CHAPTER II
Development of the Law Respecting Foreign Torts in the United States: Special Constitutional Problems

SECTION 5

THE SITUATION IN WHICH THE LAW OF THE FORUM WOULD ALLOW RECOVERY BUT THE LAW OF THE PLACE OF WRONG WOULD NOT

WHEN we turn to consider the development of choice-of-law doctrine in the United States, we are confronted by a much more extensive collection of decided cases. Yet up to a certain point, judicial experience seems to have followed the same lines as that of the English courts. The jurisdictional question is the first to be raised: should the courts take cognizance of wrongs which have occurred in far-away foreign places? The American courts turned for an answer to Lord Mansfield's vigorous discussion of the question in *Mostyn v. Fabrigas*. From that source they received the assurance that such actions were commonly entertained by English common-law courts. Hence they proceeded to do likewise.

Many of these early American opinions upon the question of jurisdiction say nothing at all about the application of foreign law. Perhaps it was thought that the court would have to apply the law of the forum to all cases coming before it.

More probably the point was not considered at all. Where the incidents of which the plaintiff complained had occurred in another common-law jurisdiction, the possibility of a difference between the law of the forum and the law of the place of wrong would not be very likely to occur to a lawyer of that day. The common law was generally assumed to be the same everywhere. None of the states had developed a very extensive local jurisprudence. And statute law, which, at a later date, produced many differences, still covered a comparatively small field.

But when the choice-of-law question was raised, it appears to have been raised under the same circumstances as in the early English cases. It is the defendant who claims the protection of the proper law. The court is asked to depart from its usual course of decision because the defendant, though perhaps guilty according to local standards, is innocent in the eyes of the law in force at the place of the alleged wrong. This is a very interesting coincidence to whose significance we shall recur at a later point. The problem was considered in a great many American cases; almost unanimously the courts reached the same conclusion as the English courts. The plaintiff who could not make out a good cause of action under the law of the place of wrong was not permitted to succeed elsewhere. 3

One might expect to find that the American courts, having adopted Lord Mansfield's views in the matter of jurisdiction, would take up the justification formula as a guide to the solution of the choice-of-law problem. That formula had been especially invented to deal with the situation where the foreign law was pleaded as a defence. But there was no general reception of the justification formula in the United States. Most courts seem to have simply worked out their

own solution to this problem without any acknowledged assistance from the English line of cases. The *ipsissima verba* of those cases made only a few fleeting appearances. In *Shaver v. White* (Virginia, 1813) for instance, the court said:

"In the case before us it was not improper for the defendant to plead that the trespass was committed in the State of Tennessee, as he also pleaded that he was acting under the authority of the laws of that State, in the instance in question. These facts, however, do not go to the jurisdiction of the court but only to the justification of the defendant; the principle being, as aforesaid, that if a party is justified, as to a transaction, in the Country or place in which it was committed, he is justifiable everywhere."

But, generally speaking, the justification formula made slight impression on American jurisprudence. Nor was any other set of symbols contrived to fill its place. Each court expressed itself as it pleased. A variety of language was used to convey the general idea that the legal effect of acts and events must be determined by the law in force where they took place.

Most of the cases in which a defendant sought to escape a liability imposed by local law were based upon statutes which gave a deceased person’s dependents an enforceable claim to damages for his death. When statutes of this type were first enacted, strenuous attempts were made to have the courts apply them in cases where the deceased had been killed outside the territory of the enacting state. These attempts were uniformly unsuccessful. Court after court held that its local statute was not intended to have extraterritorial operation. Some courts expressly held that the law of the place of wrong gave the plaintiff no cause of action. Others non-suited the plaintiff

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4 *Shaver v. White*, (1818) 6 Munf. (2o Va.) 110, 112.
5 *Campbell v. Rogers*, (1855) 2 Handy (Ohio) 111; *Needham v. Grand Trunk R. Co.*, (1865) 38 Vt. 294; *Nashville, etc.*, R. Co. v. *Eakin*, (1869) 46 Tenn. 582; *Selma, etc.*, R. Co. v. *Lacy*, (1871) 43 Ga. 461; *Allen v. Pitts. & Conn. R. Co.*, (1876) 45 Md. 41; *Willis v. Missouri Pac. R. Co.*, (1884) 61 Tex. 432; *Great Western R. Co. v. Miller*, (1869) 19 Mich. 305.
because he had failed to prove that the law of the place of wrong gave him a cause of action.

*Whitford v. Panama etc. R. Co.* (New York, 1861) is a good sample decision. The action was brought in New York by an administrator to recover damages for the death of his decedent, who had been killed while riding on one of the company's trains in New Grenada. The Court of Appeals held that the action must be governed by the law of New Grenada and emphatically refused to allow a recovery under the New York death statute. The question had been much discussed in the lower New York courts. In writing the judgment of the Court of Appeals, Mr. Justice Denio emphasized the importance of "comity," respect for the laws of New Grenada in cases which had arisen there:

"It would be easy to illustrate the correctness of these positions by referring to the preposterous results which would follow from a different rule. Suppose the government of New Grenada to have enacted that the proprietors of a railroad company should not be responsible for the negligence of its servants, provided there was no want of due care in selecting them; it could not be pretended that its will could be set at naught by prosecuting the corporation in the courts of another State where the law was different. Or suppose that government had passed a statute like ours, except that the amount which might be received was unlimited, no one, I presume, would deny that the full amount of damages which could be proved might be recovered, though it might exceed the limit in our statute, in whatever court the suit might be brought. The true theory is, that no suit whatever respecting this injury could be sustained in the courts of this State, except pursuant to the law of international comity. By that law foreign contracts and foreign transactions, out of which liabilities

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have arisen, may be prosecuted in our tribunals by the implied assent of the government of this State; but in all such cases we administer the foreign law as from the proofs we find it to be, or as without proofs we presume it to be."

The learned judge then referred to the English jurisprudence, saying:

"The cases of Rafael v. Verelst and Mostyn v. Fabrigas were decided upon the presumption respecting the foreign law to which I have referred. Both cases were actions in the English courts for the imprisonment of the respective plaintiffs in foreign countries. The principle applicable to the present question was not much discussed but Lord Mansfield said, in the last case, that whatever would be a justification in the place where the thing was done, ought to be a justification where the case was tried; thus putting the liability of the defendant upon the provisions of the foreign law."

SECTION 6

THE SITUATION IN WHICH THE LAW OF THE PLACE OF WRONG WOULD ALLOW RECOVERY BUT THE LAW OF THE FORUM WOULD NOT

Having applied the choice-of-law principle for the benefit of defendants, American courts had then to decide how far they were prepared to go in applying it for the benefit of plaintiffs. That is to say, if the law of the place of wrong gave a plaintiff a cause of action, could that cause of action be enforced in a forum where the local law would not have given him any cause of action? The issue was raised in numerous suits based upon the death statutes, which varied considerably from state to state. For example, A causes B's death in state X. Can B's dependents bring an action under the death statute of state X, in state Y where a different death statute is in force or where, perhaps, there is no death statute at all? For a time the answer to this question was very uncertain. Both
the courts and the textwriters hesitated to adopt the position that a plaintiff could recover upon a cause of action created entirely by foreign law and not in any way dependent upon the law of the forum.

The first attempts to enforce foreign death statutes were met by a bristling array of technical objections. Some courts objected to the collection of a foreign claim by a local administrator.\(^1\) Some courts suggested, rather feebly, that perhaps foreign death statutes were penal or criminal laws and so they ought not to be recognized outside their state of origin.\(^2\)

The textwriters took various views.\(^3\) Wharton, whose first edition appeared in 1872, appears to have thought that the cause of action conferred by a death statute could not be enforced outside the state where the fatal injury occurred. Rorer, in his “Interstate Law,” laid down a rule to the same effect in the baldest terms. In 1880 both the Supreme Court of the United States (in *Dennick v. Railroad Co.*)\(^4\) and the Court of Appeals of New York (in *Leonard v. Columbia Steam Navigation Co.*)\(^5\) took an opposite view and allowed actions based upon foreign death statutes to proceed to judgment. After these decisions, claims based upon foreign death statutes became common in the courts. But this did not mean that such claims were always and everywhere enforced. The New York Court of Appeals, in the case mentioned, invented

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1 See Richardson v. New York Cent. R. Co., (1867) 98 Mass. 85; Mackay v. Central R. Co., (C. C. N. Y., 1876) 14 Blatchf. 65; Woodard v. Michigan, etc., R. Co., (1859) 10 Ohio St. 121.


3 See WHARTON, CONFLICT OF LAWS, Ed. 1 (1872) 383; RORER, INTERSTATE LAW, Ed. 1 (1879) 145, 155.

Rorer had a theory that the statute law of a state could not be enforced in any other state. See Buckles v. Ellers, (1880) 72 Ind. 220; Willis v. Mo. Pac. R. Co. (1884) 61 Tex. 432; Ash v. B. & O. R. Co., (1890) 72 Md. 144, 19 Atl. 643.

4 *Dennick v. Central R. Co.*, (1880) 103 U. S. 11.

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a flexible restrictive theory which became very popular. This was the rule that the law of the place of wrong must be “similar” to that of the forum:

“The rule here laid down,” said the court, “is just and reasonable and it is not essential that the statute should be precisely the same as that of the State where the action is given by law, or where it is brought, but merely requires that it should be of a similar import and character. The statute in this State is certainly of the same nature, and the similarity is such as to authorize the conclusion that it is founded upon the same principles and possesses the same attributes as the statutes of Connecticut which have been cited. The same remedy was to be accomplished, and an examination of the different provisions evinces an agreement in both of the statutes as to their main features, and that they are substantially alike and to the same effect as to the survivorship of the action. In fact, when there are similar statutes, instead of the common law, the right to recover damages stands precisely the same as if the common law in both States relating to the subject prevailed.”

As Mr. Justice Cardozo later pointed out, this doctrine had no more stable foundation than a misapprehended dictum in an earlier case. Despite its spurious origin it spread rapidly from state to state. In 1891 it was applied with approval by the Supreme Court of the United States. No doubt its popularity was due to the fact that it provided the courts with a flexible tool for rejecting unfamiliar doctrines without unduly fettering their power to adopt foreign law.

The similarity doctrine is not unlike the first rule in Phillips v. Eyre that, “the wrong must be of such a character that it would have been actionable if committed in England.” The similarity doctrine does not, perhaps, draw the line quite so clearly between foreign law which should be rejected and

7 Texas, etc., R. Co. v. Cox, (1891) 145 U. S. 593, 12 Sup. Ct. 905.
8 Phillips v. Eyre, (1870) L. R. 6 Q. B. 1, 28.
that which should be accepted. Wharton, in his second edition of 1881, attempted to introduce the English theory into the United States but with small success. A few courts sponsored it but without enthusiasm. In *Huntington v. Attrill* the Supreme Court went out of its way to repudiate the English theory.

The similarity doctrine remained in vogue for a time. But as the courts became accustomed to enforcing the laws of other states, the similarity doctrine came to appear selfish and provincial and its authority crumbled. As early as 1883 the Supreme Court of Minnesota watered it down in the following words:

"A few cases appear to lay some stress upon the fact that the statutes of both states were similar, but rather as evidence of the fact that the statute of the state giving the right of action is not contrary to the policy of the laws of the state where the action is brought. . . . But it by no means follows that because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."

9 See *Wharton, Conflict of Laws*, Ed. 2 (1881) 523.

See *The Lamington*, (D. C. N. Y., 1898) 87 Fed. 752; *Anderson v. Milwaukee & St. P. R. Co.*, (1875) 37 Wis. 321; *Texas, etc., R. Co. v. Richards*, (1887) 68 Tex. 375, 4 S. W. 627.


11 *Herrick v. Minneapolis & St. L. R. Co.*, (1883) 31 Minn. 11, 14, 16 N. W. 413.
This view of the similarity rule was adopted by court after court. In *Loucks v. Standard Oil*¹² (1918) that doctrine was discarded by the New York Court of Appeals, the very court which was the first to put it forward. At the present day it is probably retained only in Texas and Maryland.¹³ For most American courts, the grounds upon which they may dispense with the ordinary application of choice-of-law rules are the same in tort cases as in others and are represented by the same brief symbol,—"public policy," which is generally supposed to have the meaning attributed to it by the Supreme Court of Minnesota in the passage quoted. To sum up the story, American courts, in the 1870's, adopted a restriction upon the affirmative enforcement of foreign tort obligations almost as confining as the first rule in *Phillips v. Eyre*. But in the following decades they rebelled at this confinement, discarded the restrictive theory and replaced it with one which gave more scope to the operation of choice-of-law principles and the foreign rules thereby imported.¹⁴

SECTION 7

RECENT TENDENCY TO EXTEND THE APPLICATION OF FOREIGN LAW

Another important trend in American jurisprudence deserves consideration in our historical outline. It is a well-recognized doctrine in all branches of conflict of laws that


¹⁴ *Dalton v. McLean*, (Maine, 1940) 14 Atl. (2d) 13, is an interesting case. A New Brunswick statute was, by its express terms, given retroactive effect. A Maine court refused to enforce it retroactively on the ground that retroactive laws are contrary to Maine's public policy.
courts, in applying doctrines of foreign law, follow the procedural or remedial rules of the forum. This theory operates as an exception to all choice-of-law theories, as a limitation upon their effectual application. It may prevent the foreign law from taking effect as a defence. Or it may prevent the foreign law from assisting the plaintiff to a recovery. There are many aspects to the operation of this restrictive doctrine which we shall examine later. For present purposes it is of interest to note a tendency toward a fuller and less restricted application of foreign law. This tendency is not an obvious one, but there are a number of decisions, most of them handed down in the last two decades, which, taken together, would seem to indicate that the courts are gradually limiting their resort to local procedural rules. In cases involving the application of foreign law even local rules governing the burden of proof and trial by jury have been temporarily discarded.\textsuperscript{1} This general tendency has been approved by a number of present-day writers.\textsuperscript{2}

\section{8}

\textbf{The Comity Theory; The Obligation Theory; The Vested Rights Theory}

Generally speaking, American courts have not shown the tendency to cling to particular verbal symbols which characterizes English decisions in this field. English courts, in rationalizing their results, have laid great stress upon the term "justification." This term has been scarcely used at all by American courts. But the American courts have had their own favorite symbols. Let us consider some of them.

We have quoted an excerpt above in which comity, the

\textsuperscript{1} See sections 33, 35 below.

\textsuperscript{2} \textit{Stumberg, Conflict of Laws (1937)} 148; Cook, "'Substance' and 'Procedure' in the Conflict of Laws," (1933) 42 \textit{Yale L. J.} 333, 343.
respect of one state for another's sovereignty, is put forward as a reason for enforcing other states' laws. The word "comity" appears frequently in American opinions. It has the sparkle of a partial truth. Respect for the authority of a friendly state with regard to acts and events which have occurred there is clearly a matter to be taken into account in conflicts cases. "Comity" does represent one of the reasons for recognizing foreign law. But to regard it as the alpha and omega of the conflict of laws would lead to unfortunate results. There are other very important choice-of-law policies to be considered too. A court which can see nothing behind a choice-of-law principle except interstate courtesy seriously underrates the significance of the principle. The due application of the principle may suffer thereby. In a word, the term "comity" is incomplete and so misleading. But is this not true of all the catch words and maxims used by lawyers? The word "comity" expresses a measure of truth; surely that is all we can reasonably demand of a juridical symbol.

In *The Halley* Mr. Justice Phillimore described the application of the law of the place of wrong to a foreign tort as the enforcement of an obligation. The same idea has been expressed in numerous American decisions. There is nothing very original about it. But the obligation conception received its most authoritative and emphatic recognition in the United States when Mr. Justice Holmes delivered the Supreme Court's opinion in *Slater v. Mexican National R. Co.* The action had been brought to recover damages for a wrongful death which had occurred in Mexico. Under Mexican law the

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2. The popularity of the word comity was probably due to its use by Story. See his *Commentaries on the Conflict of Laws* (1834) §§ 29-38.
deceased's dependents would have been entitled to a long series of periodical payments. If certain specified events occurred the defendant would be relieved from the duty to make further payments. The American court could not very well give a judgment in accordance with the Mexican law. The plaintiff requested an unconditional judgment for a lump sum. The Supreme Court refused this relief on the ground that it might impose a burden upon the defendant which would be greater than that contemplated by Mexican law. Speaking for the majority, Mr. Justice Holmes said:

"The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

The reasoning of the *Slater* case is analogous to that of *Phillips v. Eyre*.

The reasoning of the *Slater* case is analogous to that of *Phillips v. Eyre*. Both opinions start with the premise that the defendant’s liability rests upon an obligation created by the law of the state of wrong. In *Phillips v. Eyre* the legislature of that state had, by an act of indemnity, abolished the obligation. So the action was dismissed. In the *Slater* case the foreign obligation had not been abolished but it had been qualified in such a way as to make its transitory enforcement impracticable. Hence the action was dismissed there also.

Very similar to the obligation theory in its implications, affirmative and negative, is the doctrine of vested rights. It

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6 *Phillips v. Eyre, (1870) L. R. 6 Q. B. 1.*
appears to have made its American début in Beale's "Cases on the Conflict of Laws" (1902) where it was advanced as an explanation of the operation of choice-of-law principles. The author's language is not specifically directed to the field of torts but its application to tort cases is obvious.

"The topic called 'Conflict of Laws' deals with the recognition and enforcement of foreign created rights. In the legal sense all rights must be created by some law. A right is artificial, not a mere natural fact; no legal right exists by nature. A right is a political, not a social thing; no legal right can be created by the mere will of the parties. Law being a general rule to govern future transactions, its method of creating rights is to provide that upon the happening of a certain event a right shall accrue. The law annexes to the event a certain consequence, namely, the creation of a legal right. . . . "A right having been created by some appropriate law, the recognition of its existence should follow everywhere. Thus an act, valid where done, cannot be called in question anywhere." 7

This terse and forceful terminology for explaining the operation of choice-of-law rules has found its way into judicial opinions. 8 For example, in Loucks v. Standard Oil Co., 9 an action brought in New York for a tort committed in Massachusetts, Mr. Justice Cardozo said:

"A foreign statute is not law in this state, but it gives rise to an obligation which, if transitory, 'follows the person and may be enforced wherever the person may be found.' [Citations] 'No law can exist as such except the law of the land; but . . . it is a principle of every civilized law that vested rights shall be protected.' Beale, Conflict of Laws, 51. The plaintiff owns something and we help him to get it."

Undoubtedly the theory of vested rights has exercised a considerable influence upon the thinking of American lawyers and judges.

Both the obligation theory and the vested rights theory emphasize the notion that an injured person’s claim to reparation depends upon the law of the territory where he was injured. From this it follows that if the law of the place of wrong would not allow him any compensation at all, courts in other jurisdictions should do likewise. Courts in other jurisdictions ought to give him exactly what the law of the place of wrong allows him—no more and no less. That is his vested right. Attention has already been directed toward the marked inclination of American doctrine and jurisprudence to accord the fullest possible recognition to the law of the place of wrong.¹⁰ The category of procedure within which the rules of the forum hold sway is being gradually limited. Rules of the law of the place of wrong which might affect the relative positions of the parties are sedulously observed by outside courts. Perhaps this tendency, which seems to be very desirable, may be attributed to the obligation and vested rights theories. By stressing the significance of the law of the place of wrong they may have induced the courts to make a greater effort to really enforce that law.

But like many other legal conceptions, the vested rights and obligation doctrines are ambiguous and incomplete. They reveal to us only a part of the conflict of laws picture. Foreign obligations are not always and everywhere recognized. Their recognition is frequently qualified by the operation of local rules of procedure. Sometimes it is denied entirely for reasons of local policy. Sometimes it is denied for obscure and insufficient reasons, as where the injury affects foreign land. In short, there are a number of important conflict of laws prin-

¹⁰ Above, section 7.
principles which in practice modify and limit the enforcement of vested rights. Although courts may say that they are enforcing foreign vested rights, they are continually impeded and frustrated by the necessity of adhering, in some degree, to the moral traditions and habitual technique of their own jurisdiction. 11

Moreover, the vested rights and obligations theories can scarcely be reconciled with one of the important phenomena of the conflict of laws, the application to a single set of facts of legal rules drawn from two or more foreign jurisdictions. 12 To illustrate: an action is brought for a tort alleged to have been committed in state X. The defendant pleads a release of all claims executed by the plaintiff in state Y. The court will look to the law of state X to decide whether or not the plaintiff ever had any cause of action. But the law of state Y will probably have to be consulted also, in order to determine the validity and effect of the contract of release which was executed there. Each body of law governs a particular aspect of the case. It cannot be said that either legal system determines whether or not the plaintiff has a vested right. Both must be considered. Suppose the contract of release is void according to the law of state X, the place of wrong, but valid by the law of state Y where it was executed. The court allows the law of state Y to prevail and dismisses the suit. 13 Here the law of the place of wrong has created an obligation but the substantive law of some other system has been permitted to


12 For further discussion of this phenomenon see below, section 37.

13 This result was reached by a court in Leach v. Mason Valley Mines Co., (1916) 40 Nev. 143, 161 Pac. 513.
destroy it. Considerable interpretation and qualification of
the obligation theory would be required to make it consistent
with such a result.

Our final observation upon the vested rights and obligation
theories is that they fail to indicate why the law of the place of
wrong should be applied to cases which have arisen there. They
give us a guiding principle but without any raison d'être.
When an action is brought based upon extraterritorial acts and
events, it would be much simpler to apply the ordinary law
of the forum than to learn and apply the law of the place of
wrong. Yet courts habitually take the latter course. There
must be some very good reason or reasons for doing so. Doubt-
less some important social policy lies behind the principle
that tort claims should be governed by the law of the place
of wrong. But neither the obligation theory nor the vested
rights theory throws any light on this aspect of the matter.

In the foregoing paragraphs an attempt has been made to
reveal certain inadequacies in the comity theory, the vested
rights theory, and the obligation theory. To recognize these
inadequacies is not to depreciate all reference to these theories
but only to warn against exaggeration of their significance.
Each of them contains a measure of truthful statement. Each
of them indicates some important conflict of laws policy or
practice. They are useful symbols, but it would be a mistake
to regard any one of them as an infallible guide to the solu-
tion of all conflicts cases. Indeed the suggestion is ventured
that the problems of the conflict of laws and the jurisprudence
which American courts have built up in dealing with them
are much too complex for comprehensive summary in any
single phrase or maxim. Much less is it possible to construct
a brief formula containing within itself the germs of a just
and satisfying decision for every case which might conceiv-
ably arise in this field.
We generally assume that the courts and the legislature of an independent state are free to follow or to disregard choice-of-law theories. There is no higher law which would prevent the Parliament of the United Kingdom from abolishing the choice-of-law rule for torts, if it chose to do so. The House of Lords might (within the limits set by the doctrine of *stare decisis*) interpret English statutes, and mould the English common law in such a manner as to curtail the application of the law of the place of wrong in cases where one person has injured another in a foreign country, but there is no higher court which could reverse the House of Lords' decisions because they had this effect.

The legislatures and courts of the states of the United States occupy a somewhat different position. The states of the United States are not autonomous units in the conflict of laws. Certain clauses of the federal constitution have been interpreted as imposing limitations upon the power of the state governments to make their local law govern transactions which have occurred in other states or in foreign countries. If a state court, in determining the ambit of its local laws, oversteps these limitations, its decision may be reversed by the Supreme Court of the United States. This means that the Federal Constitution, as interpreted by the Supreme Court, sets the bounds within which the state courts are free to depart from choice-of-law principles. To a certain extent, choice-of-law principles are compulsory for state courts.¹

The principal clauses upon which the Supreme Court relies in exercising this corrective jurisdiction are the due process clause and the full faith and credit clause. The significance of the full faith and credit clause is obvious. Suppose an action arising out of an alleged tort in one state is brought in the courts of another state. The court, for one reason or another, refuses to enforce a statute of the state of wrong. Such a refusal might, in some circumstances, constitute a refusal to obey the command of the full faith and credit clause. The court might be said to have denied full faith and credit to the statute of the state of wrong. It should be noted, however, that there is some ambiguity about the words "public acts, records, and judicial proceedings." They have been held to include the judgments and statutes of a sister-state. It seems very doubtful whether they would be construed as including rules of common law embodied in judicial decisions. Another noteworthy point about the full faith and credit clause is that it only requires full faith and credit to the law of a sister-state. It does not affect the power of state courts to disregard the law of a foreign nation.

Most of the cases related to the subject of this treatise which involved the effect of the full faith and credit clause have been somewhat complicated in their nature. They can be more advantageously analyzed after certain other preliminary questions have been discussed. For present purposes it will be sufficient to notice the general principle upon which the Supreme Court professes to apply the full faith and credit

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2 United States Constitution, Art. 4, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Art. 14, § 1: "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
clause. In *Alaska Packers Association v. Industrial Commission of California* the Court said:

“In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent. A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another.

"Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. It follows that not every statute of another state will override a conflicting statute of the forum by virtue of the full faith and credit clause; that the statute of a state may sometimes override the conflicting statute of another, both at home and abroad; and again, that the two conflicting statutes may each prevail over the other at home, although given no extraterritorial effect in the state of the other.”

In a subsequent section of this book it is argued that a departure from choice-of-law principles is likely to press harder upon a defendant than upon a plaintiff. A plaintiff, whose claim based upon the law of the place of wrong has been refused recognition at the forum, can generally sue elsewhere.


*Section 11, below.*
A defendant whose foreign defence has been denied must pay the judgment and forever hold his peace. It might be thought that the Supreme Court would be more ready to use the full faith and credit clause as a shield for a defendant than as a means to compel the enforcement of a plaintiff's rights. And this idea is supported by a passage from the opinion in *Bradford Electric Light Co., Inc. v. Clapper.* But a somewhat different view is expressed in *Alaska Packers Association v. Industrial Commission of California:*

"The necessity is not any the less whether the statute and policy of the forum is set up as a defence to a suit brought under the foreign statute or the foreign statute is set up as a defence to a suit or proceeding under the local statute. In either case, the conflict is the same. In each, rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

The bearing of the due process clause upon the solution of choice-of-law problems is not quite so obvious as that of the full faith and credit clause. It may be illustrated by a simple case drawn from the field of contracts. In *Home Insurance Co. v. Dick* a fire insurance contract was made in Mexico. It provided that all legal proceedings to enforce the policy should be taken within a year from the date of loss. This clause was valid under Mexican law. The policy covered only losses in Mexican waters and was payable in Mexico. A loss having occurred, a suit to enforce the policy was brought in Texas, after the time limit of one year had elapsed. Certain

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companies who had reinsured part of the risk were brought into the action by garnishment proceedings. These garnishees pleaded that, by the very terms of the contract, the action was brought too late. But the Texas court followed a Texas statute which purported to avoid such contractual limitations when they required a shorter period than two years. Judgment was given in favour of Dick, the insured. On appeal, the Supreme Court of the United States reversed this judgment:

"The Texas statute as here construed and applied deprives the garnishees of property without due process of law. A state may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of re-insurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contract of reinsurance were done there or in New York. And likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were involved for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law."

The due process clause was implemented in this case to protect a defendant from an improper resort to the law of the forum. It seems unlikely that it would ever be invoked to assist a plaintiff whose foreign cause of action had been denied recognition. The court would have to go the length
of holding that the court of the forum, in refusing to enforce a foreign cause of action, had deprived the plaintiff of property without due process of law. In this respect, the scope of the due process clause is more limited than that of the full faith and credit clause.

But the full faith and credit clause has, as we have seen, certain limitations which are not found in the due process clause. If, in a given case, a state court's refusal to apply the proper law of the case is a denial of due process, it is immaterial whether the appropriate rule of the proper law which has been rejected is a rule of common law or a statute. It may be doubted, however, whether a state court's refusal to apply the common law of a sister state (as distinct from its statute law) could ever amount to a denial of full faith and credit. Again, the full faith and credit clause only compels American courts to recognize the laws of other American states. But the application, by a state court, of its own local law to a set of facts arising in a foreign country might constitute a denial of due process. This is what happened in the Home Insurance Company case.

Attempts have been made to invoke the due process clause in some of the more complex tort cases. They can be more conveniently considered at a later point.

In subsequent sections of this book it is proposed to discuss various principles which operate as exceptions to the general choice-of-law principle. The effect of these exceptional principles in practice is to exclude the application of the law of the place of wrong. When a court follows one of these principles it disregards the law of the place of wrong and either applies its own law instead or else washes its hands of the case. The law of the place of wrong may be excluded on the ground that it concerns procedure, that it is contrary to public policy, that it is penal in character, etc. In discussing the operation of these exceptional principles, the reader should bear in mind the fact that each one of them is overshadowed by the
possibility of a constitutional limitation. In the *Home Insurance Company* case the Texas court, in trying to deprive the insurers of the benefit of a term in their contract, valid under the proper law, said that it was applying Texas law to a matter of procedure. It said the proper law of the contract was contrary to Texas public policy. But the Supreme Court said the Constitution prohibited this particular application of established conflict of laws theories. No one can tell how far the Supreme Court may go in using the full faith and credit clause or the due process clause to check state courts which refuse to follow choice-of-law principles directing them to respect and apply the laws of other states.

**SECTION 10**

**THE FEDERAL COURTS OF THE UNITED STATES AND THE CONFLICT OF LAWS**

The relation between the federal courts and state law is a large and difficult question which goes far beyond the scope of this study. We shall not attempt to discuss it exhaustively but a few comments upon its conflict of laws aspects may not be out of place. Since these courts exercise a large and important jurisdiction, notably in cases where the parties are citizens of different states, it is important to know where they stand in relation to the conflict of laws.

Judicial administration by federal courts in the United States is governed by section 34 of the Judiciary Act\(^1\) (1789) which provides:

"The laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

Without considering the precise meaning of this section we pass on to another federal statute controlling the administration of the courts which provides:

"The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the court of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, or modify the substantive right of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect."  

Pursuant to this statute the Supreme Court drafted and promulgated a code of rules which took effect in 1938. This code governs the procedure in all the lower federal courts throughout the United States. It establishes a uniform procedure in these courts which is independent of the rules followed in the courts of the various states. But by the very terms of their constituent statute, these rules may not "abridge, enlarge or modify the substantive right of any litigant." Where a matter of "substantive right" is involved, the federal courts must observe the mandate of the Judiciary Act (section 34).

If we examine section 34 of the Judiciary Act from a conflict of laws point of view we discern an ambiguity. The section says that "the laws of the several States . . . shall be regarded as rules of decision . . . in cases where they apply." This section might be interpreted in at least

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3 Before the introduction of these rules the lower federal courts followed the procedure of the state courts for the state in which they were located, as directed by the Conformity Act, 17 Stat. L. 197, § 5 (1872), 28 U. S. C. (1934) § 724.

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The formulation and application of the uniform federal code will doubtless raise many border-line issues as to whether particular rules or problems are matters of "procedure," i.e., whether they ought to be governed by uniform federal rules. See Note, (1938) 38 Col. L. Rev. 1472.

Such an issue has been raised regarding the burden of proof in relation to contributory negligence. See section 36, below.
two different ways. The direction to the federal courts to apply the laws of the several states might be interpreted as a direction to apply those laws in conformity with established choice-of-law principles. Since the direction to apply state law proceeds from the federal Judiciary Act and the choice-of-law principles to be followed are implicit in the direction itself, the scope and application of these principles would naturally be determined by the federal courts themselves with the final word lying in the mouth of the Supreme Court.

A second interpretation might be placed upon the section: that a federal court shall apply to each case coming before it the laws of the state in which the federal court is located, including the conflict of laws rules normally applied by the courts of that state. If we adopt the second interpretation, it follows that a federal court ought, in conflicts cases, to follow automatically the conflict of laws rules of the state in which it sits, as expounded by the courts of that state.

Before we turn to the judicial treatment of this problem let us pause to consider it from the standpoint of a student of the conflict of laws. There are, in the United States, a number of different jurisdictions with different internal laws. Within the limits set by the Constitution, each state is free to develop its own body of legal rules, different from those of the other states. Yet it is frequently possible for one of two parties engaged in a legal controversy to choose any one of several

4 The Supreme Court's opinion in Erie R. Co. v. Tompkins, (1938) 304 U. S. 64, 58 Sup. Ct. 817, contains statements which appear to indicate that the relation between the federal courts and state laws is determined by the Constitution and that Congress is without power to alter that relation.

But, carefully considered, the majority opinion does not seem to go beyond a statement that, in the absence of Congressional direction, the federal courts' assumption of power to disregard state decisions was unconstitutional. The opinion does not say explicitly that Congress could not prescribe special rules of decision to be followed by the federal courts in all cases coming before them. See Note, (1939) 52 HARV. L. REV. 1002.

states as the forum in which to litigate the controversy. If the court of each of these states were to apply its own internal law in settling the controversy the fortunes of the parties to it would depend entirely upon their choice of a forum. Such a situation would produce grave injustice, not to mention the possibility of unseemly bickering between the courts of different states. The solution to this difficult problem has been found in the application of choice-of-law principles. In dealing with a controversy which has arisen in another state, a state court will normally decline to apply its own local law and will try, so far as possible, to apply the law of the state in which the controversy arose. For the sake of uniformity and other choice-of-law policies which we shall discuss later, the state courts of the United States are all engaged in a cooperative enterprise to solve the problem of the conflict of laws.

Viewed in this light, the conflict of laws appears to be a problem of national consequence. Although one of its prime objectives is justice for the individual, this objective cannot be secured without the cooperation of all the states and state courts. Moreover, the application of choice-of-law principles in certain types of cases involves a certain weighing and adjustment of the interests of different states which is, in some sense, an interstate problem. The Supreme Court has already recognized this national aspect of the conflict of laws. It has intervened on constitutional grounds to check the activity of state courts which were extending the application of their local laws in utter disregard of choice-of-law principles. In this way the Court limits and supervises, in the interests of the nation, the administration of the conflict of laws by state tribunals.

But the Supreme Court, although it has set limits to the powers of state tribunals, has left them considerable freedom

*For a more detailed discussion of choice-of-law policies, see sections 11, 12, 38.
*See generally section 9.
to follow or to abandon choice-of-law principles as they please. And it must be admitted that the state courts do not always give the fullest possible measure of cooperation to the work of solving the conflict of laws problem. Although paying lip-service to choice-of-law principles, they sometimes refuse to enforce particular rules of the law of a sister-state on the ground that these rules run counter to their own “public policy” or “procedure.” Occasionally there is good reason for such a refusal but often there is none. In some cases it is difficult to avoid the conclusion that a state court’s failure to co-operate in the application of choice-of-law principles has resulted from a narrow, provincial point of view or a failure to completely understand the conflict of laws problem and its solution. But although we may deplore such decisions, the Supreme Court, on its present view of the matter, is powerless to prevent them.

Let us now consider the role of the federal courts with the aid of a specific example. A injures B in state X. The law of state X does not allow any interest on damages for an injury of this character. If B brings suit in state X the court there will very properly apply its own law to the case and B will recover no interest. Now let us suppose that B brings suit, not in state X, but in state Y. Under the local law of state Y interest would be recoverable upon damages for an injury of the character sustained by B. But A should not have to pay greater damages because he happens to be subject to the jurisdiction of state Y. For the sake of uniformity and other choice-of-law ideals the court in state Y ought to adopt a co-operative attitude. It should disregard its local rule regarding interest in this case and adopt the rule of state X, the state of wrong.7 We shall suppose, however, that the court of state Y refuses to follow the law of state X and applies its own rule instead. This decision is unfair to B and evinces an unwilling-

7 For a more detailed discussion of rules relating to damages, see section 26, especially note 2.
ness to co-operate with other state courts in solving the conflict of laws problem.

Now we reach the final stage of our analysis. Suppose B brings suit in a federal court sitting in state Y. If we adopt the second of the two interpretations of the Judiciary Act which we have outlined above, the federal court will have to give the same undesirable decision which the state court of state Y would give. If the federal court were disposed to accord more complete support to the choice-of-law principle by allowing the law of state X to govern the measure of damages it would not be permitted to do so. Surely this is a most unfortunate result. A federal court, representing the judicial power of the United States, ought not to be forced to take an unjust and uncooperative attitude toward a problem of national significance. The federal courts should, it is suggested, be left free to decide conflicts cases according to their own best judgment subject, of course, to the guidance of the Supreme Court.

It is quite true that this suggested view of the federal courts' powers would permit such a court to render decisions which would not conform to the rulings given in similar cases by the local state court. Thus, in our example above, we have suggested that the federal court in state Y should decide the A-B controversy in a manner inconsistent with the views of the state Y state court. This lack of uniformity is no doubt regrettable. But if the federal court in state Y was bound to do as the local state court would do, its decision would not conform to that which would be given by the court of state X, or by the court of any other state which adhered thoroughly to the choice-of-law principle. Hence there is bound to be some lack of uniformity in any event.

Perhaps the strongest argument which can be advanced against the view here suggested is that it would permit a federal court to disregard the policy of its home state as enunciated by the state courts. No doubt the policy of its home
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state is a matter to which a federal court should always give serious consideration. But in a conflict of laws case the policies of other states besides the forum may also be involved. And, more important still, the national policy of uniformity in the solution of conflicts cases will always be affected in some degree. In view of these facts it is difficult to understand why the federal court should be expected to give an automatic pre-eminence to the policy of the state in which it sits and to slavishly follow the decisions of that state’s courts.

There is a further point to be made in favour of federal independence in the conflicts field. The primary objective of choice-of-law principles is to secure uniformity in the treatment of conflicts cases consistent with a fair adjustment of the interests of the states involved. To attain this objective the various state courts must act in concert. Such concerted action in the treatment of conflicts problems would be greatly facilitated if some single pre-eminent tribunal could take the lead in laying down a pattern of sound decisions to which the various state courts might conform. This function might very well be performed by the Supreme Court of the United States. If the Supreme Court were free to follow its own bent in conflicts cases coming up from the federal courts, it would be able to offer persuasive guidance, not only to the lower federal courts, but to the state tribunals as well. If, on the other hand, the federal courts were in all cases bound to follow their local state decisions, the Supreme Court would have much less occasion to pronounce upon conflicts problems. It could only do so when some state or federal court had exceeded the limits set by the Constitution.

This suggestion that the Supreme Court should sound the key-note of conflicts doctrine for the state tribunals is by no means a theoretical novelty. In the past the Court has (as we shall see) made a practice of writing independent opinions upon important conflicts problems for the special guidance of

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8 See section 12.
federal courts. Some of these opinions had a widespread influence not only upon federal but also upon state tribunals and made important contributions to the erection of a uniform American conflict of laws jurisprudence. Without going outside the field of torts we can name such great cases as Dennick v. Railroad Co., Huntington v. Attrill, Slater v. Mexican National R. Co.

Having speculatively considered our problem let us turn to its history in the courts. As we have said, the Judiciary Act is patient of two constructions. One construction would permit the federal courts to apply state laws according to established choice-of-law principles as understood by them, the other construction would bind the federal courts to apply state laws upon the automatic principle of locality. This doubt was not resolved by the Supreme Court until the decision of Klaxon Co. v. Stentor Electric Mfg. Co. (1941). The seeming tardiness of this clarification was due to the fact that until the epochal decision of Erie Railroad Co. v. Tompkins (1938) the problem was almost totally obscured by the doctrine of a general federal common law. For many years, the Supreme Court and other federal courts assumed that they were entitled, notwithstanding section 34 of the Judiciary Act, to disregard the decisions of the state courts when dealing with matters of "general law." In certain fields of law, never clearly defined, they administered a general federal common law which governed the decision of all cases coming before federal courts. They did not, of course, disregard state statutes which the states had constitutional power to enact. But if a case in a federal court involved a point of common law within

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the general law field, the federal court made no attempt to follow state law. The case was simply decided according to the rules of the federal common law, a jurisprudence built up by the accretion of federal decisions. The final authority upon matters of general law was, of course, the Supreme Court.

The classic justification for this practice was Mr. Justice Story's opinion in *Swift v. Tyson* 14 (1842) in which he said:

"... the true interpretation of the thirty-fourth section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

In *Erie Railroad Co. v. Tompkins* the Supreme Court acknowledged that all this was error. The doctrine of *Swift v. Tyson* was described as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." The court declared that "in applying this doctrine this Court and the lower federal courts have invaded rights which in our opinion are reserved by the Constitution to the several States." For the future, federal courts were directed to

apply and enforce the non-statutory as well as the statutory law of the states.

During the heyday of the *Swift v. Tyson* doctrine the problem of choosing between the two interpretations of the Judiciary Act outlined above did not arise because at that time the Supreme Court regarded the application of choice-of-law principles as a branch of law which came within the scope of that doctrine. Conflict of laws was a part of the general federal common law. Lower federal courts took their conflict of laws doctrine from the Supreme Court. In various cases coming up from the lower federal courts the Supreme Court announced its own independent solutions of conflict of laws problems without any particular regard for the views entertained by the courts of the states in which these cases were tried.

After *Erie Railroad Co. v. Tompkins* the propriety of this practice was at least questionable. The general law theory upon which it was based had been destroyed, root and branch. The power of the federal courts to work out their own conflict of laws principles could not be supported any longer upon the general law theory. It might still have been justified, however, as a necessary implication of the relation between the federal courts and the laws of the several states, as that relation was determined by the Judiciary Act of 1789.\(^\text{15}\)

But in *Klaxon Co. v. Stentor Electric Mfg. Co.*\(^\text{16}\) (1941) the Supreme Court appears to have definitely decided that the federal courts must adhere implicitly to the conflict of laws decisions of their local state courts. The action was brought in a Delaware federal court for breach of a contract made in New

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York. Having won a judgment, the plaintiff claimed that, under New York law, he was entitled to interest from the date of suit to that of the judgment. The defendant opposed the application of New York law. The Circuit Court of Appeals for the Third Circuit ruled that the rights of the parties ought to be governed by New York law and that the plaintiff was entitled to the interest claimed. The Circuit Court of Appeals apparently reached this conclusion independently without consulting the Delaware cases or statutes. The Supreme Court remanded the case to the Circuit Court of Appeals for decision in conformity with the law of Delaware. Speaking for the Court, in a rather short opinion, Mr. Justice Reed said:

"We are of opinion that the prohibition declared in Erie Railroad Co. v. Tompkins against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. . . . Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbours. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law."

In view of our extended speculative discussion above, any comment upon this decision would be tautologous.