barnes and the child when the agreement was signed there, and was still the domicile of Barnes when the support proceedings were brought in New York).

The maintenance and support of children domiciled within a state, like their education and custody, is a subject in which government itself is deemed to have a peculiar interest and concern. Their tender years, their inability to provide for themselves, the importance to the state that its future citizens should be clothed,
nourished and suitably educated, are considerations which lead all civilized countries to assume some control over the maintenance of minors . . . . In order that children may not become public charges the duty of maintenance is one imposed primarily upon the parents . . . . The measure of the duty is the needs of the child and the ability of the parent to meet those needs at the very time when performance of the duty is invoked. Hence it is no answer in such a suit that at some earlier time provision was made for the child which is no longer available or suitable because of its greater needs, or because of the increased financial ability of the parent to provide for them, or that the child may be maintained from other sources. (Emphasis added by author.)

Assuming that we are persuaded by the contention of Justice Stone, as adopted by Brainerd Currie, how shall we distinguish this hypothetical case from the cases previously considered? The most obvious distinguishing factor is that we are here concerned with the sustenance and welfare of a relatively helpless and dependent minor child. Even able-bodied and educated adults are protected from harsh and unconscionable contracts. In a choice-of-law context, of course, the problem inevitably becomes more complex. The government of Illinois was apparently willing to assume all the expenses of feeding and clothing a minor child if the father would contribute $800. But this is a free country in which the mother and her minor child are entitled to move from state to state. A minor child’s need for maintenance and support will inevitably exist for a considerable period of time. A choice-of-law doctrine that would require the people of New York to recognize the absurd concession to the father, apparently granted him by the law of Illinois (then in force), would be intolerable.

IX.

In the previous eight parts of this essay, our attention has been confined to the situation in which after the alleged commission of a tort or making of a contract, one party has changed his domicile to a state whose pertinent rule of law, if applied, would clearly aid his cause. We now turn to the totally different and considerably less complicated situation in which after the alleged occurrence, one party has changed his domicile to a state whose pertinent rule, if applied, would be disadvantageous to his cause.

Since there are very few decided cases on this point, we shall
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begin with two simple hypothetical examples.

Assume, as in Part I, that state Blue had an anti-guest statute and that state Red had none. Guest and host were both domiciled in state Blue. Guest, while riding in Host’s car in state Blue, was severely injured as a result of Host’s ordinary negligence in the operation of the car. After the accident, Host changed his domicile from state Blue to state Red. Guest, though still domiciled in state Blue, brought suit against Host in state Red, alleging a cause of action against Host under the state Red rule that a host-driver should be liable for ordinary negligence.

Guest argued that, had he been a citizen of state Red when the accident occurred, a state Red court would very likely have decided in his favor. (A number of decisions support this position.) He therefore urged the state Red court to adopt an altruistic approach to this case (similar to that adopted by the Oregon court in Erwin v. Thomas) and to not discriminate against him merely because when he was injured by Host in state Blue, he was not a citizen of state Red. According to Guest, a decision in his favor would not conflict with any policy of state Blue because that state no longer had any concern for the application of its anti-guest statute to protect Host. Host had ceased to be a citizen of state Blue before the suit was filed.

Guest’s argument, though superficially plausible, rests upon an erroneous assumption. When Host was a citizen of state Blue, and Guest was injured there, that state had a clear concern that Host should be protected from liability to a guest passenger for his ordinary negligence. Did state Blue cease to have such a concern when Host changed his domicile to state Red? Of course not. Every state and nation has a strong concern that, when its citizens or domiciliaries move to another state or nation, they should not, for that reason, be subjected to a new or increased liability for acts or events occurring before they left the protection of the government of their former domicile. Host’s change of domicile necessarily subjected him to the jurisdiction of state Red courts. It was, therefore, the obligation of those courts to treat Host (a former citizen of state Blue) with the same consideration that they would expect a state Blue court to treat a former citizen of state Red who had moved to state Blue. Such reciprocity or “comity” (as it was formerly called)

60. See, e.g., Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); dissenting opinion of Mr. Justice Roberts in Cipolla v. Shaposka, 439 Pa. 563, 568, 267 A.2d 854, 857 (1970).
is one of the oldest recognized policies of choice-of-laws doctrine.

As for Erwin v. Thomas, the notion of reciprocity was totally irrelevant in that case. Because Washington had no concern whatever for the application of its law to defeat Ruby Erwin's claim to consortium damages, Oregon was free to adopt an altruistic policy, at the expense of the Oregon defendants, if it chose to do so. In our hypothetical case, however, the state Red court was not free to subvert the law and policy of state Blue in a situation where all states have a strong common interest in fair treatment of those persons who choose to change their domiciles. Moreover, were the state Red court to adopt Guest's argument, it would in effect be telling Host something very curious; it would be telling Host that he ought to have remained in state Blue until the litigation was completed or settled or barred by the statute of limitations. Would this not have been absurd? When a choice of law doctrine attempts to penalize a person for changing his domicile, there is surely something seriously wrong with it.

Suppose that both Host and Guest had moved to state Red after their accident. Those who believe that fair and rational results can be reached by "grouping of contacts" (i.e., counting up contacts without regard to their importance in relation to the policies of the domestic laws involved) may conclude that this would be a stronger case for Guest than the preceding example. It would, of course, create a true conflict problem similar to the first hypothetical example of Part I (where Guest alone after injury in state Blue moved from state Blue to state Red). But that true conflict, we concluded, should be resolved by subverting state Red's concern for Guest and his family because giving effect to that concern would have been unfair to Host. The result, where both Host and Guest have moved to state Red, should be the same. Whether Host had moved (along with Guest) to state Red or had remained in state Blue, that state would have had a strong interest in the enforcement of its anti-guest statute for Host's protection.

The conclusions advanced in this Part are contrary to certain remarks of Judge Keating, writing for the majority in Miller v. Miller, 61 a four to three decision of the New York Court of Appeals. In that case, the court faced a sharp conflict between a Maine statute limiting wrongful death damages to $20,000 and a New York constitutional provision (originally adopted 1894) that not only permitted full recovery, but prohibited any legislative enactment at-

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tempting to curtail it. The decedent and his dependents were at all times domiciled in New York. The defendant (his brother) was domiciled in Maine when the fatal accident occurred there as a result of his alleged negligent operation of a car in which the decedent was riding. When a wrongful death action was filed by the decedent's executrix, the defendant pleaded the $20,000 limitation of the Maine statute as a partial defense. The executrix-plaintiff's motion to strike out this defense was sustained by the lower courts and the defendant appealed.

The intensity of the conflict between New York's constitutional provision and the Maine statute is obvious. What brought the case within the scope of this essay was the defendant's change of domicile from Maine to New York about three months after the fatal accident, but before the suit was filed. Judge Keating, unfortunately, tried to use this event as a means of eliminating the Maine statute and its policy from the case, thereby resolving the conflict.

To the extent that the Maine limitation evinced a desire to protect its residents in wrongful death actions, that purpose cannot be defeated here since no judgment in this action will be entered against a Maine resident. Maine would have no concern with the nature of the recovery awarded against defendants who are no longer residents of that state and who are, therefore, no longer proper objects of its legislative concern. It is true that, at the time of the accident, the defendants were residents of Maine but they would have no vested right to the application of the law of their former residence . . . . Any claim that Maine has a paternalistic interest in protecting its residents against liability for acts committed while they were in Maine, should they move to another jurisdiction, is highly speculative . . . . 62 (Emphasis added by author.)

Ironically, Judge Keating's inept remarks were totally unnecessary. He could have resolved the conflict between the Maine and New York rules in either of two well-recognized ways. First, he could have noted that damage limitation statutes resulted from the fears of legislators, who had created a cause of action for wrongful death, that excessive jury verdicts might severely hinder the development of railroads and other industrial enterprises emerging in the United States in the mid-nineteenth century. The anachronistic nature of these statutes is reflected in the fact that they have been abolished in many states. Second, Judge Keating could have relied upon the fact that the Maine limitation statute had been repealed prior to the

62. Id. at 21, 290 N.Y.S.2d at 741-42, 237 N.E.2d at 882.
time the suit was filed, indicating that Maine legislators did not feel that the limitation was necessary to the welfare of its citizens. Or, he could have simply held that New York, having a strong interest in the application of its law, was entitled to enforce its own law in its own courts.

An instructive hypothetical example involving a disadvantageous change of domicile in a contract case has been provided by Professor Cavers. In the example, based upon the actual case of Bernkrant v. Fowler, California's statute of frauds invalidated oral testamentary promises, but Nevada law sustained them if clearly proven. It was assumed that the plaintiffs and Granrud, the decedent, were all domiciled in California when Granrud (for valuable consideration) orally promised to release, by his will, any sum owed to him by them (at his death) on their promissory note secured by a trust deed on their building (also assumed to be located in California). Then Professor Cavers supposed that, after making his oral testamentary promise, Granrud had changed his domicile to Nevada and died there. If the plaintiffs had brought suit against his estate in Nevada, they might have contended that "Nevada had no qualms about the oral testamentary contracts of its citizens and California policy would no longer be served by the application of its law."

But a decision for the plaintiffs would, Professor Cavers believes, be quite wrong. The policy of the California statute required that it take effect as soon as the oral promise is made and that it remain in effect until the promise is reduced to writing. "It [the statute] does not simply lie dormant pending a shift in the testator's domicile." In other words, the invalidating policy of the California statute would remain in full force for the protection of Granrud and his estate even though he had become domiciled in Nevada.

In concluding the discussion of a post-transaction change of domicile to the disadvantage of the changing party, it is suggested that judges should normally give careful consideration to any attempt to create a new liability based on events occurring before the change of domicile. Careful consideration should also be given to any attempt to increase the burden of an existing liability based upon such events, or to deprive the changing party of rights that

63. Cavers, supra note 26, at 59-61.
64. 55 Cal.2d 588, 360 P.2d 906, 12 Cal.Rptr. 266 (1961).
65. Cavers, supra note 26, at 61.
66. Id.
accrued prior to the change. Of course, in a case where the state of the new domicile has at all times had a concern in determining the legal effects of the acts and events occurring before the change (as in Miller v. Miller), the courts of that state may be justified in enforcing their own law and policy. But they ought not to pretend that the change has deprived the state of the changing party’s former domicile of all concern in the outcome of the case. However, where, as in our state Red-state Blue tort example and Professor Cavers’ contract example, the state of the new domicile has no interest (in the usual sense) in the result, its disadvantageous rule should not be applied. Such application would be grossly unfair to the changing party and would amount to an officious, unjustified invasion of the interest of his former domicile.

X. CONCLUSION

After this lengthy catalog of real and hypothetical cases, an attempt should be made to reiterate the more important contentions of the essay.

Of these, the most important has been that a major distinction should be drawn between cases where the application of the law of the post-transaction domicile would benefit the moving party and those in which it would operate to his disadvantage. In the first type of case, the state of the post-transaction domicile has an obvious concern for the welfare of its new member. But a problem is frequently created by the unfairness to the other party of allowing the moving party to improve his position by his unilateral post-transaction act.

The second type of case is entirely different. If, prior to the moving party’s change of domicile, the case presented a purely domestic or false conflict problem, the movement of one party to a state whose law, if applied, would be disadvantageous to him, would not give that state any interest whatever in the outcome. And if, prior to the moving party’s change of domicile, the case presented a true conflict problem, as to which the post-transaction domicile already had an interest (as in Miller v. Miller), that state’s interest would in no way be strengthened or enlarged by the change of domicile. Indeed, Judge Keating did not contend, in Miller v. Miller, that it would. He merely contended that because the defendant had changed his domicile from Maine to New York after the fatal acci-

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68. Id.
dent, Maine had no concern, at the time the suit was filed, that its statute limiting damages should be applied for the defendant's protection. This contention, however, was clearly incorrect. Every state has a common concern that when one of its domiciliaries moves to another state, he should not be deprived of his rights nor subjected to new or greater liabilities in relation to previous transactions. It was the duty of the New York court to recognize this concern of the state of Maine, just as it would had the defendant remained domiciled there.

We return to the case where the moving party would profit by the application of the law of his post-transaction domicile. In Parts I through IV, it was pointed out that if the case had originally presented a purely domestic or false-conflict problem, the post-transaction change of domicile would create a true-conflict problem. State interest analysis has shown that the solution of true-conflict problems is the major difficulty encountered in choice of law cases. Various techniques of reconciliation are available, but each one has only a limited sphere of application, a particular class of cases in which it can be used. Moreover, application of the law of the moving party's post-transaction domicile to his advantage usually involves some unfairness to the non-moving party. Hence, it was suggested that in cases where the post-transaction change of domicile has created a true conflict, the law of the new domicile should usually be disregarded. This doctrine is supported by the first part of Justice Traynor's opinion in Bernkrant v. Fowler\(^69\) and by the Supreme Court's decision in the Yates case,\(^70\) indicating that application of the law of a post-transaction domicile may sometimes be unconstitutional.

But an exception to the foregoing doctrine should be made in cases involving a parent's legal responsibility for the support and education of a minor child. Some states permit a father's responsibility in this respect to be terminated or limited by a contract between him and the child's mother. But if, after the making of such a contract, the child should acquire a post-transaction domicile, the courts of that state would be justified in enforcing their domestic rules against the father even though their rules are inconsistent with those of the state of the common domicile of the mother, father and child in force at the time the contract was signed, and even though their rules invalidate the contract. This exception is rooted in the

\(^{69}\) 55 Cal.2d 588, 360 P.2d 906, 12 Cal.Rptr. 266 (1961).
\(^{70}\) 299 U.S. 178, 81 L.Ed. 106, 57 S.Ct. 129 (1936).
particularly vital concern that the state of the minor child’s new domicile has in the child’s welfare, coupled with the fact that the child’s needs as well as the father’s ability to meet them, will change from time to time.\textsuperscript{71}

Three types of cases have been discussed that radically differ from those considered in Parts I through IV. The common feature of all three types was that the post-transaction change of domicile did not, \textit{ipso facto}, create a true-conflict problem. It was therefore suggested that, for reasons varying in each type of case, some consideration should be given to the interest of the new domicile in the application of its law.

In the type of case illustrated by \textit{Clay v. Sun Insurance Office Ltd.},\textsuperscript{72} the policies of the pertinent domestic rules indicated that only the post-transaction domicile (Florida) had any concern in the outcome of the case. A Florida statute invalidated a time-of-suit clause that would have denied access to its courts by its citizens (Clay) in defiance of its Statute of Limitations. No other state had any concern in the decision.

In the type of case illustrated by a hypothetical example based on \textit{Erwin v. Thomas},\textsuperscript{73} the laws of the plaintiff’s domicile, also the state of harm, were adverse to her claim. The laws of the defendant’s domicile, also the forum, favored the plaintiff. Thus, the court might either have dismissed the plaintiff’s claim or altruistically upheld it by applying the law of the defendant’s domicile. If, after the event, the plaintiff had become domiciled in the state of defendant’s domicile, that state would have acquired an interest (in the usual sense) in the enforcement of its law for the plaintiff’s benefit. Moreover, such enforcement would not conflict with the law and policy of any other state. In such a case, the court should normally give some consideration to the effect of plaintiff’s change of domicile.

In the type of case illustrated by \textit{Haines v. Mid-Century Insurance Co.},\textsuperscript{74} a true-conflict already existed when one party made an advantageous post-transaction change of domicile. Thus, disregarding the policy implications of the change of domicile would not have resolved the true conflict. On the contrary, consideration of those policy implications might well provide an additional ground for enforcing the law of the new domicile, thus assisting in the resolution

\textsuperscript{71} See text at note 59, supra.
\textsuperscript{72} 377 U.S. 179 (1964).
\textsuperscript{73} 264 Or. 454, 506 P.2d 494 (1973).
\textsuperscript{74} 47 Wis.2d 442, 177 N.W.2d 328 (1970).
of the true conflict. This apparently happened in the \textit{Haines} case. It seems inevitable that in similar cases, judges will give at least \textit{some} consideration to the policy implications of the change of domicile.

In short, the resolution of true conflict cases has come to be recognized as the outstanding problem of choice of law in the United States. The problem created by a post-transaction change of domicile to the advantage of the changing party will be, in many cases, overshadowed and influenced by the larger problem of conflict resolution. Nevertheless, state policy analysis must recognize the concern of the newly acquired domicile, as well as the element of unfairness to the non-moving party involved in such recognition. Particular policies of particular laws will also influence decisions, as illustrated by the \textit{Clay} case and Currie's parent and child example. This essay has suggested a limited number of compromise solutions in the hope that they may be helpful to judges and advocates—and to my colleagues who must train the judges and advocates of the future.