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Is This Conflict Really Necessary?*

ROGER J. TRAYNOR†

Conflict of laws is one of the most hazardous of subjects, and it is with hesitation that I approach it. Each new conflicts case seems to present an extraordinary problem which refuses to fit into the existing scheme of the law. However, there is no problem so extraordinary as to defy thinking about the ordinariness underlying the extra. It may hearten you to know that here and there judges have come to notice that conflict of laws, far from huddling in esoteric passes, exists for anyone to see in many a mundane situation that never even comes to court because no lawyers happen to be about with seeing eyes. Moreover, it has for a long time been eking out an existence of sorts in the courtrooms themselves, though in only a few states has it begun to have recognizable features. Then why did the plot get so thick when the mystery was so thin?

One explanation is that until recently most judges have failed in a purported conflicts case to ask: Is there a true conflict here? Had they begun with this question they would have been compelled to inquire sooner how sound was the prevailing conflicts theory of vested rights embodied in the Restatement. Meanwhile they would have hastened the day of International Shoe Co. v. Washington1 by focusing their attention on the prevention of needless conflicts engendered by mechanical rules. It would then have taken less than sixty-eight years to move from Pennoyer v. Neff2 to International Shoe.3 We might well remember that this advance is on one front alone and be on guard against another such sixty-eight-year lag, for the world seems destined to move still more swiftly ahead of lagging law from 1959 to 2027 than it did from 1877 to 1945.

However tardy, International Shoe significantly released state courts from the territorial power concept of jurisdiction, which generated conflicts. It shifted the emphasis to jurisdiction based on minimum contacts

* Address presented on Law Day, April 24, 1959, at the University of Texas School of Law.
† Associate Justice, The Supreme Court of California.
1 326 U.S. 310 (1945).
2 95 U.S. 714 (1877).
3 326 U.S. 310 (1945).
with the state, fair notice and opportunity to be heard. It thereby facilitated suit where the facts giving rise to the cause of action occurred, regardless of defendant's absence or nonresidence. By thus insuring a rational basis of jurisdiction, it served to eliminate the choice-of-law problems that necessarily arose when the plaintiff was compelled to resort to the courts of the state in which he chanced to serve the defendant. However conscientiously such courts have ordinarily sought to apply the substantive law of the state where the facts took place, they have become embroiled in the chronic problems of characterization, and in the illusory classification of statutes of limitation, statutes of fraud, and rules governing burden of proof.

Meanwhile the plea of forum non conveniens has become a useful complement to the International Shoe doctrine, since courts persist in recognizing service within the forum state as a basis for personal jurisdiction even when that state has no contact with the cause of action. Together they can do much to discourage forum-shopping and compel litigation of transactions where they took place rather than where the defendant is by chance served with process. It of course bears noting that as yet the International Shoe doctrine, including its most recent application in McGee v. International Life Ins. Co., has been applied only to corporations by the United States Supreme Court, though its extension to other defendants seems probable.

As a counterbalance, Hanson v. Denckla reaffirms the restriction of Pennoyer v. Neff on the personal jurisdiction of courts in states that have no minimal contacts with the defendant. Nevertheless there is a net gain of jurisdiction available to states in the modern concept of due process that envisages not only minimum contacts as a primary basis of jurisdiction but also fair notice and opportunity to be heard as the primary tests for valid service. Most states have not yet begun to exercise this jurisdiction. In part the fault lies with statutes that have not kept pace. Even antiquated statutes, however, may be so geared to the due process clause of the United States Constitution as to lend themselves to interpretation in accord with the mutations in that clause. One might note by way of illustration how the California courts have interpreted an 1872 statute authorizing service of process on foreign corporations doing business in the state. They have reasoned that doing business was adopt-

6 95 U.S. 714 (1877).
ed as a test not for immunity but for jurisdiction, consonant with the then tenor of the due process clause. Any test of jurisdiction geared to its then tenor and expressed in pliant language was therefore no more than illustrative of service of process in accord with the jurisdictional concepts of that period. As those concepts became more flexible the courts found that the wording of the 1872 statute yielded a correspondingly flexible meaning. Thus in the given case it covered the local activity of the corporation because that activity gave rise to the cause of action. It is worth noting that “doing business” would probably call for greater local activity if the cause of action were not local.

When statutes lack such flexible language, however, only the legislatures can bring them up to date. The Illinois legislature set an example by enabling the state to take full advantage of permissible personal jurisdiction through service of process outside the state, provided the cause of action arose in Illinois from the transaction of any business, the commission of a tortious act, the ownership, use or possession of any real property or the contracting to insure any person, property, or risk within the state whether the policy was delivered by mail or otherwise.

If other states follow the example of Illinois, they should avoid such pitfall phrases as “tortious act” which raised the problem in *Nelson v. Miller* of whether the court would be precluded from taking jurisdiction until the plaintiff had established that defendant’s act was a tort. Not all courts might resolve the problem as the Illinois Court did by construing the statute as not requiring a determination of the merits as a basis for determining jurisdiction. Drafters of statutes can probably avoid the problem by avoiding such words as “tortious.” Unless they take such care a defendant might take a default judgment and resist subsequent enforcement in his own state by collateral attack for lack of jurisdiction, thus compelling plaintiff to litigate the merits there.

Even given a model law, state boundaries are still significant and *Pennoyer v. Neff* will continue to restrain the personal jurisdiction of courts. Suppose, for example, a nonresident defendant denied the ownership, use, or possession of the local real property giving rise to the cause of action, and that he had ever done anything in or out of the state in any way connected with the property. Suppose, specifically, that he denied ownership of a building that collapsed and injured the plaintiff. A court able to reach out for the nonresident owner of a local building could hardly reach out to impose ownership on a nonresident who denied it. It is one thing to take a nonresident owner’s local property or

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8 ILL. REV. STAT. ch. 110, § 17 (1957).
10 95 U.S. 714 (1877).
impose liability upon him for injuries caused thereby. It is quite another to foist upon a nonresident the obligations of ownership.

If a state is not free to confer on an unwilling nonresident the status of an owner, a fortiori it is not free to confer upon him a status attended by even heavier obligations, such as fatherhood, as a recent California case made clear. The pertinent statute cryptically stated that “An action may be brought for the purpose of having declared the existence or nonexistence between the parties of the relation of parent and child, by birth or adoption.” Plaintiff, domiciled in California, brought an action under the statute against a nonresident defendant based on service outside the state. He sought to justify such service as in accord with local code provisions on the ground that the proceeding to establish paternity was a proceeding in rem by analogy to ex parte divorce proceedings. He contended that, as with marital status, the state of his domicile had sufficient interest in his status as defendant’s child to adjudicate that status without securing personal jurisdiction over the defendant. The court first declared that even though the proceeding dealt with status it was not necessarily in rem. It went on to distinguish the ex parte divorce cases, noting that a state court’s termination of a marital relationship to which a domiciliary is a party is a far cry from creating that relationship and making a nonresident an involuntary party thereto. An absent defendant’s regret at the termination of his marriage would hardly equal his outrage at being made party to a marriage by some foreign court. Yet the termination-creation dichotomy would not invariably serve to test jurisdiction. Thus an absent defendant might be equally outraged at the termination or creation of a parent-child relationship by a foreign court.

We are driven to question the reality of traditional jargon about in rem and in personam jurisdiction in these aggravated clinical cases where we deal with the fictional res of status. What could be more personal than the intimate marital or parental relationship? Whatever the historical explanation of their reification as a means of circumventing Pennoyer v. Neff while purporting to respect it, the time has come to slough off the ritualistic classifications through which judges still feel bound to think their hard way to realistic decisions.

Why should they not be free to consider jurisdiction at the outset in the complex of the parties’ contacts with the forum state, the interests of the state concerned in the outcome, and a prevailing concept of fair play to all parties? The ex parte divorce cases might well have been decided openly on these considerations when a plaintiff asked no more

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11 Hartford v. Superior Court, 47 Cal. 2d 447, 304 P.2d 1 (1956); see Horowitz, supra note 5, at 369–77.
12 95 U.S. 714 (1878).
than freedom to remarry and there remained to the nonresident defendant no more than a marriage in name. In this exceptional situation a court could reason that even a defendant who had no contacts whatever with the forum state would not be gravely affected by a decree enabling the plaintiff to remarry, since there would be no way of compelling the plaintiff to cohabit with defendant and no effective way of preventing the plaintiff from cohabiting with anyone else. Moreover, divorce proceedings are not for the most part adversary except in name. In any event, a defendant's purposeless interest in barricading the plaintiff's avenue to freedom is overwhelmingly outweighed by the plaintiff's purposeful interest in securing freedom. Finally, the dubious interest of defendant's state in perpetuating a broken marriage in limbo is overwhelmingly outweighed by the forum state's major interest in the orderly resolution of a plaintiff domiciliary's marital status.

State courts, however, are not free to take the initiative in abandoning consideration of ex parte divorces in terms of a fictional res. So long as they are thus constrained they must discourse in the jargon of in rem jurisdiction, albeit with dismay that realistic analysis is thus obscured. The constraint seems destined to continue. The Supreme Court's insistence in the 1958 case of Hanson v. Denckla13 that defendant must have some contact with the forum state compels resort to a fictional res when contact cannot otherwise be established.

The interacting considerations of the parties' contacts with the forum state, the interests of the states concerned in the outcome and a pervading concept of fair play to both parties could have served equally well to preclude jurisdiction when a plaintiff sought to terminate his duty of support to his nonresident spouse, or alternatively when a plaintiff sought support from the nonresident spouse.14 All three considerations would militate against jurisdiction with such drastic consequences to the nonresident defendant.

There is an element of contract and some equality of parties in the marital relationship. These are lacking in the parent-child relationship, and the interest of the state therefore becomes correspondingly larger in any action involving parent and child. Contracts of both parties with the state also take on larger and perhaps paramount importance, since the consequences of any action either declaring or terminating the relationship are so momentous to the parties. In conjunction with fair play, these considerations would normally preclude jurisdiction over a nonresident defendant having no contact with the forum state. Nevertheless,

even here we must recognize that the state where a child is present must be competent to regulate his custody whether his parent is present or not, and if the parent cannot be found or has failed to discharge his parental obligations, that state, given the best notice reasonably possible, should be free to promote the interest of the child by permitting his adoption.

Though a liberalized due process clause now makes available to state courts an enlarged jurisdiction over nonresidents with the appropriate minimum contacts, state statutes that prattle of “in rem” or impose dated tests continue to plague the courts. Thus, in a 1957 California case, the court felt compelled to find a quasi-in-rem basis for jurisdiction, even though there were enough contacts with the state to justify full in personam jurisdiction over the nonresident defendant, because a statute authorized a personal judgment only if the defendant was a resident at the time of suit. Plaintiffs, members of the American Federation of Musicians, sought a declaration that a collective bargaining agreement providing for employer payments to a New York trustee was invalid. Plaintiffs contended that the payments represented wages wrongfully diverted to the trustee. There was personal jurisdiction over the employers and the union but the statute precluded it over the trustee. Could there then be jurisdiction quasi-in-rem to determine the interests of the plaintiffs and trustee in the intangibles in question? Was the chose in action, the payments admittedly due from the employers to the plaintiffs or the trustee, “property in the state” under a statute governing actions relating to local real or personal property in which a nonresident defendant claims an interest?

The statute was construed to give the court the full jurisdiction consonant with due process. Plaintiffs had asked for a declaratory judgment that would have the effect of terminating the trustee’s interest in the trust res. We noted that in actions involving intangibles a court could take jurisdiction for some purposes without personal jurisdiction over all the parties. It seemed as irrational to resolve the problem by assigning a fictional situs to intangibles as it would to pin a tail blindfolded to a nonexistent donkey. Instead it was identified as a problem of jurisdiction over persons and property. It was resolved in terms of the interacting elements of the parties’ contacts with the forum state, the interests of the states concerned in the outcome, and the pervading concept of fair play to all parties. All of the parties had substantial contacts with California, the forum state. Plaintiffs were residents of California. The payments

in question allegedly represented their wages for work in California. The major elements of the transaction were in California; the trustee had brought himself into this essentially local transaction by accepting the trust; and under conventional choice of law rules, California law would govern the question whether plaintiffs' compensation could be diverted to the trustee.

California afforded an eminently convenient forum. Fairness to plaintiffs demanded that they be able to reach the fruits of their labors before they were removed from the state. The union defendant and the employer defendants were within the personal jurisdiction of the court. Fairness to them demanded a final adjudication of the conflicting claims of the plaintiffs and the trustee. Had we held that the trustee's absence precluded a declaratory judgment that would have the effect of terminating his interest, plaintiffs could still have asserted that the employers' payment to the trustee would not discharge the employers' obligation to them, and that the federation would likewise be independently liable for damages for breach of its fiduciary duty. The employers would then have been subject to multiple actions, one by the plaintiffs and the other by the trustee, with the attendant risk of double liability.

The case graphically illustrates how local statutes can limit the jurisdiction of courts available under the due process clause. The statute precluding a personal judgment unless the defendant was a resident at the time of suit ruled out the possibility of a judgment against the trustee that would hold him liable for an alleged breach of trust or compel him to make an accounting. At most the court could determine only his interest in the trust res under another statute authorizing the determination of a nonresident's interest in property in the state. Clearly the Legislature did not regard a judgment under this statute as a personal judgment such as was precluded by the other statute. Yet it would affect the rights of persons as any judgment does, and the jurisdictional question is not solved simply by regarding the proceeding as in rem. The case made clear that realistic tests to determine jurisdiction to grant the specific relief sought must be applied regardless of labels. Justice is ill-served by mechanical ones.

It is time we had done with mechanical distinctions between in rem and in personam, high time now in a mobile society where property increasingly becomes intangible and the fictional res becomes stranger and stranger. Insofar as courts remain given to asking "Res, res—who's got the res?" they cripple their evaluation of the real factors that should determine jurisdiction. They cannot evaluate the real factors squarely until they give up the ghost of the res. As they do so, the gap will narrow between the tests of jurisdiction and the tests of forum non conveniens. With these converging, we can expect them to absorb choice-
of-law tests. This is eminently sound, for the state whose law controls is the one whose courts are best qualified to interpret and apply it. There would be no better way of decreasing choice-of-law problems and hence conflict than thus to channel the litigation of transactions to that state.

Conflicts in certain areas are also bound to be minimized as we make progress with model and uniform laws. Indeed, conflict might by now have become uncontrorollable had it not been for the pioneer uniform laws. Imagine how disunited life would have been in the United States had each state gone its ruggedly individual way on negotiable instruments, bills of lading, warehouse receipts, stock transfers. Imagine how negotiable instruments, those so-called couriers without luggage, would have been slowed down if some states had demanded heartier endorsements than others. Imagine a holder trying to hold on to his due course when varying state rules set the course in all directions. Imagine the village curlicues that would have appeared on bills of lading and warehouse receipts. Imagine the bewilderment of shareholders trying to keep stock of their titles without benefit of uniform rules.

Lest we grow complacent because we now have some uniform laws, we might now and again call the roll of problems that still cry for uniform solution. True, we have a National Conference of Commissioners on Uniform State laws. In all too large part, however, its proposals lie idle. The grass that grows over them bears witness to our professional apathy, for they might go far to clarify the law in many areas that needlessly breed conflict. We need town criers in every hamlet to arouse interest in model acts that would enable us to will our worldly goods in accord with local rules with some assurance that the same rules would govern if at death we had another domicile or our goods another situs. It is unfortunate that they so often do not, in an age when life and death in an ancestral home on Blackacre is the exception rather than the rule, and when a decedent so frequently leaves property in different forms at different places. The need grows daily for widespread study and action on the Model Execution of Wills Act and the Uniform Probate of Foreign Wills Act. There should also be study and action as to proposals that would facilitate the administration of decedents’ estates and rid it of needless expense.

The large question is how one enlists interest and moves from there to study and action. Only occasionally does a judge have the luxury of expounding on the law that might be instead of the law that is. Lawyers, engaged in the practice of the law that is, are hard put to it to do more than enlist interest in law revision through their bar associations. We

Such proposals would include the Uniform Acts on Powers of Foreign Representatives, the Ancillary Administration of Estates, The Intestate Arbitration of Death, Taxes, and the Interstate Compromise of Death Taxes.
tend to think that legislators can readily enact model laws. They are so heavily engaged in investigation and lawmaking on so many fronts, however, that we cannot expect them to close ranks for the single-minded task of making repairs and renewals in the common law. What they can do, with the active cooperation of the bar, is to set up law revision commissions such as are now at work in such states as New York, New Jersey, and California. Such commissions, secure enough to withstand the prevailing winds of pressure groups, can make the maximum use of the abundant wasting assets of scholarly studies. The day is fast coming when no state can afford to be without such a commission.

Meanwhile the courts could do much more than they have done toward a rapprochement of states in the optimum development of common law. The more courts strive for the optimum, the more they will liquidate local anachronisms that breed conflict. The more they realize that judicial law-making is something more than parroting the once timely wisdom of their predecessors or perpetuating their sometimes unfortunate foolishness, the more they will come to share at least the idiom of their own day and therefore common rules. If I speak confidently and not hypothetically of such a prospect, it is because of a belief that law schools are training future lawyers and judges who will be ready, willing, and able to analyze universal problems in a universal language that transcends archaic modes of thought and the patois of their own provinces.

Whatever studied efforts accomplish, there will be other forces at work to diminish conflicts. Thus, when Congress preempts a field, as it did with the Federal Employers’ Liability Act, it cuts down conflict therein. Likewise, it cuts conflict down when it legislates interstitially on such matters as interstate free railroad passes. Not all federal legislation, however, majestically preempts a field or modestly fills a chink. Often Congress makes a camel-like entry into a field that compels the states to move over, but not to move right out. The resulting uneasy joint tenancy, with state law’s dubious right to survive, does not always cut down conflict, and sometimes breeds it anew. How far is the old tenants’ authority cut? How far does the new tenant choose to control? As yet we have only sporadic answers to these questions.

The federal government itself, in countless new contacts with persons, is nouveau riche with authority and seems sometimes uncertain in which way to use it. There are sometimes no clues in the federal statutes, let alone a directive specifying the substantive rules, or a directive such as the one in the Federal Tort Claims Act, specifying as the applicable law “the law of the place where the act or omission occurred.” The Su-

preme Court must then take its long views of the lay of the land, always mindful of federal union, in declaring whether federal or state law or both are applicable in a given relation between the federal government and persons. Enough cases are now emerging to suggest an evolution of at least two complementary tests. Cases seriously involving the very structure of a federally created institution, such as a national bank or the very functioning of a federal program such as National Service Life Insurance, call for a universal rule. Cases without such repercussions, predominantly involving relations among persons, may call for appropriate state rules. Thus state law controlled the question whether an illegitimate child came within the meaning of "children" in the copyright act providing for their succession to the right of copyright renewal. Obviously the case did not seriously involve the functioning of federal copyright; it involved the parent-child relationship that has traditionally been a state concern.

Whether the Supreme Court, in relation to federal statutes without specific directives, formulates a federal substantive rule or invokes an appropriate state rule, it makes federal common law. When the appropriate state rule represents a choice among conflicting ones, the court also makes a choice-of-law rule that is henceforth binding upon the states. In this development of federal common law, it is free of the rule in Erie R. R. v. Tompkins as extended by Klaxon Co. v. Stentor Elec. Mfg. Co., which compels federal courts to apply not only local statutes but also state decisional law, including choice-of-law rules. That rule is limited to cases that involve diversity of citizenship and lack a controlling federal question. Its underlying theory is that the constitutional grant of jurisdiction to federal courts in such diversity cases, unlike the grant of jurisdiction in admiralty cases, carries no grant of power beyond the passive application of state law. There is no such restriction of their power, however, on federal questions. There can hence be no restriction in this field, such as there is under the Klaxon case, on their power to make federal choice-of-law rules. They can make them in the open field unhampered by the host of irrational and inconsistent precedents that wander round the inviting shady premises of the Restatement.

[27] See Mishkin, supra note 20.
Given this power of federal courts, there is a corresponding dispossess-
ion of state courts and hence a diminution of conflicts. Moreover, if the
federal courts develop an exemplary federal common law of conflicts,
their rules are bound to find their way into state law on similar problems
and thus to diminish conflicts further.

Exemplary federal rules, however, could hardly have more than this
limited effect. There would remain undisturbed the coral reefs of state
law on conflicts involving no federal question. It behooves us then to
inquire into the possibilities of diminution of conflict through exemplary
state rules. They have been so far from exemplary in the past as to defy
rational and consistent development. Yet it became clear a generation
ago that a deep fault lay in the underlying theory of a superlaw set forth
as gospel in the Restatement, with an attendant catechism of questions
and answers.

Cook and Lorenzen and other scholars such as Currie, Ehrenzweig,
Cavers, and Stumberg, have demonstrated that superlaw is the most
impractical law on earth. There is compelling logic in the corollary that
within constitutional limitations local law is supreme. Judges must then
painstakingly evolve pragmatic exceptions to the local law that will
coalesce into a realistic law of conflicts. However hard their task is as
they work their way out of the wreckage of meretricious theories, they
can at least evaluate competing policies free of the misconceptions which
led to mechanical decision. Given a focus properly on local law and
vision presumably free of parochialism, judges can appraise the appro-
priateness of local law for the case in comparison with any plausible
exceptions.

In a series of articles that brilliantly set forth an affirmative new ap-
proach to conflict of laws, Professor Brainerd Currie 28 has demonstrated
that often there is no real conflict and therefore no real basis for advanc-
ing an exception to the local law. He first sets apart the obvious case
wherein a court refers to foreign law, not for the rule of decision, but for
a datum point. Thus under a statute conferring benefits on widows, a
court may refer to the law of another state to verify a disputed contention
that a claimant has been married under that law. With that question re-
solved, the court can then determine the applicability of the local statute.

When it seems that the law of another state might also afford the rule
decision, Professor Currie would have the court look first to see if there

28 Survival of Actions: Adjudication versus Automation In The Conflict of Laws, 10
Stan. L. Rev. 205 (1958); Married Women's Contracts: A Study In Conflict-of-Laws
Method, 25 U. Chi. L. Rev. 227 (1958); On the Displacement Of The Law of The
Forum, 58 Colum. L. Rev. 964 (1958); The Constitution And The Choice of Law:
Governmental Interests And The Judicial Function, 26 U. Chi. L. Rev. 9 (1958);
Notes on Methods and Objectives In The Conflict of Laws, 1959 Duke L.J. 171. See also
is a local policy. If there is, the court would then look to see if there are enough local contacts with the case to give the forum state an interest in applying that policy. It would go through the same analysis as to the policy, contacts, and interest of the other state. The court would not yield to the interest of the other state except when there is no local policy or no local contacts sufficient to give the forum state an interest in the application of local policy. Professor Currie thereby succeeds in breaking away from the fuzzy interchange of policy, contacts, and interest that has characterized our awkward efforts to abandon the lexicon of superslaw. He clarifies the meaning of all three by putting first things first.

Such clarification is heartening to judges reluctant to resolve problems in terms of the old lexicon, yet reluctant also to improvise at close range to an isolated case that has come up at random in a crowded calendar of unrelated ones. It seems clear that with such experimental pitons at hand, a judge stands a far greater chance than before to reach at least a ledge from which he can not only prepare for further exploration but secure a rope to others.

Suppose now we test the proposition that, in the main, courts should apply the law of the forum except when there is no local policy or no local contacts sufficient to give the forum state an interest in the application of local policy.

Certainly there should no longer be any question of the appropriateness of local law if a proposed exception to that law would defeat a legitimate interest of the forum state without serving a legitimate interest of any other state. A court may find it difficult to ascertain whether a legitimate interest exists in each state, but it is not thereby excused from making inquiry. When it fails to do so, and assumes an interest without demonstrating it, there is no clear basis for its decision. Thus in one case a student at a Washington College was injured on a college-sponsored tobogganing excursion in Idaho, allegedly through the negligence of the college. Under Idaho law the college was immune from liability. Washington policy precluded immunity of charitable corporations for negligence. Washington had enough contacts with the case to give it an interest in the application of its policy. Even so, a United States District Court in Washington, following Washington choice-of-law rules, granted summary judgment for the college under the law of Idaho because it happened to be the place of alleged injury. It thus defeated a legitimate interest of the forum state without inquiring into the interest of either Washington or Idaho. The sole issue it decided was the capacity of the college to be sued. It never reached the issue whether a tort had actually been committed, and the place of injury was therefore as irrelevant as it was fortuitous, unless perchance Idaho had an interest in the issue of

capacity to be sued. It is bad enough for courts to prattle unintelligibly about choice of law, but unforgivable when inquiry might have revealed that there was no real conflict.

The reports abound with such confusion. Thus a Wisconsin court frustrated its own state's policy, permitting spouses to sue each other for negligence, with the usual ritual about place of wrong that led it to choose the law of Illinois which had a contrary policy. Its preoccupation with place of wrong insulated it from any concern that it might be giving Illinois law a wider application than Illinois itself had contemplated. It is hardly plausible that Illinois policy was ambitious enough to envisage spouses wherever they might be domiciled. Lack of necessity is the stepmother of invention, however, and the Wisconsin court cerebrated to make a choice of law heedless of whether or not a conflict existed to compel it. The date of this case was 1931. Lest you write it off as ancient history, it bears adding that it is still repeating itself.

As it was repeating itself in Connecticut in 1955, California closed the book on it in a case on an Idaho accident involving California domiciliaries. We had occasion to make a contemporary declaration of California policy, namely, that tort actions are permissible between brothers and sisters even though minors, and that minors may sue their parents for willful or malicious torts. We went on to hold that because of its substantial contacts with the case, the state had enough interest in the application of its policy to invoke local law as the appropriate law. We held that disabilities to sue and immunities from suit because of a family relationship are properly determined by reference to the law of the state of the family domicile and that hence no conflict was involved on the issue of capacity to sue and be sued.

"That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries in temporary absences from their home."

Other situations arise in which courts must be on the alert against making exceptions to the local law that would defeat a legitimate interest of the forum state without serving the interest of any other state. Though

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they arise all over the country, I single out another California case only because I remember it vividly as a striking illustration of the problem.

Two cars collided in Flagstaff, Arizona. All of the parties were residents of California. Plaintiffs, the driver of one car and his two passengers, sued the administrator of the estate of the driver of the other car, who died of his injuries. California permits the survival of tort actions and Arizona does not.

California policy views damages for personal injuries as compensatory and the survival statute implements that policy by subordinating the interests of the decedent’s heirs, legatees, devisees and creditors to the interests of the injured person. California contacts were more than sufficient to give the state an interest in applying its policy. Not only were the parties residents of California but the decedent’s estate was being administered in California. The court parted company with the Restatement by expressly rejecting the law of the place of wrong. It applied California law and allowed recovery. Had it mechanically invoked the law of the place of wrong, it would have made an exception to the local law, defeating a legitimate interest of the forum state without serving the interest of any other state. Even though Arizona had a policy giving preference over injured claimants to heirs, legatees, devisees and creditors of an estate, there was no indication that it had any contact with the case other than the fortuitous occurrence of the accident in Arizona, hardly sufficient to give it an interest in the application of its policy. Thus there was no real conflict of laws in the case.

So far we have seen how a court that assumes a conflict even though none may actually exist can be misled into making an irrational exception to the local law. Such a court can also be misled into an irrational insistence on local law. A California case is again illustrative. Plaintiff, a resident of California when the action was brought but not at the time of injury, sought recovery from an Hawaiian resident whose child caused his injury in Hawaii. Hawaiian law made resident parents liable for the torts of their minor children. California law did not. California’s policy of immunizing parents hardly envisaged Hawaiian parents of children who committed torts in Hawaii. In any event, the state had no contacts with the case, apart from plaintiff’s residence at the time of the action, to give it an interest in applying its policy. Since Hawaii not only had a

34 Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); see Currie, Survival of Actions: Adjudication versus Automation In The Conflict of Laws, supra note 28.

35 It may not be amiss to add that although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law.

well-defined policy but substantial contacts with the case, its law would have qualified eminently as an exception to the local law. There was thus no conflict. Nevertheless the court saw a ghost and flatly refused to take jurisdiction "on account of the conflict of law which exists between the forum and the foreign territory." It thus defeated a legitimate interest of Hawaii without serving any interest of California. In the process it also defeated the legitimate interest of its own resident in recovery.

If this California decision was not the best under the sun, neither was it the worst. A Wisconsin court became so fascinated first by the ghost of a conflict and then by the sanctity of its own policy that it chose its own law even though there was not a single contact to give it an interest in doing so.™ Plaintiff sought substantial damages from a New York telegraph company that delayed delivery of his message from New York to Chicago. The telegraph blank limited liability to the price of the message, a stipulation valid under the laws of both New York and Illinois. There was no showing that either the sender or the addressee was a resident of Wisconsin, that the message concerned anything in Wisconsin, or that the message passed through Wisconsin. Nevertheless the court ignored the law of the interested states and invoked its own, though it had no legitimate interest in doing so. It had only a policy, valid for Wisconsin, on which it stamped with evangelistic fervor: "This policy good indefinitely for excursionists from other states. Any ghost accompanying them will be wrapped up as a gift."

Not many courts have been quite so zealous to propagate local policy. In the main, local judges as well as legislators make law with the local scene only in mind, even when they use general terms. When a problem arises with interstate repercussions, however, a court must determine whether the policy underlying the statute or judicial precedent envisaged more than local activities or persons. Difficulties arise when the policy is local in one respect and not in the other.

A New Hampshire court encountered such a difficulty with a statute providing that "No contract or conveyance by a married woman, as surety or guarantor for her husband . . . shall be binding on her."™ It held the statute inapplicable to a mortgage on New Hampshire land executed by a married woman at her home in Massachusetts which had abolished disabilities of married women. It found that the policy underlying the statute was to protect married women only in transactions taking place in New Hampshire. One might note parenthetically that when the statute is thus localized to transactions in New Hampshire rather than to the married women of New Hampshire, it narrows the protection or

37 Fox v. Postal Tel. Cable Co., 138 Wis. 648, 120 N.W. 399 (1909); see Paulsen & Sovern, supra note 36.
enlarges the freedom, depending on one's point of view, of New Hamp-
shire married women in transactions outside the state. At the same time
it broadens the protection, or narrows the freedom, of other married
women in transactions taking place in New Hampshire. The court's inter-
pretation generously upholds the security of transactions in other states.
The reverse of the coin is that it foists protection upon all married women
who come into New Hampshire even though they may have long since
ceased to be the victims of protection in their own states, which are most
concerned with their welfare. Whatever its imperfections, however, its
recognition of an exception to New Hampshire law was preferable to an
insistence upon New Hampshire law that would have served no interest
of New Hampshire. The real quarrel is less with the interpretation than
with the obsolescent statute itself. The wholesale liquidation of married
women's disabilities has fortunately put an end to the conflicts, real and
spurious, that they engendered.

Other areas remain, however, in which courts must recurringly deter-
mine the reach of a policy underlying local law. Again I cite a California
case without apology, because it is recent, because it held that at least one
California policy did not reach out to Texas, and because it bears the
intriguing title of People v. One 1953 Ford Victoria. The people, of
course, were Californians. The Victoria came out of Bexar County, Texas,
where Willie Smith bought it from a dealer. The dealer took a note and
chattel mortgage to secure the unpaid balance and promptly assigned it
to a Texas finance company. The mortgage specified that the car was not
to leave Bexar County without the written consent of the mortgagee.
Willie nevertheless took off with the car for California. Some time later
California seized it because he had used it in the state to transport nar-
cotics unlawfully. California statutes limit forfeiture consequent upon
such use to the interest of the purchaser if the innocent mortgagee proves
that before he took the mortgage he made a reasonable character investi-
gation of the purchaser. In Texas there was no forfeiture at all of auto-
mobiles used in the unlawful transportation of narcotics. There was
therefore no reason for the mortgagee to make a character investigation
and it did not do so.

The policy underlying the California requirement of a character inves-
tigation was to diminish the risk that automobiles would be sold to those
who might use them for unlawful transportation of narcotics. We found
that it applied only to California mortgagees. It was not reasonable to
suppose that California would expect an out-of-state mortgagee to inquire
into California law every time he took a mortgage. If one state could
reach out in such a manner, all states could, and there would be no end

39 48 Cal. 2d 595, 311 P.2d 480 (1957); cf. Chambers v. Consolidated Garage Co., 210
to the legal research incumbent upon a mortgagee. Given a policy intended only for California mortgagees, even the substantial contacts of California with the case did not give it an interest in the application of that policy to an out-of-state mortgagee. There was thus no conflict between the restricted local policy and the Texas policy of protecting a mortgagee’s contractual rights. The parallel lines never met.

It is not always so clear, however, what the local policy is. Nor is it always so clear that it is confined to local transactions or persons. Once the court succeeds in ascertaining what the policy is, it may yet have to determine whether or not it has more than a strictly local aspect. Such statutes as the Workmen’s Compensation Acts are exceptional in spelling out their scope. Rarely does a statute or judicial opinion articulate whether it can be extended to more than local transactions or persons.

If the local interest rests on a policy clearly envisaging more than local transactions or persons, and that policy is expressed in a valid statute, it is bound to prevail. If instead the policy is found in judicial precedent it is not bound to prevail. If a court hitherto uncritical finds it backward in comparison with that of the other state it may overrule its own precedent as unsuitable not only for the instant case but for strictly local ones, and in so doing again eliminate a conflict. It is as concerned in a conflict case as in any other with optimum justice. It is alerted as in no other to alternatives that may reveal shortcomings in its own law, and its enlightenment in such a case is bound to extend to purely local cases also.

There is little likelihood of many revelations so swift and devastating as to counteract the gravitational pull on even the most open-minded court toward the local policy. It may well find that the policy of the other state is not enlightened and indeed so backward as to call for resistance. Should it also find that the local policy has not yet been articulated in statute or precedent, it may proceed to articulate it for the first time, for purely local as well as interstate cases, and thereby create an open conflict with the other policy. Thus the court has a dual responsibility. Within the confines of policy based on precedent, it can revise backward local precedent to harmonize with an enlightened policy of another state. It can also set an enlightened local precedent to conflict with the backward policy of another state.

So far we have stated the problem narrowly in terms of one specific policy against another. Conflict need not always be resolved in such narrow terms. A perceptive court may dissipate conflict between specific policies by training on what harmony there may be between large policies that govern them. We have examples for the asking on the local scene. Thus we accept the large policy of putting an end to litigation by the doctrines of res judicata and collateral estoppel as governing any specific policy that may be frustrated by the termination of litigation. Pro-
fessor Cheatham and Professor Reese have suggested a parallel in conflict of laws of a state's large policy of harmonious relations with other states, which could appropriately govern lesser policies whenever it better serves a long-range interest of the state besides fulfilling the reasonable expectations of the parties. They approvingly cite Cammell v. Sewell, wherein an English court recognized a purchaser's title to shipwrecked lumber acquired under Norwegian law at an auction sale held by the master of the ship, even if under English law the master exceeded his authority. A policy of harmonious relations with other nations dictated the general rule that "if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere." In thus safeguarding title vested elsewhere against the hazard of attack upon any change in location of the chattel, the court subordinated immediate local considerations to facilitate commercial intercourse that would in the long run better serve its interest.

More than one scholar has suggested that a state may also facilitate commercial transactions having no significant public repercussions and at the same time preclude conflict, by recognizing the autonomy of parties of roughly equal bargaining power in a contract with multistate aspects. When more than one state has substantial contacts with the transaction, it seems reasonable that equal parties should be free to designate the law of one of the states as controlling the validity and effect of their contract, since reasonable certainty is of the utmost importance to the parties and needless uncertainty serves neither private nor state interests.

We have now run through a gamut of tests that dispel as spurious many so-called conflicts. We have also considered various possibilities of avoiding or diminishing actual conflict. We come at last to the conflict pure and complicated, the conflict that cannot be routed, avoided or diminished, when the strong legitimate interest of one state squares away for a head-on clash with the strong legitimate interest of another. However the forum court now avoids collision, it must do so at a price to its own state or another. Should it yield to the interest of the other state, it would sacrifice the interest of its own. The likelihood is that, freed of metaphysical rules of choice of law, the forum court will let the local interest prevail and sacrifice the interest of the other state. Professor Currie has marshalled formidable arguments for the proposition that this is as it should be. As such scholars continue their constructive analysis of the cases, there may be in time only vestigial reminders of the dismal

43 Articles cited note 28 supra.
era when courts invoked mechanical rules without regard for legitimate state interests.

There will remain the inevitable problem in a federal system that recurrently competing state interests in a conflicts case may have to be evaluated in the light of the national interest in interstate harmony. It is the classic political problem of weighing, adjusting, and harmonizing diverse community values, which is ultimately the responsibility of Congress. No wonder the Supreme Court is now disentangling itself therefrom after some unhappy efforts to elevate choice-of-law rules to constitutional rank. It does not follow, however, that Congress either would or should enact choice-of-law rules posthaste, or even that it should ever enact them wholesale. As we now finish one long servitude to categorical imperatives, we should be on guard against another. The law of conflicts has been kept in its infancy all too long to survive another deep freeze. It has a chance at last to develop freely. Only as progressive case law accumulates can we gain the necessary perspective for determining the areas in which conflicting state interests so chronically threaten interstate harmony as to call for federal legislation.

For some time to come, therefore, the main responsibility for the rational development of conflict of laws is bound to remain with the state courts. The responsible court will have to be on its mettle. It must be prepared to reject unrealistic rules, yet cautious enough not to make formulations that reach too zealously into the future or give too zealous a scope to local policy. It must distinguish between real and spurious conflicts at the outset. It must temper its freedom to declare local policy and its scope with a sense for harmonious interstate relations as well as for the justifiable expectations of the parties.

There are always some to remind us that those who make decisions on our courts, like those who make decisions elsewhere, may sometimes be provincial in outlook. They say no more than that there is always a shortage of wise men. It is answer enough to the misanthropes that the forces against provincialism are strong today and that a judge trained to look through the partisan wrappings of a conflict will be inclined to look through provincial wrappings as well. There is no reason why he should be less dispassionate in a conflicts case than in any other. The hazard is less of impassioned provincialism than of the lingering ills of a passive formalism.