

1957

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MINNESOTA LAW REVIEW

Volume 41

May, 1957

No. 6

INTERSTATE AND INTERNATIONAL CONFLICTS LAW: A PLEA FOR SEGREGATION

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Mr. Armand Du Bois' article in the *Minnesota Law Review*¹ has, for almost a quarter of a century, remained the only analysis of the subject of the present article. His opinion, which favored substantial identity of interstate and international conflicts in this country, is shared by the *Restatement of Conflict of Laws*.² A brief re-examination of his thesis may be necessary at a time when the American Law Institute has embarked upon a complete revision of the *Restatement*.³ Professor Willis Reese, the reporter for the *Restatement Second*, has expressed the opinion that this new project, except where its text clearly indicates otherwise, should be read as referring only to interstate conflicts.⁴ This article is written in support of that view.

The only precedent for this approach is Rorer's *Interstate Law* which, eighty years ago, excluded from its scope international transactions as governed by "the doctrine of international law."⁵ Before and after this treatise, American courts and writers assumed identity between the principles governing international and interstate transactions.

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This paper is an abbreviated version of the author's contribution to the roundtable discussion on this topic at the 1956 meeting of the Association of American Law Schools in Chicago. This version will, in substance, be included in a text now in preparation.

1. Du Bois, *The Significance in Conflict of Laws of the Distinction between Interstate and International Transactions*, 17 Minn. L. Rev. 361 (1933).

2. Restatement, Conflict of Laws § 2 (1934).

3. Restatement Second, Conflict of Laws, Tent. Draft No. 3 (1956).

4. Professor Reese has kindly authorized me to refer to this opinion orally expressed at the above roundtable with the proviso that this opinion is not to be taken as that of his advisers or of the American Law Institute.

5. Rorer, *American Inter-State Law* 1 (1879). I Beale, *Conflict of Laws* XXX (1935), denies this book any "independent authority." For an intimation that from early beginnings the difference between international and interstate conflicts law has been keenly felt in the civil law state of Louisiana, see Livermore, *Dissertations* 137 (1828), concerning the disposition of personal property under the law of "a sovereign state" as distinguished from another state of the union.

When Story wrote his *Commentaries*,⁶ this assumption was based on at least two facts no longer true. In the first place, a general commercial and common law largely avoided interstate conflicts situations;⁷ and those few that arose from a slowly spreading disruption of this general law were held solvable under a "law of nations" derived from natural law ideals and continental traditions.⁸ Secondly, constitutional limitations upon the application of such ideals and traditions to the solution of interstate conflicts were still in their infancy, even as to the most obvious object of constitutional stringency, the recognition of sister state judgments.⁹ Instead of attempting to trace the changes that have since occurred in both respects and their impact upon the relation between international and

6. Story, *Conflict of Laws* (1834).

7. See in general 1 Crosskey, *Politics and the Constitution in the History of the United States* 549 (1953).

8. Story, *Conflict of Laws* 9, 10 (1834). According to Du Bois, *supra* note 1, this derivation accounts for what he considers the essentially interstate character of both our international and interstate conflicts law, since he sees both the Dutch and French sources of this law based on interregional relations. Du Bois, *supra* note 1, at 362, 380. As to the recognition of foreign judgments this analysis is clearly open to challenge. True, in the Netherlands a decree of 1580 following the Union of Utrecht had provided for mutual enforcement of judgments by the several provinces, and the Code Michaud of 1629 had given a similar injunction for France. But neither law applied to the judgments of foreign countries. Nadelmann, *Non-Recognition of American Money Judgments Abroad and What to Do About It*, 42 *Iowa L. Rev.* 236, 238 (1957). Thus, as to such judgments, it was the Dutch doctrine of international comity, the French attitude of outright hostility to foreign judgments [*cf.* *Hilton v. Guyot*, 159 U.S. 113, 210 (1895)] or Lord Mansfield's aloofness [*Walker v. Witter*, 1 *Doug.* 1, 99 *Eng. Rep.* 1 (K.B. 1778)], rather than interregional affinities, that were the sources of early American law. See, *e.g.*, *Bartlett v. Knight*, 1 *Mass.* 401, 2 *Am. Dec.* 36 (1805), *Hitchcock v. Aicken*, 1 *Caines* 460 1st ed. (N.Y. 1803).

Similarly, as to problems of *choice of law*, early American law was completely devoid of interregional influence. Huberus, Story's main source, was in the first place a Frisian, devoted to "the jealous separatism of seven individualistic provinces" [Yntema, *The Historic Bases of Private International Law*, 2 *Am. J. Comp. L.* 297, 306 (1953)], and concerned with "the observance of Frisian laws in other countries," among which he included the laws of the other provinces [Huber, *The Jurisprudence of My Time*, vol. 1, p. 11, see also, *e.g.*, vol. 2, p. 130 (1939)]. And d'Argentre, his great continental predecessor and counterpart, also relied upon by Du Bois, *supra*, for his interstate thesis, was equally "preoccupied with the defense of the legal autonomy of his province." Batiffol, *Droit International Prive* 266 (2d ed. 1955). See also Yntema, *supra*, at 306, and particularly Gamillscheg, *Der Einfluss Dumoulin's auf die Entwicklung des Kollisionsrechts* 101 (1955). We must conclude, therefore, that American conflicts law is international rather than interregional in its origin, though its later interstate developments may have contributed significantly to a tightening abroad of private international law. See also, Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 *Colum. L. Rev.* 189 (1942), Ehrenzweig, *American Conflicts Law in Its Historical Perspective*, 103 *U. Pa. L. Rev.* 133 (1954).

9. See, *e.g.*, *Peck v. Williamson*, 19 *Fed. Cas.* 85 (C.C. N.C. 1813), *Smith v. Lewis*, 3 *Johns.* 157 (N.Y. 1808), *Bartlett v. Knight*, 1 *Mass.* 401 (1805), *Phelps v. Holker*, 1 *Dall.* 261 (Pa. 1788), *Jenkins v. Putnam*, 1 *Bay* 8 (S.C. Law 1784) *But see infra* note 12.

interstate conflicts, the following summary analysis will list, as of today, some of the reasons that may be urged for their separate treatment, having in mind the need for both an independent interstate and an independent international conflicts law. The problems discussed should be taken as mere examples to illustrate the need for a comprehensive study of the entire subject of conflict of laws from the stated viewpoint.

NEED FOR AN INDEPENDENT INTERSTATE CONFLICTS LAW

The near abandonment of international,¹⁰ and lately even of a national conflicts law,¹¹ in combination with the great diversity of the common and statutory laws of the several states, has, in view of the continuing growth of interstate commerce and migration, prompted a demand for ever more definite and uniform interstate conflicts rules. Even beyond long acknowledged compulsions in the recogni-

10. On the current controversy about a proposed constitutional amendment which would preclude treaties from modifying state conflicts rules, see, e.g., Perlman, *On Amending the Treaty Power*, 52 Colum. L. Rev. 825 (1952), 78 Report of N.Y. State Bar Ass'n 281 (1955).

On the desirability on the other hand, of greater initiative of the United States in this field see, e.g., Nadelmann, *The United States and the Hague Conference on Private International Law*, 1 Am. J. Comp. L. 268 (1952), Nadelmann, *Ignored State Interests, etc.*, 102 U. Pa. L. Rev. 323 (1954), Nadelmann, *supra* note 8. Possibly, constitutional objections to federal and executive interference with state rights are the primary cause for hesitation. Cf. the line of dicta from *In re D'Adamo's Estate*, 212 N.Y. 214, 106 N.E. 81, 85 (1914), to *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554 (5th Cir. 1946), *cert. denied*, 331 U.S. 808 (1947), and saving clauses, such as Art. 299c of the treaty of Versailles, or that contained in the Peace Treaty with Italy of 1947 (61 Stat. 1367). On a similar attitude to inter-American efforts for treaty codification, see Kuhn, *Opinion of the Inter-American Juridical Commission on Revision of the Bustamante Code*, 46 Am. J. Int. L. 317 (1952), Lorenzen, *The Pan American Code of Private International Law*, 4 Tul. L. Rev. 499, 519 (1930). But see Fenwick, *The Charter of the Organization of American States as the "Law of the Land,"* 47 Am. J. Int. L. 281 (1953). A possible change of attitude in at least a limited field may be foreshadowed in the proposal of the U. S. Department of Justice to appoint a federal commission to study international rules of judicial procedure. Release March 16, 1955. See in general Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515 (1953).

11. See Cheatham, *A Federal Nation and the Conflict of Laws, The Conflict of Laws and International Contracts* 193 (1949), Cheatham, *Federal Control of Conflict of Laws*, 6 Vand. L. Rev. 581 (1953). *United States v. Belmont*, 301 U.S. 324, 331 (1937), still stands as the only authoritative statement by the Supreme Court promising the development of such a national conflicts law, outside the field of admiralty and congressional legislation. Such minimum national standards of choice of law as may be implied in *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), have found little implementation in the last quarter of a century. See *infra* note 55. Federal conflicts law, as applied by the federal courts, has suffered a fatal blow from the extension of the *Erie* doctrine to the field of conflict of laws. *Klaxon Co. v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487 (1941). For criticism see, e.g., Clark, C.J., in *Collins v. American Automobile Insurance Co. of St. Louis*, 230 F.2d 416 (2d Cir. 1956). See also Annot., 21 A.L.R. 2d 247 (1952).

tion of sister state judgments,¹² such new needs have been met by new constitutional controls.¹³ Policies developing such controls are obviously fundamentally different from those which continue to determine international conflicts,¹⁴ a fact signally apparent in the

12. *Mills v. Duryee*, 11 U.S. (7 Cranch) 481 (1813), per Story, J. As to the present relations between the two conflicts laws in this respect, compare Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783 (1950), and Nadelmann, *supra* note 8, with Reese and Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 Colum. L. Rev. 153 (1949), Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 Iowa L. Rev. 183 (1957). Compare also Ehrenzweig, *Recognition of Custody Decrees Rendered Abroad*, 2 Am. J. Comp. L. 167 (1953) with Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 Mich. L. Rev. 345 (1953).

13. See, e.g., Cheatham, *supra* note 11, Smith, *The Constitution and the Conflict of Laws*, 27 Geo. L. J. 536 (1939) The selection by the Supreme Court, in promoting this control, of a theory of full faith and credit to statutes (see, e.g., Reese, *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. Chi. L. Rev. 339 (1952)) seems less than fortunate. In the first place such language, which is probably due to an international conflicts heritage (stressing respect to the decrees of foreign sovereigns), fails to disclose the fact that such faith and credit requires "a full-fledged system of conflict of laws" (Rheinsteim, *The Constitutional Bases of Jurisdiction*, 22 U. Chi. L. Rev. 775, 788 (1955)), as to which statutes should not be treated differently from common law rules. Cf. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945). Secondly, and most important, this terminology has prevented the Court from disclosing and analyzing the choice of law rule it has impliedly recognized. If an action based on a wrongful death statute of a sister state must be entertained (*Hughes v. Fetter*, 341 U.S. 609 (1951)) we shall have to know whether it is the statute of the state where the wrongful conduct was committed, or where the injury was inflicted, or where death occurred. We have not learned this so far. We may hope that the Court, if following its present approach, will choose to make clear that all it has done and probably can do, as it could and did do under due process, is to establish a set of minimum rules of choice of law designed to exclude application of the *lex fori* where justified expectations require such exclusion.

14. Only "in the absence of proof to the contrary" should it be assumed that such control will result in "a greater degree of comity, and friendship, and kindness" toward a sister state. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 590 (1839). See also *Bond v. Hume*, 243 U.S. 15, 22 (1917) Foreign experience shows that interregional conflicts rules may be even less rigid than international ones. See Ficker, *Grundfragen des Deutschen Interlokalen Rechts* 7 (1952), Wengler, *Prinzipienfragen des interzonalen Rechts in Deutschland*, 4 Neue Jur. Wochenschrift 49 (1951). In this country recognition (possibly prohibited by the due process clause for interstate relations) of the "international" competency of a foreign judgment court lacking jurisdiction under its own law, may result in greater "kindness" to a foreign judgment than that of a sister state. *Pemberton v. Hughes*, [1899] 1 Ch. 781, 790. See also note 55 *infra*. While similar problems exist in some federations such as Australia (cf. Cowen, *The Conflict of Laws in Australia and the United States, The Conflict of Laws and International Contracts*, 174 (1949)) and Germany (Ficker, *supra*), they have been largely eliminated in others, including Canada, Mexico and Switzerland. See Eliesco, *Essai sur les Conflits des Lois* (1925), Klein, *Studien zum Interlokalen Privatrecht* (1925), Scramali, *I Conflitti Interregionali di Legge nel D.I.P.* (1925), DeNova, *Les systèmes juridiques complexes en droit international privé*, Rev. Crit. D.I.P. 1 (1955), DeNova, *Natura del D.I.P.*, 32 Riv. Dir. Int. (1940) Niboyet, *Conflits entre les lois françaises et les lois locales d'Alsace et Lorraine en droit privé*, *Comm. de la loi du 24 Juillet 1921* (1922) See also Guldener, *Das Internationale und Interzonale Zivilprozessrecht der*

near-general limitation to interstate conflicts, of current efforts for uniform legislation in this field.¹⁵ Full faith and credit between sister states would and should gain in a final divorce from the "comity" between foreign nations.¹⁶

Some of these policy differences have resulted in the development in each field of large sectors which lack counterparts in the other. Thus, problems prevailingly occupying the courts in interstate relations, such as those concerning the constitutional "jurisdiction" of the judgment court, the applicability of foreign wrongful death statutes, or the manifold problems arising from different statutes of limitations¹⁷ and workmen's compensation,¹⁸ are comparatively rare

Schweiz (1951), Kolléjwin, *Ned. Tijdschr. Int. R.* 269 (1953), Lalive, *Schweiz. Beitr. zum 4. int. Kong. für Rechtsvergl.* 103 (1954), Lampue, *Rev. Crit. D.I.P.* 249 (1954), Beitzke, *Droit international privé et Droit inter-regional privé*, 8 *Rev. Hell. de Droit Int.* 131 (1955), Schoch, *Conflict of Laws in a Federal State: The Experience of Switzerland*, 55 *Harv. L. Rev.* 738 (1942). For further references and comparative analysis, see *Batiffol Droit International Privé* 302 (2d ed. 1955).

15. See, e.g., the Uniform Reciprocal Enforcement of Support, Divorce Recognition, Enforcement of Foreign Judgments, Interstate Arbitration of Death Taxes, Interstate Compromise of Death Taxes Acts, U.L.A. vols. 9 and 9a. For an example of state legislation to the same effect, see N.Y. Decedent Estate Law, § 160, limiting the recognition of foreign administrators expressly to those appointed in the United States. See *Gibb v. Chusholm*, 204 *Misc.* 892, 126 N.Y.S.2d 150 (Sup. Ct. 1953).

16. "The misleading word 'comity' has been responsible for much of the trouble." See *Cardozo, J., Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 201 (1918).

17. In most of the few cases involving international conflicts, such as *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955) (Panama), *Goodwin v. Townsend*, 97 F.2d 970 (3d Cir. 1952) (Ontario), *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1930) (France) (see also *Wheeler v. Soc. Nat. des Chemins de Fer Français*, 108 F. Supp. 652, 654 (1952)), *Gonzales v. The Archangelos*, 135 F. Supp. 663 (E.D.Va. 1955) (Honduras), *Sinai v. Levi*, 208 *Misc.* 650, 144 N.Y.S.2d 316 (1955) (Italy), the *lex fori* in effect prevailed over the defense of foreign limitation. *Perkins v. Benguet Consol. Mining Co.*, 55 Cal. App. 2d, 720, 132 P.2d 70 (1942), *cert. denied*, 319 U.S. 774 (1943), is distinguishable as applying Philippine law under a borrowing statute of the forum. Insistence upon "procedural" characterization in interstate cases may be abetted by the inclusion of foreign country limitations. *Bank of Nova Scotia v. San Miguel*, 196 F.2d 950, 956 (1st Cir. 1952).

18. The following are some typical problems arising in the international field. the constitutionality of statutory discrimination against nonresident alien dependents (*Antosz v. State Compensation Comm'r*, 130 W.Va. 260, 43 S.E.2d 397 (1947)), exclusiveness as to foreign accidents (*Spelar v. American Overseas Airlines, Inc.*, 80 F. Supp. 344 (S.D.N.Y. 1947)), sufficiency of proof (*Bass Foundry & Mach. Co. v. Christopoulos*, 119 Ind. App. 568, 88 N.E.2d 692 (1949)), *Romano v. Littleton Constr. Co.*, 95 N.H. 404, 64 A.2d 695 (1949), *Catelli v. Bayonne Associates*, 3 N.J. Super. 122, 65 A.2d 617 (1949)), the scope and impact of treaties (*Liberato v. Royer*, 270 U.S. 535 (1926)), *Iannone v. Radory Construction Corporation*, 285 App. Div. 751, 1208, 141 N.Y.S.2d 311 (1955), *aff'd*, 1 N.Y.2d 671, 150 N.Y.S.2d 199 (1956) (Italy), *Micaz v. Compensation Comm'r*, 123 W.Va. 14, 13 S.E.2d 161 (1941)), and the treatment of alien enemy dependents (e.g., *Todeva v. Oliver Iron Mining Co.*, 232 *Minn.* 422, 45 N.W.2d 782 (1951)). See 2 *Larson, The Law of Workmen's Compensation* § 63.52 (Supp. 1956).

in international conflicts. On the other hand, problems such as those relating to currency fluctuations,¹⁹ expropriations, or litigation by, against or between aliens,²⁰ are virtually limited to international transactions as are those arising in bankruptcy, antitrust or admiralty where interstate conflicts are significantly reduced by a national law, or those problems concerning negotiable instruments or the transfer of stock where interstate conflicts are often avoided by uniform legislation.²¹

Insistence upon formulas general enough to serve both fields, may have impeded, and may continue to impede, that patient and "delicate weighing process"²² as to specific fact situations which alone can, it is believed, produce that degree of rationality and predictability which is indispensable if we are ever to attain a truly national conflicts law.²³ It may very well be, for instance, that lack of a careful distinction between the two fields is at least partly responsible for the progressive dedication to a defeatist "proper law" approach.²⁴ And it may well be that many a leading opinion rendered in cases involving international conflicts would, if in terms limited to such conflicts, have avoided applications in the interstate field which have proved anything but satisfactory.

In *Scheer v. Rockne Motors Corp.*²⁵ we find the court refusing to apply the owners' strict liability statute of Ontario to an Ontario accident of a New York sales agent because of the absence of proof

19. Cf. *In re James' Will*, 248 N.Y. 1, 161 N.E. 201 (1928), Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 798 (1950) (discharge by payment in devaluated French currency).

20. In contrast to aliens, citizens of sister states are protected against discrimination. Cf. Cheatham and Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959, 963 (1952). Conceivably common treatment of aliens and residents of sister states has contributed to the preservation of the few remaining distinctions for conflicts purposes between residents and nonresidents among American citizens. Cf. *Douglas v. New York N.H. & H.R. Co.*, 279 U.S. 377 (1929) (holding such discriminations constitutional), *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553 (1920), Reese and Green, *That Elusive Word, "Residence,"* 6 Vand. L. Rev. 561 (1953).

21. See Stumberg, *Commercial Paper and the Conflict of Laws*, 6 Vand. L. Rev. 489 (1953).

22. Cheatham and Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959, 982 (1952).

23. Cheatham, *A Federal Nation and Conflict of Laws*, 22 Rocky Mt. L. Rev. 109 (1950).

24. It may not have been a coincidence that the New York Court of Appeals in the now leading case of *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954), adopted this approach for the law of contracts in an international conflicts case. Failure to distinguish between the manifold problem situations in interstate cases may also account for "proper law" trends in the law of torts. Morris, *The Proper Law of a Tort*, 64 Harv. L. Rev. 881 (1951). But see Ehrenzweig, *The Place of Acting in Intentional Multistate Torts*, 36 Minn. L. Rev. 1 (1951), and Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959 (1953).

25. 68 F.2d 942 (2d Cir. 1934).

that the owner had authorized the entry of the car into Ontario. A leading text doubts "the correctness of the result,"²⁶ though apparently adopting it as hornbook law for both international and interstate cases. Might not the answer be that the holding should have been limited to the statute of a foreign country? In *Louis-Dreyfus v. Paterson S. S.*,²⁷ Judge Learned Hand excused a Canadian carrier under a Canadian statute from a negligence claim that would have obtained under the law of Minnesota, the place of contracting. His statement that the law of the place of performance also determines "any excuses of nonperformance," has apparently been adopted in the *Restatement*,²⁸ thus rendering the general rule, that the place of contracting governs, an empty shell.²⁹ Would Judge Hand have been equally intent on applying the foreign law had performance occurred in another state of the union? It is often overlooked that the "homeward trend"³⁰ may be prompted not only by greater strangeness but also by greater similarity between forum and foreign law.

NEED FOR AN INDEPENDENT INTERNATIONAL CONFLICTS LAW

Parallel and contributory to a possible divergence between the laws of international and interstate conflicts is the fact that the treatment of the former, both as to scope and merits, may not only differ from that of interstate conflicts, but even as to each foreign country involved.³¹ Obviously the law of an adjoining Canadian province will find different treatment in a Michigan or New York court than that of far distant Saudi Arabia.³²

This difficulty is enhanced by the fact that American courts, notwithstanding a legislative trend to the contrary,³³ will usually require the law of a foreign country to be pleaded and proved. Failure to comply with this requirement (now largely abandoned as between

26. Goodrich, *Conflict of Laws* 279 (3d ed. 1949).

27. 43 F.2d 824 (2d Cir. 1930).

28. *Restatement, Conflict of Laws* § 358 (1934).

29. Nussbaum, *Principles of Private International Law* 174 (1943).

30. *Id.* at 37

31. Recognition of this fact accounts for the current publication of bilateral studies by the Parker School of Foreign and Comparative Law at Columbia University. Cf. the studies of Delaume (France), Domke (Germany), Eder (Columbia), Ehrenzweig-Fragistas-Yiannopoulos (Greece), Kolleroijn (Netherlands), Nussbaum (Switzerland), Philip (Denmark).

32. See *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956), *infra* note 35.

33. See, e.g., New York Civil Practice Act, § 344-a, Nussbaum, *The Problem of Proving Foreign Law*, 50 Yale L.J. 1018 (1941), Sommerich and Busch, *The Expert Witness and the Proof of Foreign Law*, 38 Corn. L.Q. 125 (1953), Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 Colum. L. Rev. 348 (1957), 23 A.L.R. 2d 1437 (1952).

sister states)³⁴ will in international cases frequently induce the American court to apply its own law, and thus quite generally and not only where the foreign country has "no law that civilized countries would recognize as adequate."³⁵ In fact, the court may even choose to dismiss the complaint without reference to any law, as in a recent case where the plaintiff had failed to prove Saudi Arabian law, the law of "the place of wrong."³⁶ Whether that law was necessarily applicable in an international conflicts case, was not considered although parties to both the accident and litigation were American citizens. An independent international conflicts rule referring to the *lex fori* could well have been predicated upon such a common citizenship in the forum rather than upon the purely fortuitous place of the accident,³⁷ and could thus have avoided what the court itself considered a denial of justice.³⁸

There are many other concepts developed by courts primarily to suit the exigencies of interstate relations that may unnecessarily burden international conflicts law. Thus, early stress in this country upon domicile in preference to nationality, prevailing elsewhere as a basic element of choice of law,³⁹ may have been indispensable to take account of an ever-increasing mobility from state to state. But it may well be that an international conflicts law freed from its interstate background would tend toward a different solution.⁴⁰ Moreover, by a separate treatment of international conflicts it might become possible to solve the perennial problem in this field of whether

34. See Uniform Judicial Notice of Foreign Law Act, 9 U.L.A. 401 (1951, Supp. 1956).

35. Although lacking authority, such a rule would apparently be recognized in the Second Circuit [*Walton v. Arabian American Oil Co.*, 233 F.2d 541, 545 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956)] on the strength of a dictum in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 355-56 (1909).

36. *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956). See also *Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931), *McQuade v. Compania de Vapores*, 131 F. Supp. 365, 367 (S.D. N.Y. 1955).

37. *But cf. Cuba Railroad Co. v. Crosby*, 222 U.S. 473 (1912), in effect dismissing the complaint of a presumably American workman against a Cuban railroad for damages for a work accident in Cuba. Not only was the defendant a foreign corporation, but the court stressed that here the parties had entered "into civil relations in foreign jurisdictions" without reliance on American courts. *Id.* at 480.

38. *Walton v. Arabian American Oil Co.*, 233 F.2d 541, 545, 546 (2d Cir. 1956), *cert. denied*, 352 U.S. 872 (1956). See also *Leary v. Gledhill*, 8 N.J. 260, 84 A.2d 725 (1951) *Schumann v. Loew's, Inc.*, 135 N.Y.S.2d 361, 366 (Sup. Ct. 1954), 32 N.Y.U.L. Rev. 377, 382 (1957).

39. 1 Rabel, *Conflict of Laws* 101, 112 (1945).

40. *Id.* at 149. The Polish law of 1926 distinguishes between international and interstate conflicts in this respect. Makarov, *Quellen des Internationalen Privatrechts* (1953), title "Poland."

capacity should be governed by the law of the place of contracting or by the law of domicile. In interstate conflicts the former has usually been given preference,⁴¹ as in such cases "resort to domicile is impracticable, because of the uncertainties connected with domicile. It may appear, however, that the domicile of persons engaged in international trade is more stable than the domicile in the average case where interstate transactions are involved, and if that assumption is justified, domicile may furnish a convenient standard for international transactions. In fact, it might be possible to regard the place in which the business is carried on, that is, the business residence, as a substitute for domicile in determining capacity in this class of cases."⁴²

We may admire as "inspiring" the "spectacle of foreign countries being granted all the privileges of sister states."⁴³ But it has not been privileges alone that have been "granted" to foreign countries by our private international law. In *Borwin v. Talcott*,⁴⁴ an Ohio federal court denied recognition to a Quebec judgment against an Ohio motorist, service upon whom had been made by publication as required by Quebec law, and by mail by discretionary order of the Quebec court. Although the defendant had thus actually been notified, a violation of due process was seen in the fact that the Quebec statute did not comply with the standard established by the Supreme Court for American legislation of this kind.⁴⁵ This holding of the Ohio court can be justified on the ground, stated in an earlier case, that it is "unreasonable that we should give greater respect to judgments recovered in a foreign country than to a judgment recovered in one of our sister states."⁴⁶ The true issue seems to be, however, whether constitutional standards established by and for American courts and conditioned upon the peculiar history and functions of American concepts of jurisdiction,⁴⁷ should be applied in judging the propriety of procedures in courts of foreign countries based upon

41. See in general Stumberg, *Conflict of Laws* 241-42 (2d ed. 1951).

42. Lorenzen, *Uniformity between Latin America and the United States in the Rules of Private International Law Relating to Commercial Contracts*, 15 Tul. L. Rev. 165, 170 (1941), accord, Batiffol, *Form and Capacity in International Contracts*, *The Conflict of Laws and International Contracts* 103, 111 (1949). See also Beale, *The Law of Capacity in International Marriages*, 15 Harv. L. Rev. 382 (1902).

43. Du Bois, *The Significance in Conflict of Laws of the Distinction between Interstate and International Transactions*, 17 Minn. L. Rev. 361, 362, 380 (1933).

44. 102 F. Supp. 979 (N.D. Ohio 1951).

45. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

46. *Grubel v. Nassauer*, 210 N.Y. 149, 103 N.E. 1113 (1913).

47. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956).

equally ancient and fair standards of competency and notice.⁴⁸ Similar considerations apply to the unfortunate general denial of merger of causes of action in foreign country judgments,⁴⁹ more likely than not due to the lack of an independent international standard linked to the enforceability of judgments from the particular foreign country.⁵⁰

An independent international conflicts law might very well have succeeded in this and other respects, in developing its own standards, more liberal than those in effect adopted in applying inappropriate interstate conceptions. Thus, without the background of full faith and credit, American courts might have long ago decided to follow the example of New York in recognizing divorces obtained in foreign countries upon tests better adapted to international relations than the domicile test serving the typical exigencies of interstate relations, they might have developed a new test in applying the no-double-liability exception in the taking of quasi in rem juris-

48. See *Pope v. Heckscher*, 266 N.Y. 114, 194 N.E. 53 (1934) (Canadian judgment based upon service by mail), *Grubel v. Nassauer*, 210 N.Y. 149, 103 N.E. 1113 (1913) (German judgment without personal service), *Smith v. Grady*, 68 Wis. 215, 31 N.W. 477 (1887) (Canadian judgment based upon personal service in Wisconsin). "Such conformity [between American and foreign standards] is not demanded in private international law by which the obligation created by a foreign judgment should properly be tested." 48 Harv. L. Rev. 680 (1935). Cf. *Northern Aluminum Co. v. Law*, 157 Md. 641, 147 Atl. 715 (1929), recognizing a Canadian judgment complying with Canadian law, by virtue of defendant's Canadian citizenship. See Note, 27 Harv. L. Rev. 464 (1914) On the different functions of Anglo-American "jurisdiction" and civilian "competence," see Nussbaum, *Principles of Private International Law* § 20 (1943). As to the latter, see, e.g., Austrian "Jurisdiktionsnorm," § 99; Danish Lov om Rettenspleje, § 248, German Code Civ. Proc., § 23, Scotland, e.g., North v. Stewart, 15 A.C. 452 [1890], Swedish Rättegångsbalk (1948) c. 10, § 1. See Beale, *The Jurisdiction of Courts over Foreigners*, 26 Harv. L. Rev. 193, 199 (1913), Ross, *The Shifting Basis of Jurisdiction*, 17 Minn. L. Rev. 146 (1933), probably the most perceptive analysis of the problem. Perhaps it should give us pause that a highest court of a continental country recently denied recognition to a Nevada divorce, holding the notice requirements of in rem jurisdiction prevailing in this country, to be contra bonos mores. *H. nee K. divorced S. v. Austrian Federal Ministry of Justice*, Adm. Court of Austria, April 1, 1954, 4 Am. J. Comp. L. 245 (1955)

49. *Swift v. David*, 181 Fed. 828 (9th Cir. 1910), *New York, L.E. & W.R. Co. v. McHenry*, 17 Fed. 414 (C.C.S.D.N.Y. 1883), *Eastern Townships Bank v. H. S. Beebe & Co.*, 53 Vt. 177, 38 Am. Rep. 665 (1880), *The East*, 8 Fed. Cas. 265 (N.D.N.Y. 1877) See Pirsig, *Merger by Judgment*, 28 Minn. L. Rev. 419 (1944), *Developments in the Law—Res Judicata*, 65 Harv. L. Rev. 818 (1952)

50. Where the plaintiff can expect recognition of his judgment, there is no reason for permitting him to sue on his original cause of action "If the foreign judgment is conclusive upon the merits against the defendant, why is it not equally so against the plaintiff?" *Alaska Commercial Co. v. Debney* 2 Alaska 303, 312 (1904). Common treatment of international and interstate problems of res judicata should be precluded by the fundamentally different structure of this doctrine in the common law and civil law orbit. Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 Mich. L. Rev. 238 (1940)

diction;⁵¹ they might have been willing to give some effect to foreign status conceptions unknown to the laws of the sister states,⁵² as they have given effect to the civil law classification of things movable and immovable,⁵³ or to the procedural capacity of foreign heirs whose status differs so fundamentally from that of American personal representatives;⁵⁴ and they might have further extended, rather than discredited, earlier attempts at establishing an international minimum standard of choice of law which in some cases may well be more rigid than in interstate conflicts.⁵⁵

Moreover, interstate conflicts rules, whether or not adopted under constitutional compulsion, are largely dictated by the need for curtailing that "forum shopping" for the more advantageous law, which is invited by the prevailing "transient rule" of personal jurisdiction.⁵⁶ Since this consideration has little meaning in international conflicts, it may often be too much to ask from American courts, to apply interstate rules to international conflicts. This demand may well have contributed to all-too-willing resort to the *lex fori* in cases

51. Compare *Parker, Peebles & Kno, Inc. v. National Fire Ins. Co.*, 111 Conn. 383, 150 Atl. 313 (1930), *Weitzel v. Weitzel*, 27 Ariz. 117, 230 Pac. 1106 (1924) (denial of jurisdiction over nonresident aliens based on garnishment and constructive service) with *Harris v. Balk*, 198 U. S. 215 (1905) (assumption of such jurisdiction in an interstate case involving full faith and credit). See Goodrich, *Conflict of Laws* 181 (3d ed. 1949), 40 Yale L.J. 139 (1930), Annot., 69 A.L.R. 609 (1930).

52. *But see*, Restatement, *Conflict of Laws* § 120 (1934). There seems to be little justification for an American court's refusal to recognize such legal relations as those created by the French "prodigality" concept (*cf. In re Weil*, 63 J. du Dr. Int. (Clunet) 893 (1936)) or a foreign polygamous marriage between foreigners (*cf. Estate of Bir*, 83 Cal. App. 2d 256, 188 P.2d 499 (1948)).

53. See *Toledo Soc. for Crippled Children v. Hickok*, 152 Tex. 578, 261 S.W.2d 692 (1953), *cert. denied*, 347 U.S. 936 (1954).

54. Compare *In re Prevost's Estate*, 138 N.Y.S.2d 828 (Surr. Ct. 1955), *Gibb v. Chusholm*, 204 Misc. 892, 126 N.Y.S.2d 150 (Sup. Ct. 1953) with *Vanquelin v. Bouard*, 15 C.B. (N.S.) 341 (C.P. 1863), *Sultan of Turkey v. Tiryakian*, 213 N.Y. 429, 108 N.E. 72 (1915), *In re Zietz' Estates*, 207 Misc. 22, 135 N.Y.S.2d 573, 579 (Surr. 1954), *aff'd*, 285 App. Div. 1147, 143 N.Y.S. 2d 602 (1955), *aff'd* 1 N.Y.2d 748, 135 N.E.2d 49 (1956). Concerning the differences in this respect between the two great legal systems, see Rheinstein, *European Methods for the Liquidation of the Debts of Deceased Persons*, 20 Iowa L. Rev. 431 (1935). As to Louisiana law, see 27 Tul. L. Rev. 87 (1952). For an analysis of both German and American problems in this field see Raape, *Internationales Privatrecht* (4th ed. 1955) 418.

55. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), which subjected to the due process requirement a Texas court's obligation to refrain from applying the *lex fori* to a Mexican contract. This case seems to be in jeopardy in view of what appears as a lack of respect given to the decision in the interstate case of *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). See *supra* note 11. But see Restatement Second, *Conflict of Laws*, Tent. Draft No. 3, 20 (1956), *Batiffol, La Cour suprême des États-Unis et le Droit International Privé*, [1936] Rev. Crit. Dr. Int. 597, 613 (1936).

56. Ehrenzweig, *supra* note 47

involving such conflicts, either under traditional rules relating to choice⁵⁷ or proof of foreign law,⁵⁸ or by such ready tools as *renvoi*,⁵⁹ procedural characterization,⁶⁰ or public policy⁶¹ This tendency in some fields may, notwithstanding orthodox court language to the contrary, have resulted in new rules for international conflicts now concealed by the current postulate identifying the rules governing international and interstate conflicts. On the other hand, international conflicts may have to retain restrictive rules gradually weakening in interstate relations, as, for instance, in relation to the concept of local actions.⁶²

The identification of international and interstate conflicts rules in theory, and the stress as to the former upon the *lex fori*, may also have stifled the impact (so widely recognized in its American beginnings) of the general principles of public upon private international

57 In an unpublished dissertation (Berkeley, Cal., 1956) Dr. Yiannopoulos found that in cases involving foreign wills as to movables, American courts have in effect consistently applied the law of the American situs and thus usually the *lex fori* rather than the law of the testator's domicile. See also the analysis of some of the bilateral studies in Ehrenzweig-Fragistas-Yiannopoulos, *op. cit. supra* note 31, according to which American courts in cases involving foreign countries have in effect preferred the foreign law over their own only in every few exceptional cases. See also Hopkins, The Extraterritorial Effect of Probate Decrees, 53 Yale L.J. 221, 222 (1944) excluding from his analysis extranational probate decrees as presenting "distinctive elements of both law and policy." For the practice presently prevailing concerning statutes of limitations see *supra* note 17

58. See *supra* note 33.

59. See, *e.g.*, Taormina v. Taormina Corp., 109 A.2d 400 (Del. Ch. 1954), or the widely criticized case of *In re Schneider's Estate*, 96 N.Y.S. 2d 652 (Surr. Ct. 1950), *aff'd on reargument*, 100 N.Y.S.2d 371 (Surr. Ct. 1950), *cf.* 50 Colum. L. Rev. 862 (1950), 64 Harv. L. Rev. 166 (1950).

60. See, *e.g.*, Black Diamond S.S. Corp. v. Robert Stewart & Sons, 336 U.S. 386 (1949). Leroux v. Brown, 12 C.B. 801 (1852), characterizing the Statute of Frauds as procedural, is still authority in American interstate conflicts cases. Distinguishing this case as involving an international conflict might help in clarifying an increasingly complex interstate problem. See Comment, 43 Calif. L. Rev. 295 (1955). See also Cook, The Logical and Legal Bases of Conflict of Laws 154 (1949).

61. See, *e.g.*, De Brimont v. Penniman, 7 Fed. Cas. 309 (C.C.S.D.N.Y. 1873), Bodenheimer, *The Public Policy Exception in Private International Law: a Reappraisal in the Light of Legal Philosophy*, 12 Seminar 51 (1954), Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 Yale L.J. 1155 (1947); Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 Yale L.J. 1087 (1956), Neuner, *Policy Considerations in the Conflict of Laws*, 20 Can. B. Rev. 479 (1942), Paulsen and Sovren, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969 (1956) On the ever declining function of this concept in interstate law, see, *e.g.*, Goodrich, *Foreign Facts and Local Fancies*, 25 Va. L. Rev. 26 (1938).

62. *Cf.* Reasor-Hill Corp. v. Harrison, 220 Ark. 521, 249 S.W.2d 994 (1952) discarding this concept in part on the ground that "one may have some sympathy for this position in international disputes, but it has no persuasive effect when the States are involved." *Id.* at 525, 249 S.W.2d at 996.

law.⁶³ Thus, resistance to a greater exercise of the treaty power in the conflicts field⁶⁴ could perhaps be reduced if interstate conflicts law could be specifically exempted from its scope. Moreover, greater concession to a federal law of conflicts, and, indeed, a possible restoration of a federal courts conflicts law in modification of the Klaxon doctrine,⁶⁵ could perhaps be achieved by limiting this goal to the law of international conflicts embodied in a new "federal field" within Justice Sutherland's famous dictum postulating a supra-state law in matters concerning international relations.⁶⁶

Finally, such separate treatment seems urgently needed for the guidance of foreign lawyers to whom the *Restatement*, particularly since its translation into French, has become the primary source of American private international law.⁶⁷ Exclusion of this law from the *Restatement Second*, as contemplated by its reporter, and the resulting segregation of both fields would greatly contribute to a sounder development of American conflicts law.

63. See Dickanson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 792 (1952-53), Katzenbach, *Conflicts on an Unruly Horse*, 65 Yale L.J. 1087, 1128 (1956), Stevenson, *The Relationship of Private International Law to Public International Law*, 52 Colum. L. Rev. 561 (1952).

64. See *supra* note 10.

65. See *supra* note 11.

66. *Ibid.*

67. See Eder, *El estudio del derecho Anglo-Americano*, Cuadernos de Derecho Angloamericano 33, 40 (1953), Ehrenzweig, *El Restatement Americano del Conflicto de Derechos: Historia de un Fracaso* 37, 38 (1954), Ehrenzweig, *Bol. Inst. Der. Comp. de Mex.* 258 (1952), Goodrich, *The American Law Institute, Report for 25th Annual Meeting* 7 (1948), Ehrenzweig, *Zum Handwerkszeug des amerikanischen internationalen Privatrechts*, 7 Oesterreichische Zeitschrift für öffentliches Recht 521 (1956).

