Hastings Law Journal

Volume 32 | Issue 6 Article 8

1-1981

Concluding Remarks

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By DONALD T. TRAUTMAN

Like Professor Sedler, I shall limit my concluding remarks to a few comments on the choice-of-law issues presented. Although our reasons for dissatisfaction may differ radically, Dean Hay and I both find much to criticize in the current state of the law of conflicts, and we both deplore solutions in terms, as he puts it, of "what the market will bear constitutionally by way of the . . . application of local law."[1] I also applaud in general his plea for greater awareness of the federal concern and for development of choice of law as an aspect of federal common law, a plea I have made in some detail elsewhere.[2] A possible disagreement between us is that I perhaps have more faith in the courts, state and federal, than Dean Hay does. Finally, I am indebted to Professor Sedler for characterizing the differences between him and me as ones relating to the function of courts in conflicts cases; in the remaining portion of these remarks, I shall address that question.

My first reaction to Professor Sedler's observation that we disagree about the function of courts in conflicts cases was one of surprise; I did not think I had dealt with the question and certainly do not want to be understood as suggesting that the courts' function can be fairly summarized as one of "policing," as he puts it, the multistate order and "subordinating the policy underlying a rule of substantive law in favor of supposed multistate policies."[3] I would be distressed if the courts were doing what he says they are. I believe a fair summary of what courts have always done and are continuing by and large to do is to seek to consider all relevant concerns, not only those of the forum but of other concerned jurisdictions and of the multistate order, in order, as I perhaps too

1. Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1666 (1981).

2. *See generally* Trautman, *The Relation Between American Choice of Law and Federal German Law*, 41 LAW & CONTEMP. PROB. 105 (1977).

3. Sedler, *Concluding Remarks* 32 HASTINGS L.J. 1681, 1681 (1981).

briefly said in my first statement, to do justice between the parties in light of all those concerns. On too many occasions to be dismissed as aberrations, the courts have subordinated local policy to policies drawn from other sources, and I have no reason to suppose that the dominant strains of conflicts thought will discourage them from continuing to do so.[4]

Although this is not the place to attempt a full statement of the function of courts in conflicts cases, Professor Currie's basic premise on this question should be recalled. It was that a court lacked competence to weigh the conflicting interests of its own and of another state.[5] This premise is antithetical to the assessment of competing policy that has been and is being carried out by courts in multistate cases, admittedly with greater difficulty but, it is hoped, with the same attitude of responsibility and restraint shown by common law courts in molding the law in any area, domestic or multistate. The difficulty is greater in multistate cases but so too is the responsibility; as Professor von Mehren has pointed out,[6] the court in a multistate situation is in a somewhat different position institutionally from that of a court in a domestic case, in which the responsibility to further the basic aims and purposes of the law is shared with, and complementary to, legislative (and, it might be added, at times other institutional—executive and administrative) responsibility. Ultimately, however, an inquiry into the function of the court must ask the same question in all cases: how effectively it performs as an instrument of institutional settlement.[7] Time and space preclude more than a few suggestions about what would be required to satisfy the criterion of effectiveness. At the least, as I suggested at the outset, I suppose the effectiveness of the court as

4. I scarcely know where to begin in citing instances, although a number of the best known cases are in A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 215-327 (1965). Among my favorites are Lauritzen v. Larsen, 345 U.S. 571 (1953), Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266, Shannon v. Irving Trust Co., 275 N.Y. 95, 9 N.E.2d 792 (1937), and Cammell v. Sewell, 5 Hurl & N. 728 (Ct. of Exch. Ch. 1860), to take an important selection over time from jurisdictions entitled to respect. Some recent examples not fitting the Currie model include Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978), and *In re* Estate of Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

5. For references to various expressions of this view in his writings, see A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 78 n.28 (1965).

6. *See* von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROB. 27, 39 (1977). *Cf.* von Mehren, *The Significance of the State for Choice of Law*, in FESTSCHRIFT FÜR KONRAD ZWEIGERT 287 (H. Bernstein, V. Drobnig & H. Kötz, eds. 1981).

7. *See* H. HART & A. SACKS, THE LEGAL PROCESS 4-6 (Tent. ed. 1958).

an instrument of institutional settlement requires it to seek to do justice between the parties in light of all relevant concerns and to seek to contribute to and participate in the growth of rule and principle. A multitude of questions are implicated; I suggest a few. Does the decision do justice to the individual parties in light of their legitimate expectations? Will the litigants and others similarly situated perceive the result as a fair way to settle this and similar controversies? Does the decision provide guidance to others in similar situations? Does it advance and contribute to our understanding of the policies of the law at stake? Does it command respect for the law and for the judicial process? Does it bring greater stability and increased benefit or satisfaction to the societies concerned?

Certainly some of these questions are answered in a more satisfactory way by the approach of the California court in *Bernkrant* and *Offshore Rental* than would be the case under the approach proposed by Professors Currie and Sedler. Again, in *Neumeier,* conceiving the court's function as I have would have produced a far more satisfactory result than that achieved by asking whose ox would be gored by one result or the other. Even this very limited set of questions about the effectiveness of the court's performance demonstrates how far short of the mark a court falls if it sees its function as one of advancing some, but not all, relevant policies and of being satisfied if the policies of the concerned forum happen, whether desired or not, to produce a sound result for the particular parties. Certainly many of the demands of effective institutional settlement are not satisfied, some indeed are barely recognized or are blindly overlooked, by forum-biased approaches to choice of law.