

1931

Has the Conflict of Laws Become a Branch of Constitutional Law

G.W.C. Ross

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Ross, G.W.C., "Has the Conflict of Laws Become a Branch of Constitutional Law" (1931). *Minnesota Law Review*. 1348.
<https://scholarship.law.umn.edu/mlr/1348>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

HAS THE CONFLICT OF LAWS BECOME A BRANCH
OF CONSTITUTIONAL LAW?

By G. W. C. Ross*

As a point of approach to the problem stated in the title the more specific question may be posited: Might the Wisconsin decision in the case of *Fox v. Postal Telegraph Co.*,¹ have been reversed if it had been taken to the United States Supreme Court? Over the wires of a New York corporation a telegram was sent from New York City to Chicago, unrepeated and subject to stipulation that for delay in delivery the company should be liable only to refund the price of the message (forty cents). Delivery was delayed, and repudiating the stipulation, the sender sued the company for substantial damages in a Wisconsin court. Judgment for the plaintiff was affirmed by the Wisconsin supreme court on the ground that though the stipulation might be valid and a good defense by the law of both New York and Illinois, it was odious to the public policy of Wisconsin and unenforcible in Wisconsin courts.

This would seem an extreme case, to bring to sharp focus the questions it is desired here to discuss. The law of Wisconsin was pertinent only as *lex fori*, not as *lex loci contractus* in any possible meaning of that term. The contract was made in New York, performable there and in Illinois.² Defendant was a New York corporation and the report does not show that either the sender or the addressee was a resident of Wisconsin or that the message concerned any property located or affairs pending in Wisconsin; and the wires that carried it did not at any point between its terminals run within Wisconsin. Yet in disregard of both New York and Illinois law, the law of Wisconsin³ was rigorously applied to control the result. The Wisconsin supreme court discussed the

*Professor of Law, St Thomas College, St. Paul, Minn.

¹(1909) 138 Wis. 648, 120 N. W. 399.

²Or, if the basis of liability could be deemed non-contractual, or to contain non-contractual elements, it remains true that the whole transaction and relationship of the parties, on which liability could be based, began in New York and came to an end in Illinois and never touched Wisconsin. Cf. note 94, post.

³Meaning, of course, the purely domestic law of Wisconsin, i. e., the rule that would have been applied to a purely Wisconsin telegram.

case as an application of the doctrine that the forum may refuse to enforce a contract contrary to its public policy, no matter how valid it may be by the *lex loci contractus*. But that is not what the court really did. What it really did was to enforce a contract that was never made and adjudge a liability that was not imposed by the law of any place that had any connection with any of the operative facts. A state⁴ may refuse in its courts to enforce rights (contractual or non-contractual) that would arise by applying a foreign rule of law to the events that happened, even though they all happened within the territory of that foreign law and were brought to pass by parties personally bound in allegiance to it.⁵ It has been said, that no American court would ever give judgment against a prostitute's customer for the wages of her trade, even though she had earned the wages in some "heathen" country where her trade perchance was lawful and its wages recoverable in court.⁶ But judgment on such a doctrine is for the defendant and it would seem proper (at least in other states) to regard it as not on the merits, but rather as in the nature of a non-suit, leaving the plaintiff free to pursue the defendant again in any jurisdiction that may entertain the action and be willing to enforce the claim.⁷ But this Wisconsin judgment was not a non-suit. It was not a judgment for defendant at all; it was for the plaintiff,—necessarily *res judicata*,⁸ making impossible the future application

⁴Meaning by "state," one of the United States of America. For a state in the fully sovereign, international sense, the word "country" will be used in this article.

⁵Unless the right in question is based on a judgment rendered in another state, *Fauntleroy v. Lum*, (1908) 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039; *Roche v. McDonald*, (1927) 275 U. S. 449, 48 Sup. Ct. 142, 72 L. Ed. 365, or, perhaps, on a statute of another state, *Langmaid, The Full Faith and Credit Required for Public Acts*, (1929) 24 Ill. L. Rev. 383; *Dodd, Power of the Supreme Court to Review State Decisions in the Field of Conflicts*, (1926) 39 Harv. L. Rev. 533, 540 et seq.; *Cook, Powers of Congress under the Full Faith and Credit Clause*, (1919) 28 Yale L. J. 421, 432 et seq. Cf. note (1917) 26 Yale L. J. 405, 410-11; *Beach, Uniform Interstate Enforcement of Vested Rights*, (1918) 27 Yale L. J. 656, 662 et seq.; *Field, Judicial Notice of Public Acts under the Full Faith and Credit Clause*, (1928) 12 MINNESOTA LAW REVIEW 439. Yet even the valid judgment of another state may apparently be refused enforcement by the forum if founded on a "penal" obligation, *Huntington v. Attrill*, (1892) 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. Cf. *Goodrich, Conflict of Laws* 11-17. Cf. note 47 post.

⁶Cf. *Goodrich, Conflict of Laws* 216.

⁷Cf. *Langmaid, The Full Faith and Credit Required for Public Acts*, (1929) 24 Ill. L. Rev. 383, 418-19, footnote 124.

⁸*Roche v. McDonald*, (1927) 275 U. S. 449, 48 Sup. Ct. 142, 72 L.

by another jurisdiction of the law of New York or Illinois to the transaction. That is not refusing to enforce foreign-created rights. It is enforcing,—with a vengeance—rights that had not been paid for nor created by any law with any bearing upon any of the facts on which the litigation was predicated, nor by any law to which any of the parties concerned in those facts was (so far as appears) personally bound.⁹ The difference is conspicuous and has been repeatedly pointed out.¹⁰ In his much-criticized opinion in the case of *Union Trust Co. v. Grosman*¹¹ Mr. Justice Holmes does not hold the Illinois contract invalid, though he evidently thinks it might well be so held. But what he holds is that however valid as an Illinois contract, Texas courts will not enforce it against a Texas married woman. The Georgia court has refused to enforce an admittedly valid Missouri contract against a Missouri married woman; i. e., refused to subject her Georgia property to its satisfaction.¹² These are genuine instances of refusal by the forum to enforce foreign-created rights.¹³

Ed. 365; *Christmas v. Russell*, (1866) 5 Wall. (U.S.) 290, 18 L. Ed. 475.

⁹The case of *The Kensington*, (1902) 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190, is cited as a direct precedent for the Wisconsin decision. The court's reasoning is similar; but in the *Kensington* Case the loss happened to an American citizen on an American ship bound for an American port. Hence that decision might be rested on other grounds, and Mr. Justice White carefully guards the language of his opinion from intimating that the result would have been the same had plaintiff been an Englishman suing for loss sustained on an English ship en route from London to Hull.

¹⁰Cf. *Oceanic Co. v. Mellor*, (1914) 233 U. S. 718, 732-33, 34 Sup. Ct. 754, 58 L. Ed. 1171; *Slater v. Mexican Ry.*, (1904) 194 U. S. 120, 126-129, 24 Sup. Ct. 581, 48 L. Ed. 900; *Spokane R. R. Co. v. Whitley*, (1915) 237 U. S. 487, 494-5, 35 Sup. Ct. 655, 59 L. Ed. 1060; *Cuba R. R. Co. v. Crosby*, (1912) 222 U. S. 473, 478-9, 32 Sup. Ct. 132, 56 L. Ed. 274; *Western Union Telegraph Co. v. Brown*, (1914) 234 U. S. 542, 547, 34 Sup. Ct. 955, 58 L. Ed. 1457; *Home Ins. Co. v. Dick*, (1930) 281 U. S. 397, 50 Sup. Ct. 338, 341-2, 74 L. Ed. 296; *Mod. Woodmen v. Mixer*, (1924) 267 U. S. 544, 551, 45 Sup. Ct. 389, 69 L. Ed. 783. Cf. note 67 post.

¹¹(1917) 245 U. S. 412, 38 Sup. Ct. 147, 62 L. Ed. 368.

¹²*Ulman & Co. v. Magill*, (1923) 155 Ga. 555, 117 S. E. 657.

¹³The whole conception expressed by the phrase, "refusal to enforce foreign-created rights" is vigorously criticized. Cf. Yntema, *Hornbook Method and Conflicts*, (1928) 37 Yale L. J. 468; Cook, *Recognition of "Massachusetts Rights" by New York Courts*, (1918) 28 Yale L. J. 67; Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, (1926) 39 Harv. L. Rev. 533. No doubt the expression involves an ellipsis, and perhaps an hypothesis. Yet to the present writer the dispute seems largely a logomachy; cf. note 18, post. In any case the locutions here used conform to the

In his pioneer development of the subject in this country Judge Story wrote that a forum applies foreign law to a state of facts only by "comity."¹⁴ This has been widely taken to mean that for the purpose of granting as well as denying recovery a forum may treat operative facts that occurred abroad to and by procurement of foreigners just as though they had occurred at home to and by the acts of its own domiciled citizens. Professor Dicey says:

"The English courts might . . . decide every matter, . . . whatever the cause of action and wherever it arose, solely with reference to the local law of England, and hence determine the effect of things done in Scotland or in France, exactly as they would do if the transactions had taken place between Englishmen in England."¹⁵

Professor Cook revises this into the bolder proposition that a forum "may attach any legal consequences whatever to any state of facts whatever, including acts done in other countries, even by persons not citizens or residents of" [the forum].¹⁶ Certainly the decision of a court of last resort is not reversible by any other legal authority.¹⁷ If the sender of the message in the *Fox Case* had sued in a British court instead of in Wisconsin and the House of Lords had affirmed a judgment treating the message just as though it had been sent by an Englishman in London to an Englishman in Liverpool over English-owned wires, of course the decision would have stood. Or, to take Professor Cook literally, if the House of Lords had chosen to treat the New York-Illinois telegram just as the French courts would treat a message sent by a Frenchman at Paris to a Frenchman at Lyons, that decision would have stood too,—in England. That is rather a statement of arbitrary power than of any civilized law.¹⁸ But Professor Dicey's statement lays down in the terms of a general proposition exactly what the Wisconsin court actually did in the *Fox Case*. It treated that New York-Illinois message precisely as though it had been sent by one Wisconsin citizen at Milwaukee to another Wisconsin citizen at Madison over the wires of a Wisconsin com-

dition and apparent mental attitude of the United States Supreme Court; cf. notes 10, ante and 94, post.

¹⁴Story, *Conflict of Laws*, 8th ed., ch. 2.

¹⁵Dicey, *Conflict of Laws*, 3rd ed., p. 9.

¹⁶Cook, *Recognition of "Massachusetts Rights"* by New York Courts, (1918) 28 Yale L. J. 67, 69.

¹⁷Except by the forum's own legislature, if not restrained by any "bill of rights" constitutional provisions.

¹⁸Cf. note 13, ante.

pany. But Professor Dicey makes his statement only to point out its enormity.¹⁹ And is an American state supreme court today in the position of the House of Lords in this regard? Is it constitutionally free to ignore the whole personal and geographic incidence of the operative facts?

The burden is on those who assert the constitutional limitation to find it in some definite provision of the United States constitution. Discussion seems generally to come down to the "full faith and credit" clause²⁰ and the "due process" clause of the fourteenth amendment.²¹ In the case of *Western Union Telegraph Co. v. Brown*²² the United States Supreme Court disabled South Carolina from applying its own law to a telegram sent from South Carolina to the District of Columbia and cited (inter alia) the "interstate commerce" clause of the constitution.²³ But that seems aside from our problem. When on that ground a state is held incompetent to apply the law of its own legislature and domestic decisions to an interstate commerce transaction, it is not because the law of some other state is applicable, but because the law of no state is applicable; regulation of interstate commerce being committed by the constitution to the federal government. The Fox telegram was an interstate commerce transaction; but no federal law controlling it came into view, and it is not perceived what light the interstate commerce clause can shed upon the Wisconsin court's duty or liberty to apply New York law, or Illinois or Wisconsin law, to that situation.²⁴

But the other two clauses of the constitution may be controll-

¹⁹Dicey, *Conflict of Laws*, 3rd ed., pp. 10-11.

²⁰Art. IV, sec. 1.

²¹Art. XIV, sec. 1.

²²(1914) 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457.

²³Art. I, sec. 8 (3).

²⁴Some cases suggest consideration also of the "impairment of contracts" clause of the constitution, art. I, sec. 10 (1). But since this clause applies only when state legislation has been enacted since the contract involved was made, *New Orleans Co. v. Louisiana Co.*, (1888) 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607, it seems aside from the precise problem posited by the Fox Case. And the court seems never to have based a decision pertinent to this problem upon that clause; though it might be material in certain related situations. Cf. *N. Y. Life Ins. Co. v. Head*, (1914) 234 U. S. 149, 157, 34 Sup. Ct. 879, 58 L. Ed. 1259; *Home Ins. Co. v. Dick*, (1930) 281 U. S. 397, 50 Sup. Ct. 338, 340, 342-43, 74 L. Ed. 296. No doubt lawyers' ingenuity can plausibly suggest the relevance of still other constitutional provisions; but as yet, all such suggestions seem to rest in purely academic speculation.

ing.²⁵ Professor Schofield has urged that the due process clause ought to protect against all error in state decisions, not only in the field of conflicts but in any sort of case, on purely domestic facts, so that any erroneous state decision would be reversible by the United States Supreme Court.²⁶ It would probably be fortunate if the court would adopt Professor Schofield's position. The Australians in their national constitution adopted,—contrary to Canada and South Africa²⁷—the American principle of federalism, to-wit: that the individual states should be the governments of general, reserved powers and the national government a government of defined, delegated powers.²⁸ But the Australians made their national high court a court of general appeal from the state courts, in all cases and all fields.²⁹ This no doubt they did advisedly, on careful consideration of the working of the American judicial system,³⁰ and very likely they did wisely. Our system of co-ordinate and (to a large extent) mutually independent state and federal courts has come to be a thing "fearfully and wonderfully made," of a complex technicality rivaling the most mysterious intricacies of common law special pleading in its hey-day. Only by adopting the Australian system could the "uniform laws" that are coming to cover more and more fields of the law be kept really uniform. More than a scintilla of suspicion may be entertained that it is only so that the thorough, carefully considered

²⁵Cf. *The Due Process and Full Faith and Credit Clauses as Applied to the Conflict of Laws*, (1917) 26 *Yale L. J.* 405; Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, (1926) 39 *Harv. L. Rev.* 533; Cook, *The Powers of Congress under the Full Faith and Credit Clause*, (1919) 28 *Yale L. J.* 421; Beach, *Uniform Interstate Enforcement of Vested Rights*, (1918) 27 *Yale L. J.* 656; Field, *Judicial Notice of Public Acts under the Full Faith and Credit Clause*, (1928) 12 *MINNESOTA LAW REVIEW* 439; Langmaid, *The Full Faith and Credit Required for Public Acts*, (1929) 24 *Ill. L. Rev.* 383.

²⁶Schofield, *The Supreme Court of the United States and the Enforcement of State Law by the State Courts*, (1908) 3 *Ill. L. Rev.* 195.

²⁷Cf. *British North America Act of 1867*, sec. 91; *So. Africa Act of 1909*, secs. 59, 85, 86.

²⁸*Commonwealth of Australia Act 1901*, sec. 107. Cf. sec. 1, and the opening language of sec. 51, with the U. S. const., art. I, sec. 1 and the opening words of sec. 8.

²⁹*Commonwealth of Australia Act 1901*, sec. 73.

³⁰The Australian judicial system does not impair the proper legislative autonomy of their individual states, but it does make possible a uniform "common law of Australia," as there is not a "common law of the United States"; cf. *Smith v. Alabama*, (1887) 124 U. S. 465, 477-78, 8 Sup. Ct. 564, 31 L. Ed. 508; Bryce, *Studies in History and Jurisprudence* 416-17.

work of the American Law Institute in restating American law as a single, comprehensive body of rules, could ever achieve a result adequate to its enormous labor and expense.³¹ But notwithstanding Professor Schofield's persuasive argument, it may be doubted whether the Australian system will ever be put into effect in this country without a direct constitutional amendment.³²

But does not that foreclose this whole investigation? If the doctrines of conflicts are simply part of the local law of each state within and for itself,³³ then are not state decisions in the field of conflicts as little reviewable by the United States Supreme Court as any others? That Court has so stated at least once. By written contract made either in Minnesota or North Dakota a Minnesota vendor agreed to convey Colorado land to a North Dakota purchaser, the payments to be made and (presumably) the deed delivered in Minnesota. The Minnesota supreme court determined the rights and obligations of the parties under that contract by the law of Minnesota and not by the law of Colorado or North Dakota,³⁴ and its decision was affirmed by the United States Supreme Court.³⁵ But the opinion does not make it entirely clear whether Minnesota was held simply free to apply its own law or whether Minnesota law was held the only properly applicable law, which the Minnesota court and all other state courts would be constitutionally bound to apply to that contract. The latter interpretation of the decision was urged by appellant in the later case of *Kryger v. Wilson*.³⁶ By contract made and performable in Minnesota a Minnesota vendor agreed to convey North Dakota land. In the ensuing litigation the North Dakota supreme court controlled the rights of the parties by the (domestic) law of North Dakota.³⁷ In the United States Supreme Court the purchaser insisted that that court had already held Minnesota

³¹Cf., however, Yntema, *The Hornbook Method and the Conflict of Laws*, (1928) 37 Yale L. J. 468; Langmaid, *The Full Faith and Credit Required for Public Acts*, (1929) 24 Ill. L. Rev. 383, 419-20.

³²Cf. note (1917) 26 Yale L. J. 405, 407-08; and, in addition to the cases considered by Professor Schofield, *Frank v. Magnum*, (1915) 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969; *Moore v. Dempsey*, (1922) 261 U. S. 86, 43 Sup. Ct. 265, 67 L. Ed. 543.

³³Goodrich, *Conflict of Laws* 9-10. Cf. Beale, *What Law Governs the Validity of Contracts*, (1909) 23 Harv. L. Rev. 1, 7-8.

³⁴*Walsh v. Selover, Bates & Co.*, (1909) 109 Minn. 136, 123 N. W. 291.

³⁵(1912) 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. 146.

³⁶(1916) 242 U. S. 171, 37 Sup. Ct. 34, 61 L. Ed. 229.

³⁷(1914) 29 N. D. 28, 149 N. W. 721.

law to be the law properly applicable to such a situation, but Mr. Justice Brandeis for the Court explained the earlier decision otherwise. It meant, he said, that the question, what law was the applicable law, was not a federal question.³⁸ For this he cited cases that hold that when the courts of state X are applying the law of state Y to a fact situation, their *construction* of the law of state Y, i.e., their finding as to what the law of state Y is, or means—presents no federal question, though if the *validity* of a law of state Y is in question, then the determination of that point by the courts of state X does raise a federal question.³⁹ The case of *Lloyd v. Matthews*⁴⁰ illustrates the point. An Ohio debtor in Ohio gave one of his Ohio creditors a preferential conveyance of certain Kentucky property; then he made a general Ohio insolvency assignment. In the Kentucky court the grantee and the assignee in insolvency litigated the title to the Kentucky property. Holding, or assuming, that the validity of the conveyance as against the assignment should be determined by Ohio law, the Kentucky court gave judgment for the grantee, finding that Ohio law would support the preferential conveyance. And a writ of error taken in the United States Supreme Court was dismissed, because the Kentucky decision, being merely a construction of Ohio law, raised no federal question. But, the report notes, "Mr. Justice Harlan was of opinion that the writ of error should be retained and the judgment affirmed."⁴¹ The Court, that is, held that the Kentucky decision not only was final but would have been final if it had held that Ohio law overthrew the conveyance instead of supporting it, while Mr. Justice Harlan thought that ought to be deemed a federal question, but that the Kentucky court should be found to have rightly interpreted the Ohio law.

But suppose the Kentucky court had held that the validity of the conveyance was to be determined according to (domestic) Kentucky law, ignoring the law of Ohio? It will be seen that while *Kryger v. Wilson* itself seems closely in point, the doctrine on which Mr. Justice Brandeis relies does not squarely meet it.⁴² The question of the *applicability* of Ohio law to the operative facts

³⁸(1916) 242 U. S. 171, 176, 37 Sup. Ct. 34, 61 L. Ed. 229.

³⁹Cf. the cases cited at 242 U. S. 171, 176, 37 Sup. Ct. 34, 61 L. Ed. 229. Cf. notes 83, 84, post.

⁴⁰(1894) 155 U. S. 222, 15 Sup. Ct. 70, 39 L. Ed. 128.

⁴¹(1894) 155 U. S. 228, 15 Sup. Ct. 92, 39 L. Ed. 130.

⁴²Cf., however, notes 83, 84, post.

is not the same as the question either of its validity or its meaning (construction). In the *Fox Case* the question was not whether the law of New York, or Illinois or Wisconsin, was valid. They were all valid, *within the proper scope of their operation*. Neither was the question one of construction. Just what the New York rule was, was not in question, nor the meaning of the Illinois rule or the Wisconsin rule.⁴³ The question which of these three was the law applicable in the Wisconsin court to the events that had transpired, is a different question from the question either of validity or construction. But, starting with the proposition that the rules of conflicts are mere matter of local law in each jurisdiction,⁴⁴ it is urged, that since the only law a Wisconsin court can apply, *as law*, is Wisconsin law, therefore the question, what law a Wisconsin court shall apply to New York and Illinois events and parties, is at bottom just a question of what rule Wisconsin law prescribes as applicable to them; in other words, is merely a question of construing the law of Wisconsin, which can raise no federal question. But while as between wholly independent countries the rules of conflicts are mere matter of local law in each country for itself, that certainly is not entirely true as between the individual American states. American lawyers are accustomed to the treatment of at least two sorts of conflicts questions as constitutional questions, to-wit: taxation, and the jurisdiction of courts.⁴⁵ The latter rests squarely on the explicit words of the full faith and credit clause⁴⁶ and until lately has been treated as largely *sui generis*. But the clause includes "public acts" (which must mean statutes at least) as well as "judicial proceedings"; hence it is now seen that the same full faith and credit that state X must give to the judgments of state Y's courts, it must also give to the statutes of state Y,⁴⁷—in a proper case. This last qualifica-

⁴³The question of the applicability of a statutory rule to a state of facts is often a matter of the construction of the statute. Was it meant to be applied to such facts as these? Cf., further, notes 55, 56, post.

⁴⁴Cf. note 33, ante.

⁴⁵*Pennoy v. Neff*, (1877) 95 U. S. 714, 24 L. Ed. 565; Goodrich *Conflict of Laws* 64; Beale, *Jurisdiction to Tax*, (1919) 32 Harv. L. Rev. 587; Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, (1926) 39 Harv. L. Rev. 533-34.

⁴⁶In its inter-state application. But an intra-state enforcement of the identical rule is rested on the "due process clause" of the 14th amendment, *Pennoy v. Neff*, (1877) 95 U. S. 714, 24 L. Ed. 565.

⁴⁷Cf. Langmaid, *The Full Faith and Credit Required for Public*

tion is the constitutionally significant part of the whole statement.

Just as state X need not give faith and credit to whatever state Y might choose to call a judgment, but only to such judgments pronounced in state Y's courts as in the view of the United States Supreme Court are based on proper (conflicts) principles of jurisdiction; just so the courts of state X need not give faith and credit to whatever statutes of state Y that state might choose to say should control the situation, but only to those statutes of state Y which the United States Supreme Court will deem properly applicable to the litigation pending in state X.

But this extension of the full faith and credit clause does not quite come to grips with the problem presented by the *Fox Case*. In the *Fox Case* no statute of New York or Illinois appears involved, to which the Wisconsin court could be thought obliged to give faith and credit. The law of New York and Illinois as apprehended by the Wisconsin court in the *Fox Case* seems to have been simply the common law of those states, or as expounded and understood in those states. So the answer to our initial inquiry may be made to turn upon this question: Was the Wisconsin court in the *Fox Case* under any constitutional obligation to determine the rights of the parties to that litigation according to the common law of New York or Illinois? The conflicts problem, be it noted, is the same whether the foreign law under consideration be statute law or common law. The problem before the Wisconsin court was: Ought the rights of the parties to this litigation to be controlled by the law of New York, or of Illinois, or of Wisconsin? Apart from its strictly constitutional aspects, that problem is the same whether the New York or Illinois law in question is the statutory or the judge-made law of those states. But the Wisconsin court's constitutional liberty of choice may conceivably depend upon just that difference. It would seem difficult to read the full faith and credit clause so as to impose any obligation to give faith and credit to the common law of another state,⁴⁸ and

Acts, (1929) 24 Ill. L. Rev. 383; Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, (1926) 39 Harv. L. Rev. 533, 540 et seq.; Cook, The Powers of Congress under the Full Faith and Credit Clause, (1919) 28 Yale L. J. 421, 432 et seq. Cf. notes (1917) 26 Yale L. J. 405, 410-11; Field, Judicial Notice of Public Acts under the Full Faith and Credit Clause, (1928) 12 MINNESOTA LAW REVIEW 439. Cf. note 5 ante.

⁴⁸Cf. Dodd, The Power of the Supreme Court to Review State De-

the clause can hardly be supposed to oblige a state to apply in any litigation either the statutory or the judge-made law of a foreign country.⁴⁹ But how about the due process clause?

From this point of view the constitutional treatment of taxation is illuminating. Our national income-tax has been held applicable to the income realized from Mexican property (both real and personal) by an American citizen resident in Mexico.⁵⁰ The United States being a sovereign nation, there is no way to reverse that decision. Indeed, again following Professor Cook,⁵¹ if our Supreme Court held our federal income-tax applicable to the income derived from Mexican land by a Mexican-born Mexican citizen now and always domiciled in Mexico, that decision could not be reversed either. And it might not be mere *brutum fulmen*; in certain circumstances it might be made effective. But when Kentucky undertook to apply its tax laws to property owned by its own citizens but located in another state, the United States Supreme Court forbade.⁵² Evidently, in this field Kentucky does not stand as an independent country. It cannot "attach any consequences whatever to any state of facts whatever."⁵³ This decision rests on the due process clause.⁵⁴ But if a Kentucky decision holding its tax laws applicable to property outside Kentucky, though owned by Kentucky citizens, deprived those citizens of

cisions in the Field of Conflict of Laws, (1926) 39 Harv. L. Rev. 533, 545-47, 561-62; Beach, Uniform Interstate Enforcement of Vested Rights (1918) 27 Yale L. J. 656, 664 et seq.; Field, Judicial Notice of Public Acts under the Full Faith and Credit Clause, (1928) 12 MINNESOTA LAW REVIEW 439. Quaere: Can the word "Records" in the full faith and credit clause be made to mean that state X must (in a proper case) enforce the rules of law enounced by the reported decisions of state Y? Or does the phrase "Judicial proceedings" turn the principle *stare decisis* into an enforceable constitutional obligation? Cf. note 71 post.

⁴⁹Cf. *Hilton v. Guyot*, (1895) 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95; *Pennoyer v. Neff*, (1877) 95 U. S. 714, 24 L. Ed. 565.

⁵⁰*Cook v. Tait*, (1923) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895.

⁵¹Cf. note 16 ante.

⁵²*Union Transit Co. v. Kentucky*, (1905) 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150.

⁵³*Cook*, Recognition of "Massachusetts Rights" by New York Courts, (1918) 28 Yale L. J. 67, 69. Cf. notes 16 and 51 ante.

⁵⁴It could hardly rest on the full faith and credit clause; there was no pertinent foreign law, statutory or judge-made, to which Kentucky could be thought obliged to give faith and credit. The question was not whether the property was taxed by the foreign state where it was located; the difficulty was the ("inherent") *inapplicability* of Kentucky's tax laws to the property, whether it were taxed or exempted in the foreign jurisdiction. For a justification of the actual result of the case, but on different grounds, cf. Beale, Jurisdiction to Tax, (1919) 32 Harv. L. Rev. 587, 592.

their property without due process of law, why did not the Wisconsin decision holding its telegraph laws applicable to the New York-Illinois telegram deprive the Telegraph Company of its property without due process of law?⁵⁵ Tax laws affect the rights of the citizen against his government; telegraph laws affect the rights and obligations of citizens to each other. Can a constitutional distinction be deduced from that difference? Can the force of these taxation cases be limited to that field? Can a state's (constitutional) legislative jurisdiction be different there from elsewhere? So our first question might be restated once more, as follows: Could the (domestic) law of Wisconsin be constitutionally applied to the New York-Illinois telegram?⁵⁶

A striking early case is *Crapo v. Kelly*.⁵⁷ While a ship registered in a Massachusetts port was in the South Pacific Ocean her Massachusetts owners became insolvent and under the Massa-

⁵⁵It will be noted, that the Kentucky case involved no question of statutory interpretation (Cf. note 43 ante). The applicability of an Act of Congress to a state of facts arising outside the United States is a matter of statutory construction (Cf. *Cook v. Tait*, (1923) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895). With no constitutional limitation on the jurisdiction of the United States in this respect, that jurisdiction is (in American courts) whatever Congress declares it to be. But the Kentucky statute was explicit, that Kentuckians should be taxed on all their personal property "whether in or out of this state." There was no room for interpretation. The question was the final one, of Kentucky's legislative jurisdiction,—a conflicts question, constitutionally considered (Cf. Goodrich, *Conflict of Laws* 64, 117; American Law Institute *Re-Statement of Conflicts* No. 2, secs. 43 et seq., 64, 65 et seq., & Commentaries). But is there in this respect no constitutional limitation on the jurisdiction of the United States government? *Cook v. Tait*, (1923) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895, and *Union Trust Co. v. Kentucky*, (1905) 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, involve plainly disparate constructions of the phrase, "due process of law." Yet that phrase as it stands in the fifth amendment, applying to the federal government, is identical with the same phrase in the fourteenth amendment, applying to the states. The meaning can hardly be different in the two places. If then it is no deprivation of property without due process for the United States to tax income realized abroad from foreign property, how can it be a deprivation of property without due process for a state to do the same sort of thing? But this is a digression.

⁵⁶For its holding that telegraph companies cannot limit their liability the Wisconsin court relied first on common-law doctrine; but the opinion cites a Wisconsin statute, which the court construes to the same effect. So the final purport of the decision is, that this Wisconsin statute, declaratory of the state's common law, is to be applied in a Wisconsin court to a New York-Illinois telegram. Quære: Is that within the legislative jurisdiction of the state,—even if the statute had explicitly provided that it should be so applied, as the Kentucky tax statute did? Cf. note 55, ante.

⁵⁷(1871) 45 N. Y. 86; (on writ of error) (1872) 16 Wall. (U.S.) 610, 21 L. Ed. 430.

chusetts insolvency statutes a Massachusetts probate court appointed an assignee for the benefit of creditors. On the ship's later arrival at New York,—directly from the high seas, without having been in Massachusetts since the assignment—a New York creditor of the insolvents attached her in New York court. Then the attaching sheriff and the Massachusetts assignee in insolvency litigated in New York state courts the right to possession of the ship. Judgment for the sheriff by the state court of last resort was reversed by the United States Supreme Court. Appointment of the Massachusetts assignee for creditors had divested the insolvents' title to the ship and the New York court could not constitutionally treat her as their property and attachable as such. The ship on the ocean at the time of the assignment was deemed part of the territory of Massachusetts and thus within the operation of her laws and proceedings. The decision is rested on the full faith and credit clause, and because an insolvency proceeding was pending in the Massachusetts court, the case looks at first blush like a mere affirmation of New York's duty to give full faith and credit to a Massachusetts judgment. But it cuts deeper than that. The only Massachusetts judgment that had been rendered was, that the owners were insolvent and that their property, *so far as it was within the jurisdiction of Massachusetts*, should be assigned for the benefit of their creditors. But there appears no Massachusetts adjudication that this ship was within the jurisdiction of Massachusetts at that time (even supposing the Massachusetts court could thus conclude that question). It does not appear that the New York creditor had ever been in Massachusetts or in any way subjected himself to the jurisdiction of that commonwealth or her courts. As Mr. Evarts, of counsel, pointed out *arguendo*, there certainly had been no Massachusetts judgment binding on the creditor personally, nor in rem as to his rights or interests in or against this ship. There appears no Massachusetts adjudication that this ship was part of the insolvents' property or was embraced within the assignment. Obviously, neither the assignment nor any Massachusetts judicial proceeding could affect the title to this ship except on the theory that it was within the scope of the operation of Massachusetts law controlling the consequences of acts there done, and the decision proceeds on that ground explicitly. The basic question was the jurisdiction of Massachusetts by her laws to say whether and how

events that happened in Massachusetts (the owners' insolvency, and the assignment) should affect the title to this ship at sea.⁵⁸ Mr. Justice Hunt for the Court repudiates the contention that because of the federal admiralty jurisdiction this ship was not within the jurisdiction of Massachusetts law. The constitutional grant of exclusive admiralty jurisdiction to the federal government, he says, has no bearing on the substantive law. It establishes no rule of property. "This remains as it would have been had no such authority been given to the United States court." Hence, the "relation of Massachusetts to the Union" had no "effect upon the title to this vessel. It stands as if that state were an independent sovereign state."⁵⁹ The vessel "was subject to the disposition made by *the laws of Massachusetts*."⁶⁰ And the dissent of Field and Bradley, JJ., proceeds expressly on the ground that it is fiction to say that the vessel on the ocean was part of the territory of Massachusetts; hence that fiction is recognized abroad only by "comity," and New York could be under no constitutional obligation to apply Massachusetts law to this ship at sea.⁶¹ Mr. Justice Hunt's language sounds like a vindication of the sovereign independence of Massachusetts. But what the decision really does is to limit the independence of the state of New York. Had this ship come into Liverpool instead of New York and been attached in the British port, and had the House of Lords given the same judgment that was given by the New York courts, that decision would have stood and the attaching creditor would have got the ship,—at least in England. If she ever returned to America, of course American courts could ignore such a British decision and hand the ship back to the Massachusetts assignee. These possibilities are corollaries of true sovereign independence. But New York has not the freedom of Great Britain. In litigation before the courts of New York they must not make a "mistaken application of doctrines of the conflict of laws,"⁶² by deciding that since

⁵⁸ Apparently it was conceded, that if the owners by their own voluntary act had conveyed the ship at sea to the person whom the court actually appointed their assignee, that conveyance would have been effective and would have been respected of course by New York, (1872) 16 Wall. (U.S.) 622, 642-43, 21 L. Ed. 430. But since that had not happened, the question was reduced to the one of the jurisdiction of Massachusetts to say that her laws should control the effect of events generally that had happened in that state, upon the title to the ship on the ocean. Cf. note 79, post.

⁵⁹ (1872) 16 Wall. (U.S.) 610, 624.

⁶⁰ (1872) 16 Wall. (U.S.) 610, 632. Italics, the author's.

⁶¹ (1872) 16 Wall. (U.S.) 610, 642-44.

the ship was not in Massachusetts waters therefore New York need not apply Massachusetts law to determine the effect of acts done in Massachusetts on the title to the ship. That is not "purely a question of local common law,—with which this court is not concerned."⁶³ The decision directly defines the legislative jurisdiction of Massachusetts and enforces New York's constitutional duty to respect it as so defined.⁶⁴

More equivocal are the later cases of *Royal Arcanum v. Green*⁶⁵ and *Modern Woodmen v. Mixer*.⁶⁶ These fraternal insurance orders had been incorporated respectively in Massachusetts and Illinois. They had issued beneficiary certificates to certain members whose beneficiaries sued on the certificates in New York and Nebraska, respectively. Earlier Massachusetts and Illinois cases had determined the legal effect of the charters and by-laws of the respective orders. And held, that New York and Nebraska must give full faith and credit to the charters and by-laws of the respective orders, according to their legal effect as determined by the earlier Massachusetts and Illinois decisions. In the *Modern Woodmen Case* Mr. Justice Holmes for the Court declares that membership in the order "must be governed by the law of the state granting the incorporation. We need not consider what other states may refuse to do, but . . . they cannot attach to membership rights against the Company that are refused by the law of the domicil" (incorporation).⁶⁷ That is just what the Wisconsin court did in the *Fox Case*. It attached to the sending of a telegram from New York to Illinois rights against the New York telegraph company that were refused by the law of New York and Illinois. Mr. Justice Holmes prefaces these remarks by noting that this membership was "something more than a contract."⁶⁸ But he says this, evidently not to imply that in dealing with a mere

⁶²Per Brandeis, J., (1916) 242 U. S. 171, 176, 37 Sup. Ct. 34, 61 L. Ed. 229. Cf. note 38 ante.

⁶³(1916) 242 U. S. 171, 176, 37 Sup. Ct. 34, 61 L. Ed. 229. Cf. note 38 ante.

⁶⁴Cf. accord: *Green v. Van Buskirk*, (1866) 5 Wall. (U.S.) 307, 18 L. Ed. 599, 7 Wall. (U.S.) 139, 19 L. Ed. 109. Cf. note 79, post.

⁶⁵(1915) 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089.

⁶⁶(1924) 267 U. S. 544, 45 Sup. Ct. 389, 69 L. Ed. 783.

⁶⁷(1924) 267 U. S. 544, 551, 45 Sup. Ct. 389, 69 L. Ed. 783. The distinction here drawn is the one emphasized at the beginning of this article; cf. note 10 ante.

⁶⁸*Modern Woodmen v. Mixer*, (1924) 267 U. S. 544, 551, 45 Sup. Ct. 389, 69 L. Ed. 783.

contract a state has unrestrained freedom in selecting the applicable law, but to rebut the suggestion that because this particular certificate had been issued in South Dakota, the law of that state was the law by which to determine the rights of the parties. Nebraska was not free to adjudge the rights of these parties according to any law her courts might deem of controlling relevance,⁶⁹ nor as though all the material facts had occurred in Nebraska by the acts of Nebraskans. She was required to apply the law of Illinois, not by "comity," but by constitutional obligation.

But this law of Illinois (and of Massachusetts, in the other case) was not statutory. It is found by the United States Supreme Court in the earlier Illinois and Massachusetts decisions, to which these orders, respectively, had been party.⁷⁰ Mr. Justice Holmes seems to cite the Illinois case merely as evidence of the law of Illinois, under the principle of *stare decisis*, not as directly binding on the parties to the Nebraska litigation under the doctrine of *res judicata*. But a forum, in determining what the common law of another state is, need not be controlled by that other state's judicial precedents,⁷¹ though it is habitually so controlled (perhaps only self-controlled?) in matters of foreign statutory interpretation. But the opinion in the *Royal Arcanum Case*, while it too talks of the "law of Massachusetts" as necessarily having a controlling applicability in New York courts, yet explicitly says that New York's constitutional duty is to give faith and credit to the earlier Massachusetts *judgment*, intimating that in that earlier litigation the order "was the representative of the members," so that it could "stand in judgment as to all members" as to the issues involved.⁷² This treats the earlier Massachusetts judgment as binding directly on the instant New York beneficiary, as res

⁶⁹Cf. note 93 post.

⁷⁰*Steen v. Mod. Woodmen*, (1921) 296 Ill. 104, 129 N. E. 546, *Reynolds v. Royal Arcanum*, (1906) 192 Mass. 150, 78 N. E. 129. These decisions, however, construed corporate charters, which have a statutory origin and are doubtless "public acts" under the full faith and credit clause; cf. Field, *Judicial Notice of Public Acts under the Full Faith and Credit Clause*, (1928) 12 MINNESOTA LAW REVIEW 439, 441.

⁷¹*St. Nicholas Bank v. State Nat'l Bank*, (1891) 128 N. Y. 26, 33, 27 N. E. 849, 851. (Cf. *Forepaugh v. Delaware Co.*, (1889) 128 Pa. St. 217, 18 Atl. 503. But this latter case of course lays down no rule of constitutional obligation). Unless, indeed, the full faith and credit clause can be stretched to cover the common law of the foreign state and also to turn the principle of *stare decisis* into a constitutionally enforceable obligation; cf. note 48, ante.

⁷²(1915) 237 U. S. 531, 545-6, 35 Sup. Ct. 724, 59 L. Ed. 1089.

judicata.⁷³ So these cases perhaps mean only that a state is constitutionally required to give effect to the *judgments* of other states, but not to their substantive law as such.⁷⁴

But no such complication clouds the import of the cases next to be considered.⁷⁵ In the *Head* and *Dodge Cases* the courts of Missouri were forbidden to determine by Missouri law the rights and obligations attaching to policy loan contracts that the United States Supreme Court deemed to have been made and performable in New York; and the *Dunken* decision held the courts of Texas incompetent to determine according to Texas law the rights of the parties under an insurance policy that had been mailed by a company agent in Tennessee to the insured in Texas. To apply Texas law to that policy was to deny full faith and credit to the law of Tennessee, the properly applicable law. Just why the United States Supreme Court considered the Tennessee and New York laws, respectively, to be the properly applicable laws, is beside the present point. The point is that the state courts of Texas and Missouri were constrained in the matter of determining the relevant law to apply to the facts; they were forbidden to treat their own domestic law, the *lex fori*, as the controlling law, and were required to apply the proper foreign law to the facts of litigation before them.

And there had been no binding New York or Tennessee judgments controlling the situation. It was purely the substantive law of those states that must be applied by the Texas and Missouri courts respectively. The *Dunken* decision appears to be rested on the full faith and credit clause, though the report discloses only the common law of Tennessee as thus binding in Texas.⁷⁶ The

⁷³Cf. *Converse v. Hamilton*, (1911) 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749; *Marin v. Augedahl*, (1917) 247 U. S. 142, 38 Sup. Ct. 452, 62 L. Ed. 1038; *Hancock Nat'l Bank v. Farnum*, (1900) 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619.

⁷⁴Cf. Langmaid, *The Full Faith and Credit Required for Public Acts*, (1929) 24 Ill. L. Rev. 383, 393-96, 398-99; Field, *Judicial Notice of Public Acts under the Full Faith and Credit Clause*, (1928) 12 MINNESOTA LAW REVIEW 439, 444-6. It is not believed that such an interpretation can be maintained of *Crapo v. Kelly*, (1872) 16 Wall. (U.S.) 610, 21 L. Ed. 430. (Note 57 ante for the reasons stated in the text).

⁷⁵*N. Y. Life Ins. Co. v. Head*, (1914) 234 U. S. 149, 34 Sup. Ct. 879, 58 L. Ed. 1259; *N. Y. Life Ins. Co. v. Dodge*, (1917) 246 U. S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772; *Aetna Life Ins. Co. v. Dunken*, (1924) 266 U. S. 389, 45 Sup. Ct. 129, 69 L. Ed. 342. Cf. *Mutual Life Ins. Co. v. Liebing*, (1921) 259 U. S. 209, 42 Sup. Ct. 467, 66 L. Ed. 900.

⁷⁶At one place in the opinion, Mr. Justice Sutherland refers to the ruling of the court below, that "the Texas and not the Tennessee statute,

Dodge decision assumes to rest on the due process clause. The *Head Case* seems to have been brought to the United States Supreme Court by invoking the fourteenth amendment, but Mr. Justice White's opinion seems finally to rely on the full faith and credit clause.⁷⁷

Finally, we have the recent case of *Home Insurance Co. v. Dick*,⁷⁸ in which the United States Supreme Court required the Texas courts to apply the law of Mexico and not the (substantive) law of Texas, to Texas litigation. Since the foreign law involved here was the law of another country, the decision rests squarely on the due process clause and not on the full faith and credit clause. But if Texas is thus constitutionally obliged (in a proper case) to apply the law of a foreign country to Texas litigation, the conclusion is inescapable that it must likewise be obliged (in a proper case) to apply the law of another state to Texas litigation, be the law of that other state the common law or the statutes thereof. This case sets the capstone on the whole process and, it is confidently submitted, in connection with the cases previously reviewed will be found inevitably to commit the United States Supreme Court to the broad position that the question: "By the law of what jurisdiction shall the rights and liabilities of parties to given acts and events be determined?" is a federal question generally speaking, under the due process clause, and in many cases also under the full faith and credit clause. This subjects to federal supervision the entire field of the legislative jurisdiction of the states⁷⁹ and opens the way for making the rules of conflicts a body of true international law as between the states of this country.

controls this contract" (1924) 266 U. S. 389, 394, 45 Sup. Ct. 129, 69 L. Ed. 342.

⁷⁷(1914) 234 U. S. 149, 157, 161, 34 Sup. Ct. 879, 58 L. Ed. 1259. The report mentions also the "impairment of contracts" clause; cf. note 24, ante.

⁷⁸(1930) 281 U. S. 397, 50 Sup. Ct. 338, 74 L. Ed. 296. Cf. notes 10, 24 ante.

⁷⁹The term "legislative jurisdiction" is used here as in the American Law Institute's Re-Statement of Conflicts, No. 2, secs. 64, 65 et seq.;—i.e., the jurisdiction (right, or competence) of the state by its laws to control the consequences of given events. The problem is the same whether "its laws" are its statutes or its judge-made rules. In the *Fox Case*, for instance, the legislative jurisdiction of Wisconsin (or the lack thereof) to control by its laws the New York-Illinois telegram is the same whether the pertinent law of Wisconsin is a statute or a rule of Wisconsin common law. Cf. notes 43, 48, 54, 55, 56, 58, 64, 71, ante.

The difficulties in the way of a frank adoption of this position are not to be blinked.⁸⁰ To enforce the "impairment of contracts" clause effectively, the United States Supreme Court early realized that it must decide for itself whether a contract had been made, and what were its terms, and not take the state court's decision as final on those points.⁸¹ Just so, if the United States Supreme Court proposes to tell the Texas court that it must apply Mexican law, or Tennessee law, in Texas litigation, it will as a practical matter have to be prepared to tell the Texas court authoritatively what the pertinent law of Mexico, or of Tennessee, is. But that means overruling *Lloyd v. Matthews*⁸² and the formidable line of cases on which Mr. Justice Brandeis relied in *Kryger v. Wilson*⁸³ not to mention the overruling of *Kryger v. Wilson* itself.⁸⁴ But if that is done it leads to the apparently anomalous situation that the question: "What is the law of Tennessee?" will be a federal question when it arises in Texas litigation, but will not be a federal question when it arises in Tennessee litigation. To make it a federal question in the latter case would go the whole way with Professor Schofield and the Australians.⁸⁵ Yet the anomaly perhaps is no greater than the one illustrated by *Swift v. Tyson*⁸⁶ and *Gelpcke v. Dubuque*.⁸⁷ And will the law of Tennessee, that Texas is to be required to apply, be the law of Tennessee as expounded by her own state courts, or the law of Tennessee as expounded by the federal courts where they have original jurisdiction of the litigation?⁸⁸ The question suggests an opportunity for

⁸⁰It is not meant to urge that federal review of state decisions in this field must in all cases be matter of right, on writ of error, rather than by certiorari; cf. Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, (1926) 39 Harv. L. Rev. 533, 560-62.

⁸¹*New Orleans Co. v. Louisiana*, (1888) 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607.

⁸²(1894) 155 U. S. 222, 15 Sup. Ct. 70, 39 L. Ed. 128. Cf. note 40, ante.

⁸³(1916) 242 U. S. 171, 37 Sup. Ct. 34, 61 L. Ed. 229, cases cited at p. 176. Cf. note 39, ante. Quære, whether these cases have not already been impliedly overruled; cf. Langmaid, *The Full Faith and Credit Required for Public Acts*, (1929) 24 Ill. L. Rev. 383, 399-400.

⁸⁴Cf. notes 36-38 ante; and note 91, post.

⁸⁵Cf. notes 26, 29, 30, ante.

⁸⁶(1842) 16 Pet. (U.S.) 1, 18-19, 10 L. Ed. 865.

⁸⁷(1863) 1 Wall. (U.S.) 175, 205, 207, 17 L. Ed. 520. Cf. Miller, J., dissent p. 207-11; *Forepaugh v. Delaware Co.*, (1889) 128 Pa. St. 217, 18 Atl. 503, note 71 ante.

⁸⁸Cf. *Swift v. Tyson*, (1842) 16 Pet. (U.S.) 1, 18-19, 10 L. Ed. 865; *Liverpool Co. v. Phoenix Ins. Co.*, (1889) 129 U. S. 397, 443, 9 Sup. Ct.

the federal courts to make their view of the law of each state binding throughout the country *except* in that state itself!

It has been suggested that the doctrine here contended for may be applied only piece-meal, in cases involving only certain "types of situation," or certain lines of business.⁸⁹ That is undoubtedly the way the present condition of the law on the point has developed. The Supreme Court entered this path more or less unconsciously. But in face of the inevitable implications of the varied line of decisions now outstanding, it is not believed that such a position can much longer be maintained.⁹⁰ It is more plausibly suggested, that while in a clear case like the *Fox Case* Wisconsin may constitutionally be disabled from applying Wisconsin law, yet in a case where the conflicting rules of several jurisdictions have some relevance, or connection with the operative facts, the United States Supreme Court may well leave the forum free to pick and choose, or to disregard all foreign law and apply its own.⁹¹ Yet no support can be obtained for this suggestion, from such actual decisions as the *Head, Dodge and Drunken Cases*,⁹² where the United States Supreme Court did its own picking and choosing amongst the possibly relevant foreign laws, and required the forum to apply the one that it determined to be the one properly controlling.⁹³

Of course, to say that in the *Fox Case* the Wisconsin court

469, 32 L. Ed. 788. Cf. note 71 ante. Cf. Field, Judicial Notice of Public Acts under the Full Faith and Credit Clause, (1928) 12 MINNESOTA LAW REVIEW 439, 455 et seq.

⁸⁹Cf. Field, Judicial Notice of Public Acts under the Full Faith and Credit Clause, (1928) 12 MINNESOTA LAW REVIEW 439, 450, 451; Yntema, The Hornbook Method and the Conflict of Laws, (1928) 37 Yale L. J. 468, 482.

⁹⁰Several of the recent cases hereinbefore reviewed have dealt with the "business of insurance"; but not all of them. But can insurance possibly be deemed *sui generis* for this purpose? Insurance though across state lines is not even inter-state commerce, *Paul v. Virginia*, (1868) 8 Wall. (U.S.) 168, 19 L. Ed. 357. Cf. notes 54, 55, 56, 64 ante.

⁹¹This suggestion might reconcile *Kryger v. Wilson*, (1916) 242 U. S. 171, 37 Sup. Ct. 34, 61 L. Ed. 229, notes 36-38 ante with the other cases that have been considered; cf. note 84 ante and notes 92, 93, 94, post; cf. *Dodd*, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, (1926) 39 Harv. L. Rev. 533, 542 et seq.

⁹²Cf. note 75 ante.

⁹³Cf. especially, *Brandeis, J.*, dissent in *N. Y. Life Ins. Co. v. Dodge*, (1918) 246 U. S. 357, 377, 379-82, 38 Sup. Ct. 337, 62 L. Ed. 772; *Aetna Life Ins. Co. v. Dunken*, (1924) 266 U. S. 389. Cf. *Green v. N. W. Trust Co.*, (1914) 128 Minn. 30, 150 N. W. 229; *Patterson v. Wyman*, (1919) 142 Minn. 70, 170 N. W. 928. Cf. accord, *Stone, J.*, in *Gilbert v. Fosston Co.*, (1928) 174 Minn. 68, 72, 216 N. W. 778, 779. Cf. note 69 ante.

ought constitutionally to have applied the New York *and* Illinois law, and not Wisconsin law, would not answer the next obvious question, whether it must apply the New York *or* the Illinois law, if they had differed. That question, however, lies beyond the scope of the present thesis. It may only be remarked that an extremely flickering light is shed upon it by the United States Supreme Court decisions to date. In certain parts of the field, that court's decisions thus far rather contribute to the confusion that prevails, than help to clarify it.⁹⁴ But all that is another story.

⁹⁴Notably in the field of contracts, cf. Am. Law Inst. Commentaries on Conflict of Laws Restatement, No. 4, pp. 23, 24, 25; *Hall v. Cordell*, (1891) 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; *Scudder v. Union Nat'l Bank*, (1875) 91 U. S. 406, 23 L. Ed. 245; and of marriage and divorce, where the unfortunate decision of *Haddock v. Haddock*, (1906) 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867 has legalized a considerable amount of interstate anarchy. In matters of pure tort the court's attitude seems pretty well settled. Cf. *Am. Banana Co. v. United Fruit Co.*, (1909) 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826; *Slater v. Mexican Nat'l Ry.*, (1904) 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900; *Babcock v. No. Pac. Ry.*, (1894) 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; *Santa Fe Ry. v. Sowers*, (1909) 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695; *Cuba Ry. v. Crosby*, (1912) 222 U. S. 473, 32 Sup. Ct. 132, 56 L. Ed. 274; *Tennessee Co. v. George*, (1914) 233 U. S. 354, 34 Sup. Ct. 587, 58 L. Ed. 997; *Spokane Ry. v. Whitley*, (1915) 237 U. S. 487, 35 Sup. Ct. 655, 59 L. Ed. 1060. It seems unlikely that in the *Fox Case* the Wisconsin court would be held justified in applying Wisconsin law on the theory of *Machado v. Fontes*, [1897] 2 Q. B. 231, 66 L. J. 542; cf. *Goodrich, Conflict of Laws* 190, treating the case as sounding in tort rather than in contract. Cf. note 2, ante. But the *Fox Case* itself illustrates that to determine whether a case sounds in contract or in tort is often a problem; cf. *Alabama Ry. Co. v. Carroll*, (1892) 97 Ala. 126, 11 So. 803, and the confusion in the decisions under workmen's compensation acts; cf. *Ocean Accident & Guarantee Co. v. Arizona*, (1927) 32 Ariz. 275, 257 Pac. 644; *Smith, Sequel to Workmen's Compensation Acts*, (1914) 27 Harv. L. Rev. 235, 344; cf. accord, *Langmaid, The Full Faith and Credit Required for Public Acts*, (1929) 24 Ill. L. Rev. 383, 406-07. Any constitutional rule of jurisdiction over title to chattels seems also uncertain, despite the apparent definiteness of such cases as *Crapo v. Kelly*, (1872) 16 Wall. (U.S.) 610, 21 L. Ed. 430, and *Green v. Van Buskirk*, (1866) 5 Wall. (U.S.) 307, 18 L. Ed. 599, (1868) 7 Wall. (U.S.) 139, 19 L. Ed. 109. Cf. *Edgerly v. Bush*, (1880) 81 N. Y. 199; *Union Sec. Co. v. Adams*, (1925) 33 Wyo. 45, 236 Pac. 513. The American Law Institute Re-Statement of Conflict of Laws No. 2, sec. 52, states that there is "no authority against" the rule there enounced; but *Union Sec. Co. v. Adams*, (1925) 33 Wyo. 45, 236 Pac. 513, seems inconsistent in principle.