THE USE OF FOREIGN MATERIALS IN TEACHING CONFLICT OF LAWS

MAX RHEINSTEIN
Max Pam Professor of Comparative Law, University of Chicago Law School, Chicago, Illinois

AUGUST 20, 1949

I SHOULD like to open my brief remarks on the use of foreign materials in the teaching of conflict of laws with an observation with which, I suppose, most, if not all, teachers of conflict of laws will agree: conflict of laws is a difficult field to teach. It must therefore be one of our first concerns as teachers not to overtax our students, to keep our discussions upon the level of the essential and carefully to refrain from including in our presentation anything that is not necessary for the purpose of making the students acquainted with the basic problems of the field, its methods, and its principal applications. We simply cannot afford any frills or fads. Thus, we must well ask ourselves whether references to, or presentation of, foreign materials is at all justified in our course. It is my contention that a well-considered and cautious use of foreign materials results not in any overburdening of the course but actually in a simplification of the task of both instructor and students.

Instruction in conflict of laws, as in other fields of the law, is aimed at enabling the students to apply it practically. From the very beginning we must impress it upon our students that to apply the law practically means more than to prepare, try, and decide a litigious case and that it is one of the most essential and most responsible tasks of the lawyer to prevent future litigation as far as possible by proper counseling and drafting. When a lawyer advises a client on an international transaction of even the simplest kind, for instance a sale of goods crossing international boundaries, not to speak at all of more complex transactions of international finance or corporate structure, he must always consider the possibility that a future lawsuit may arise not only in the courts of the client's or the lawyer's own country, but also in those of one or more foreign countries. Now whether or not a lawsuit may be commenced in a particular foreign country depends not on *our* rules of jurisdiction but on theirs. *If* a suit can be brought in a foreign country, the lawyer will have to consider, *how* it will be decided there, and that depends not only on foreign sub-

stantive law but on the foreign conflict of laws. Furthermore, when the client should sue in his own country, it is important to know whether the judgment has a chance of being enforced abroad and that again depends on the *foreign* rules on the enforcement of foreign judgments. Now I do not wish to imply that a student, or even a lawyer, would have to know all the laws of all the countries of the world. Obviously such an attempt would be absurd. But one thing is necessary for the student to know, viz., that international differences exist not only between systems of substantive law but also between systems of conflict of laws. That insight is anything but self-evident to a student who is quite naturally inclined to believe that at least the law of conflict of laws is the same all over the world. He must be jarred out of that complaisant and dangerous belief and there is no better way to do this than to present him with some foreign case applying conflicts rules different from those of our own system, preferably a case in which an American party has been exposed to such an experience. Once the student has read just one such case of a really startling character, he will have been shocked out of his dangerous innocence and will know that in advising his American client he had better investigate not only the foreign substantive law but also the foreign conflict of laws. So much for the immediately practical side of the problem.

But in teaching we have generally to deal with problems of less immediate practical urgency. What we have to do primarily is to present and elucidate the law and, due to the uncertain character of so many of our own rules, that task is anything but easy. It is my belief that many of the uncertainties and obscurities of our own conflict of laws can be elucidated and clarified through judicious reference to foreign law. We have in our law, for instance, a famous controversy as to the law determining the validity of a marriage. The old rule was simple enough. A marriage valid at the place of its celebration is valid everywhere and a marriage invalid at the place of celebration is invalid everywhere.[1] Yet this ancient rule is no longer followed generally. A trend has developed to some extent to look to the law of the parties' domicil.[2] But to what extent? In almost all foreign countries that problem has been well settled. As far as we are con-

[1] See Restatement of the Law of Conflict of Laws (1934) §§ 121, 122; Goodrich, Handbook of the Conflict of Laws (3rd ed. 1949) Sect. 116.

[2] For recent discussions, see Beale, Laughlin, Guthrie and Sandomire, "Marriage and the Domicil" (1931) 44 Harv. L. Rev. 501; Taintor, "What Law Governs the Ceremony, Incidents and Status of Marriage" (1939) 19 Bost. U. L. Rev. 353; Stimson, "Law Applicable to Marriage" (1942) 16 U. of Cin. L. Rev. 81; Kalijarvi, "International Aspects of the Marriage Laws of the United States" (1945) 40 Ill. L. Rev. 217.

cerned with the formalities necessary for the creation of a legally recognized marriage relation, they still look to the law of the place of celebration, but where the question is one of "intrinsic validity," the law resorted to is that of the parties' personal status, i.e., either that of the domicil or of nationality. Now, of course, the question arises what is "intrinsic validity." A glance at the foreign laws quickly reveals the meaning of this term and the underlying policy: the state to which a person "belongs," either as a domiciliary or as a national, has an interest in determining whether or not he shall be free to marry at all, or to intermarry with a person of some particular kind, or whether, and under what circumstances, he shall be able to free himself from a marriage concluded under certain irregular circumstances, for instance under the influence of fraud, mistake, or duress. Hence, all problems of such a kind are properly referred to the state of domicil or nationality and are distinguished, as problems of intrinsic validity, from those of mere form, i.e., the problems connected with legal provisions whose observance is unimportant to the parties' home state, but with respect to which certainty is vital. These policies are sensible, and they underly also the groping attempts of our own courts. Once they are grasped, with the help of a concise survey of foreign solutions,[3] they become understandable and can be clearly articulated, much to the benefit of the understanding and further development of our own law. Of course, such a discussion must be supplemented with appropriate references to the peculiar circumstances and policies of our own country, especially the peculiarly strong *favor matrimonii* on the part of American judges, particularly of the past century, who were often only too glad by means of the rule of *locus actus* to emasculate legislative restrictions on the freedom of marriage which they did not regard as justified. But it is exactly through such confrontation of policies that our own attitudes can be more clearly presented to a class.

With respect to jurisdiction of courts, the United States occupies an unique position. We are all familiar with our American rules as to jurisdiction in actions *in personam* against individuals and against corporations. Physical apprehension in the state or doing business are the decisive criteria, supplemented by a whole set of supplementary criteria or casuistic definitions, especially of the term "doing business." The recent decision in the case of *International Shoe Company* v. *State of Washington*[4] has opened the prospect that many or all the traditional rules on jurisdiction may become obsolete. Under that decision a state may assume jurisdiction whenever the de-

[3] For such a survey, see Rabel, 1 Conflict of Laws (1945) 243 *et seq.*

[4] 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057 (1945).

fendant has "such minimum contacts with it that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" What do these cryptic terms mean? We can expect that the next twenty years or so will bring us a multitude of casuistic decisions, but that all these pronouncements will later on be grouped under certain type categories and that there will finally emerge a new set of rules of more or less clearly articulated formulation. But may we not consider already now of what character these rules are likely to be, what new rules are likely to correspond with traditional notions of fair play and substantial justice? An examination of foreign laws is quite likely to give us some hints. Practically everywhere, we find that an action arising out of a tort may be brought at the *locus delicti* and an action arising out of a contract at the place where the contract was concluded or where it was to be performed. Nowhere, on the other hand, do we find that a corporation can be sued in every place where it is doing business with respect to transactions which are not connected with that place.[5] Do we not find here ideas which can also be found already in our law, only in a less clearly articulated form? Let me remind you only of *Hess* v. *Pawloski*[6] and *Doherty and Company* v. *Goodman*,[7] on the one hand, and the doctrine of *forum non conveniens*, on the other.[8] Again, of course, we have to consider that there are at work in our country policies for which no counterpart can be found abroad, such as particularly the policy of favoring an individual plaintiff, usually visualized as a poor workman or a helpless widow who has to sue a corporation with the proverbial deep pocket. But some acquaintance with the almost unanimous foreign notions about substantial justice and fair dealing can help our students to understand certain trends of our law and may even help us to achieve an earlier consolidation and articulation of these trends.

Observation of an almost complete unanimity of foreign courts may also help us to clarify our students' notions about one of the most troublesome and most important recent controversies in present American conflict of laws. I mean the celebrated controversy about the extent to which parties to a contract shall be allowed to determine the law by which future

[5] For a brief survey of "The Civil Law Principles of Jurisdiction of Courts," see Nussbaum in Cheatham, Dowling, Goodrich, and Griswold, Cases and Materials on Conflict of Laws (2nd ed. 1941) 159; also, Lorenzen, Cases and Materials on the Conflict of Laws (5th ed. 1946) 14.

[6] 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927).

[7] 294 U. S. 623, 55 S. Ct. 553, 79 L. Ed. 1097 (1935).

[8] For a recent survey, see Notes (1946) 14 U. of Chi. L. Rev. 97, (1948) 15 U. of Chi. L. Rev. 332.

controversies about their contract shall be decided.[9] This is not the place to discuss the merits of the conflicting opinions. But our students may see in a new light the arguments made on theoretical grounds against this so-called autonomy of the parties when they are shown that these very same arguments have been made and discussed in practically every important foreign country and that in practically all these countries the courts have been left unimpressed by the learned debates and have continued to recognize the widest possible scope of party autonomy.[10] Some even fleeting acquaintance with this startling fact will be useful to our students; at the least, it will help them to plan international transactions.

Our conflict of laws, as I have already observed repeatedly and as you all know only too well, is full of uncertainties. Many of these uncertainties result from the complex nature of our problems and from the youthful age of our field, at least as far as common law countries are concerned. But a good many others have their cause in that peculiar dogmatism which has been so characteristic for the conflict of laws. What is the actual significance of these various "theories"? What considerations of policy, if any, do they express? Again, foreign law may often help the student to look through the dogmatic formulae and to recognize what real interests there are at stake. A concrete illustration may be used to show more clearly what I mean. Many an observer has been puzzled by such cases as *Buckeye* v. *Buckeye*[11], *Gray* v. *Gray*,[12] *Mertz* v. *Mertz*,[13] or *Herzog* v. *Stern*.[14] Let us look at the *Buckeye Case*. A young man and a young woman, who were both living in Wisconsin, went on a short motor trip to Illinois. While driving in the latter state, the male partner became involved in a collision in which his female companion was injured. Both parties returned to Wisconsin, and there the young woman brought an action for damages against the man. He, or more realistically seen, his insurance company, tried to meet

[9] See, among others, Beale "What Law Governs the Validity of a Contract" (1909) 23 Harv. L. Rev. 1, 79, 194, 260; Lorenzen, "Validity and Effects of Contracts in the Conflict of Laws" (1921) 30 Yale L. J. 565, 655, 31 Yale L. J. 53; Cook, The Logical and Legal Bases of the Conflict of Laws (1942) 389; Nussbaum, "Conflict Theories of Contracts: Cases versus Restatement" (1942) 51 Yale L. J. 893; Note (1948) 16 U. of Chi. L. Rev. 157.

[10] For a survey and a penetrating discussion, see Rabel, 2 Conflict of Laws (1947) 357 *et seq.*

[11] 203 Wis. 248, 234 N. W. 342 (1931).

[12] 87 N. H. 82, 174 Atl. 508 (1934).

[13] 271 N. Y. 466, 3 N. E. (2d) 597 (1936).

[14] 264 N. Y. 379, 191 N. E. 25 (1934).

the claim with the defense that in the time between the accident and the commencement of the suit the parties had become married to each other and that under the law of Illinois, where the accident happened, the cause of action had been extinguished by the parties' intermarriage. The Wisconsin court held this defense to be decisive and dismissed the suit, although in Wisconsin, the state of the forum and the parties' domicil, a statute had been adopted that had done away with the old common law rule of extinguishment of personal injury claims through the parties' intermarriage. The court's argumentation was simple. The plaintiff's claim, if any, could arise only under the law of Illinois, as the law of the place of wrong, and Illinois law was *therefore* the only one that could determine under what circumstances the cause of action could be discharged or otherwise terminated. "If, as seems clear," the court said, "the law of Illinois is to govern, both as to the creation and extent of defendant's liability, and if the liability so created is subject to discharge or modification by the law of Illinois, *we see no escape from the conclusion*[15] that plaintiff's cause of action has been wholly extinguished by her marriage." Is there really no escape from that conclusion? A brief reference to continental decisions can show the possibility of a different approach. Continental courts recognize in such cases the presence of two entirely different problems, viz., first, the problem of whether or not the manner in which the defendant drove his car constituted negligence, and second, the problem of determining what influence, if any, was to be ascribed to the parties' subsequent intermarriage. If the question is, for instance, whether a failure to stop, look, and listen at a railroad crossing constitutes tortious conduct, the courts characterize *this* problem as one of the law of torts and therefore, following the almost universal choice-of-law rule, look to the law of the place of wrong. Having found the conduct actionable, the courts then turn to the second problem of the case, viz., that of determining whether or not a personal injury claim can be maintained by a wife against her husband. This problem is not regarded as one of the law of torts but one of the law of husband and wife and, therefore, as being subject not to the law of the place of wrong, but to the law of the parties' domicil or nationality.[16] Similarly, in a case of the type of *Herzog* v. *Stern*,[17] a continental court would say that the problem of whether or not the conduct in question constituted actionable negligence, was a problem of the law of torts and thus "governed" by the *lex loci delicti*, but that the different question of

[15] Italics ours.

[16] *Cf.* Rabel, The Conflict of Laws, Vol. 2, at 266; Vol. 1, at 322, 606.

[17] *Supra*, note 15.

whether or not the plaintiff's claim survived the death of the tortfeasor *might* well be regarded as a problem of the law of decedents' estates and should therefore be decided under the law of the decedent's last domicil or nationality. But this latter characterization is not the essential point. No, the essential point is constituted by that technique of the continental courts which recognizes that one and the same "case" may contain more than one "problem" and that every one of the two or more problems which may be contained in a case may have to be decided under a different law. This technique, which is sometimes referred to as that of *depeçage* is perfectly self-evident to continental courts, and in a case like that of the unhappy Buckeyes most probably not a single word would be spent upon its justification. But to an American court this technique of *depeçage* is anything but self-evident. Quite the contrary. When problems of the conflict of laws are looked upon as problems of the enforcement of foreign-created causes of action, the *depeçage* technique appears strange and quite inapplicable. The cause of action has "arisen" under the law of a certain state and "therefore" it can only be the law of that very same state which can determine under what circumstances that cause of action is discharged or otherwise terminated. This is not the place to engage upon any debate of the comparative merits of the two techniques. Personally, I prefer the *depeçage* approach, and I am perfectly convinced that it would yield better results, that is, results more in line with the basic policies underlying the whole conflict of laws, than the vested rights-territoriality approach which we find not only advocated by influential scholars but also applied with great frequency in the decisions of our courts. But that is not the point. The essential aspect of the matter is that a reference to the foreign materials can quickly and easily make our students aware that the conclusion which the Wisconsin Supreme Court obviously disliked, but from which it could not find an escape, is consistently avoided by foreign courts, that it is therefore at least *possible* to decide differently and that this different result is due to a difference in basic technique and theory.

Here I have now reached my last point, viz., the possibility of using foreign materials for the purpose of recognizing and evaluating the basic techniques and theories of the American conflict of laws. I wish I had more time to present this aspect just a bit more in detail. But I do not have that time, and so I can do no more than present, without any evidence, the conclusion which has pressed itself upon me. That conclusion is that, as far as basic theory is concerned, American conflict of laws has not freed itself entirely from the spell of doctrines which once also dominated the conflict of laws of continental Europe, but whose spell was broken in the

first half of the nineteenth century, primarily through the devastating critique of von Waechter and the constructive work of rebuilding of Savigny. Almost from its inception in the twelfth century to the days of Waechter and Savigny, continental discussions of problems of conflict of laws were carried on almost exclusively within the framework of the controversy between personality and territoriality. Which *statuta*, which laws, are personal and which are territorial?[18] This was the principal question that was asked by almost every one, to be answered, of course, differently, by different scholars. The result was a state of affairs which was described, properly, by von Waechter as one of hopeless confusion. As in so many similar instances in the history of the law and other fields of learning, the confusion was simply due to the fact that one had not yet learned to ask the right questions. The faultiness and sterility of the entire controversy between personalists and territorialists was strikingly demonstrated by von Waechter in 1841–1842.[19] His negative criticism was followed seven years later by the great constructive work of Savigny in which he stated the way in which the problems of the conflict of laws are to be formulated if they are to make any practical sense at all. We do not have to ask whether a certain law is territorial or personal, but with what state or country a certain life relation between human beings has so close and essential a connection that we ought to look to its law rather than to that of any other state or country to decide those disputes which may arise out of, and in connection with, that life relation.[20] Of course, this way of stating the problem does not yield immediate answers to every conceivable problem, but, at least, it makes sense, and it can guide us as a heuristic principle in our search for that law whose application will be the most appropriate for a given problem. In his discovery of the right formulation of the basic problem Savigny had been deeply influenced by the work of Joseph Story. Savigny articulated an idea which had obviously inspired Story, but for which the latter had not found the felicitous formula and which must be gathered rather between the lines of his work. In his explicit and articulated statements of theory, Story still adheres to the time-honored formulae of the statutists, and more particularly of those statutists who had consistently preferred territorialism over personalism.[21] It is upon the basis

[18] *Cf.* Wolff, Private International Law (1945) 21; Beale, 3 Conflict of Laws (1935) 1886 *et seq.*; Lorenzen, "Huber's De Conflictu Legum" (1919) 13 Ill. L. Rev. 375, reprinted in Selected Articles on the Conflict of Laws (1947) 136.

[19] "Ueber die Collision der Privatrechtgesetze verschiedener Staaten," 24 Archiv für die Civilistische Praxis (1841) 230; 25 *id.* (1842) 1, 161, 361.

[20] System des heutigen Roemischen Rechts, vol. 8, transl. by W. Guthrie (A Treatise on the Conflict of Laws) (2nd ed., Edinburgh, 1880).

[21] See Story, Commentaries on the Conflict of Laws (8th ed. 1883) §§ 7, 8, 17, 18, 20; *Cf.* Cook, The Logical and Legal Bases of the Conflict of Laws, Ch. 2, reprinted

of this territorialism that there have grown up those "theories" of vested right and local law which have plagued us for the last decades and against which so many of the modern writers have been fighting with much vigor but little success in the courts, or, perhaps better, with negative success in the courts. Our judges have begun to see that there is something wrong with the old vested rights-territoriality theories, but they do not know what new approach they should now take. Their confusion is well understandable, and so is the confusion of our students. But should we not say that the time has come to tell our students about von Waechter's critique of those formulations of the problems of the conflict of laws which are still all too much current with us and to acquaint them with the ideas of Savigny and the generations that have been at work abroad since his days?[22] In that way, I believe, the greatest benefit can be derived from use of foreign materials in the teaching of conflict of laws.

Now you may wonder whether I advocate that all those foreign materials of which I have spoken should be presented to the students of an ordinary course in American conflict of laws. The answer is clearly "No." Some of them might be judiciously referred to in classroom discussions; one or the other foreign case, statutory provision, or text passage might be included in our teaching materials. Many more may be used in a seminar on comparative conflict of laws. But there is one place in which knowledge of foreign ideas ought to be present, and that is the mind of the teacher of the American conflict of laws. He needs it for the clarification of his own ideas. As a matter of fact, I should even say that at this moment of obvious crisis in the American conflict of laws and in this age of world trade and world finance some acquaintance with the modern techniques of continental conflict of laws and with its principal institutions is indispensable. Until recently, it was, of course, difficult or almost impossible for the American teacher of conflict of laws to obtain this knowledge. But now the wealth of foreign experiments, experiences, solutions, and, also of course, errors and misjudgments, has been made easily accessible to every one of us in Professor Rabel's monumental work. It is due to him and to that great institution under whose auspices his work has been carried on, that unavailability of the necessary knowledge is no longer an available excuse.

from (1931) 31 Col. L. Rev. 368, and Lorenzen, "Story's Commentaries on the Conflict of Laws—One Hundred Years After" (1934) 48 Harv. L. Rev. 15, reprinted in Selected Articles 181 *et seq.*

[22] See Gutzwiller, Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts (1923); *id.*, "Le développement historique du droit international privé" (1929) 29 Recueil des cours de L'Académie de droit international 291; see also Wolff, Private International Law 32; Beale, 3 Conflict of Laws 1924.