Essays on the Conflict of Laws

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day the importance of being fantastic becomes clearer. . . . The only condition more appalling, less practical than world government is the lack of it in this atomic age."

Little courage is needed to be a prophet of evil.

We dare not take the risk of not taking a risk in the use of reason when confronted with destructive uses of unreason. There is real evil in the world—fascism, for instance. Americans generally believe that, with courage and intelligence, we may be able to overcome many evils. But that belief does not commit us to the dogma that victory is certified. Our belief, hardy and athletic, inspires us to take reasonable chances. "The future of human society," as Mr. Justice Douglas puts it, "depends on whether this generation will be successful pioneers of adventure."

As Tocqueville's *Democracy in America* is highly esteemed by Morgenthau, it is too bad that he does not take to heart these words from the last paragraph of that book: "Providence has not created mankind entirely independent or entirely free. It is true that around every man a fatal circle is traced beyond which he cannot pass; but, within the wide verge of that circle he is powerful and free; as it is with man, so with communities." Within that circle, we must rest our hope for the future, not on a philosophy of drifting, but on a faith in imaginative, inventive intelligence coupled with integrity and good will. My answer to such pessimism as Morgenthau's I have expressed thus: "Man's conscious and deliberate purposes have to some extent affected the past, and they can also to some extent affect the shape of the future. Such is the central thesis of the traditional American credo, a thesis which can neither be proved nor be disproved 'scientifically' but which is a matter of faith. . . . Some inevitability there is in the universe, but also much evitability. . . . We need to keep in mind the . . . belief that 'God helps him who helps himself.' In expressive Americanese, we must make good."

Jerome Frank

* Judge, Circuit Court of Appeals for the Second Circuit.*

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For more than fifteen years, the Dean of Osgoode Hall Law School has attentively followed the case law in the field of conflict of laws and accompanied the important de-

74 White, *The Wild Flag* 34, 186 (1945).

75 "The prophets of evil are softies in their hearts; they have no stomach for the kind of struggle and patience which are needed again and again along the road to wider team-building." Llewellyn, *The Mechanisms of Group Tensions*, 14 Am. Scholar 228, 230 (1945).

76 Douglas, Foreword, 55 Yale L.J. 865, 869 (1946).

77 Tocqueville, *2 Democracy in America* 334 (Bradley ed., 1945). Elsewhere (p. 88) he said: "In perusing the historical volumes which our age has produced, it would seem that man is utterly powerless over himself and over all around him. The historians of antiquity taught how to command; those of our time teach only how to obey. . . . If the doctrine of necessity . . . passes from authors to their readers till it infects the whole mass of the community and gets possession of the public mind, it will soon paralyze the activity of modern society. . . ."

See also Frank, *Fate and Freedom* (1945) passim, and especially Ch. 1.


79 Frank, *Fate and Freedom* 16–17 (1945).
BOOK REVIEWS

Decisions of the Canadian and British, and occasionally also of American, courts with comments and annotations. These writings, of which some have constituted full-length articles, have now all been assembled in one volume and have thus been made readily accessible to the profession not only in Canada and other parts of the British Commonwealth of Nations but also in the United States. Dealing with or starting out from Canadian or British cases, Dean Falconbridge's articles and comments are primarily concerned with the conflict of laws as it has come to develop in the British countries, and it is one of the peculiarly interesting features of Dean Falconbridge's book that it shows along what different lines the conflict of laws has developed in the British and American parts of the common law world, e.g., with respect to torts or in the courts' attitudes toward the renvoi. But, more impressively, the book testifies to the basic legal unity of the common law part of the world, and in spite of its distinctly British flavor it will be of significance and help to American readers.

The basic problems, the basic approach, and the historical background are, after all, the same. Dean Falconbridge has kept close contact with developments to the south of the Canadian-American border; indeed, he is a participant in the great discussion which has been carried on in this country ever since the Restatement compelled American workers in the field to clarify for themselves the basic notions, policies, and fundamental conceptions. In this discussion, Dean Falconbridge sides with Lorenzen and W. W. Cook against Beale and the other advocates of the territoriality-acquired rights approach. Cook is, indeed, the thinker to whom Dean Falconbridge is closest. While demolishing the faulty structure erected by the territorialists, Falconbridge, like Cook, insists upon the necessity of the use of concepts, emphasizing, however, the necessity of their being formulated in accordance with the interests which are really at stake in choice of law problems rather than upon preconceived notions which are incompatible with the law actually applied by the courts. This insistence of the author upon the necessity, nay, indispensability, of clearly formulated concepts constitutes one of his most valuable and important contributions, a contribution which is particularly necessary in view of the tendency of some of the critics of the Beelite approach to fight not only the concepts of the territoriality-acquired rights approach but any formulated concepts and rules at all, and simply to strive for the just decision of every individual case. Like Cook, Dean Falconbridge well knows that justice cannot be done without rules and that rules must of necessity be expressed in concepts. In the formulation of these concepts Falconbridge also shares with Cook the consciousness of the dangers of the use of imprecise and, particularly, of elliptical language. He is aware of the problems which lurk behind such ambiguous statements as the one that a certain "legal relation" is "governed" by a certain "law." Whenever he has to use words or expressions of potential ambiguity, he always makes it clear in what sense he is using them, without fear of sacrificing elegance of style to clarity of thought. Similar to Cook, Falconbridge is primarily interested in fundamentals, but here his interest is probably guided not so much by sheer intellectual curiosity as was the case with Cook, the scientist. Falconbridge's approach is that of the practitioner, who knows that the right solution of the individual case cannot be found without clarity about the "legal and logical bases." Falconbridge is the practitioner's interpreter of Cook's high flights. His discussions of individual cases will be more palatable and therefore particularly valuable to the harassed practitioner who has become frightened by the abstract discussions which have given to the conflict of laws such a mysterious and forbidding character. Falconbridge talks the language of the attorney and the judge. Being basically
a man of practice, and of British traditions, he is also more conciliatory than Cook. While generally adhering to the local law theory, he tries to do justice to the advocates of the acquired rights theory; while generally adverse to the renvoi, he tries to discover in what special situations an application of the renvoi may be justified.

Convinced of the necessity of redefining and clarifying basic problems, Falconbridge is especially attracted by the problems which have in recent years been discussed under the name of characterization or qualification. As a matter of fact, while the various articles and comments collected in the book range over practically the entire field of the conflict of laws in the sense of choice of law, almost every one of the numerous problems touched upon by the author has some connection with characterization. This selection is well justified, because characterization, when properly understood, is indeed the basic problem of the conflict of laws. Unfortunately, the term has been confused and to some extent become discredited by its indiscriminate application to a variety of intrinsically different problems, and not even Dean Falconbridge has completely escaped this ambiguity of terminology. The very word characterization expresses the nature of the problem very neatly; it quite particularly indicates that the problem is not limited to the conflict of laws but occurs in every field of the entire system of law. Indeed, there is no mental activity in which a lawyer has to engage more frequently than that of characterizing a problem. We are engaged in that mental activity day in and day out whenever a problem is presented to us for legal determination and decision. Whatever the problem presented to us, before we can do anything with it as lawyers, we have to characterize it, i.e., we have to determine whether it is a problem of the law of torts, or contracts, or taxation, or administrative law, or constitutional law, or some other field, and then, in a more refined process, to determine which of the several rules of the field in question is to be resorted to in order to make a decision in the case. Occasionally it may happen that we do not find for our case any readily available existing rule and then the court will have to formulate a new rule for the novel case. But even in such situations we do have to "characterize" our problem before we can say that it does not fit well into any one of the existing rules of law. The rule under which we have to subsume our case may be formulated in a statute or it may have to be derived from a case or a series of cases, but we simply cannot decide any case without stating the rule by which we decide it, the allegation to the contrary once made by some radical realists in this country and abroad notwithstanding. Courts concerned with wills and deeds have every day to characterize the interests created or sought to be created in the instrument in question, whether the instrument deals with a remainder or a reversion, a vested interest or a contingent one, or whether the instrument is testamentary or embodies a transaction inter vivos, etc. In tort cases we have to determine whether our action is one for trespass q.c.f., or trespass d.b.a., or trover, or assault and battery, or invasion of privacy, or libel, or slander, etc. We could accumulate other illustrations ad infinitum from every branch of the law. The rules of the conflict of laws are more broadly and more generally formulated than those of other, older, and better developed fields, such as real property or contracts, and much of the unsatisfactory nature of the present conflict of laws can be traced to that fact of underdevelopment. But the rules are there and, just as in any other field, no case can be decided without determining which rule we have to apply to the problem on hand. If the problem is that of determining which law answers the problem of whether a cause of action for negligent invasion of the plaintiff's bodily integrity caused in an accident in State X is terminated by the subsequent marriage of the plaintiff and the
defendant; we have first to determine whether the problem of the influence of the marriage upon the continued existence of the cause of action is a problem of the law of torts or rather a problem of the law of family relations. Only then do we know whether we have to apply the rule that problems of the law of torts are to be decided in accordance with the law of the place where the alleged tort occurred, or whether we should rather resort to the rule which tells us that problems of the law of family relations are to be decided in accordance with the rules of the law of the place in which the family resides. If a passenger has bought his railroad ticket in state A and is injured in an accident in state B, we have, when he sues the railroad for damages, to know whether the problem of determining whether he is entitled to damages and, if so, to how much, is one of the law of torts or of the law of contracts. If it is the former, we shall have to apply the choice of law rule relating to tort problems which has just been stated; but if our problem is one of the law of contracts we have to decide the problem in accordance with the law of the place at which the alleged contract was made (at least if we think that the place of contracting rule is the correct choice of law rule for contracts problems, which it is certainly not).

What we have to characterize in the conflict of laws is the same as in any other legal case; we do not characterize facts and still less do we characterize a "legal relation." What we characterize is a problem, and quite clearly and correctly Dean Falconbridge thus uses the term "characterization of the question" for the problem which he discusses with great lucidity. Now, the characterization of the problem, indispensable though it is, does not of itself decide the case. We have to take several additional steps, which are also analyzed and described by the author with fine clarity. The first additional step is that of interpreting the term of contact contained in the choice of law rule of the forum which we have chosen as the proper one upon the basis of our characterization of the question. The choice of law rule of the forum may refer us to the place where an alleged contract was concluded, or where an alleged tort was committed, or where a certain individual has his domicile or residence, etc. What do these terms of contact mean? They must be interpreted, just as any other term occurring in a rule of law. Unfortunately, for this stage of the process, Dean Falconbridge again uses the term characterization. The careful reader will, of course, know that in this connection the word is used with a different meaning, but if the meaning is different and if such a good word as interpretation is readily available, why then use the word characterization at all and thus create the danger of again confusing two different mental steps and processes?

Now, having interpreted the terms of contact contained in the choice of law rule of the forum, we are able to know to what country's legal system we shall have to look for the substantive law rules under which we shall have to decide our case. But, upon a closer inspection, it turns out that we are still not quite ready. We have to know which ones of the rules of the foreign country in question we shall have to consider; quite particularly we have to know whether we shall have to consider or to ignore the

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1 See Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).
3 See infra at 486.
foreign country's choice of law rules. In the former case we shall be confronted with
the renvoi, and to this vexed problem Dean Falconbridge devotes an extensive and
clarifying discussion. The problem is more acute in British countries than it is in the
United States because of certain applications of the renvoi in a whole series of English
decisions. Of these cases Dean Falconbridge is critical on both theoretical and practi-
grounds, but with the cautiousness so typical of him he refrains from a general
theory in favor of or against the renvoi but rather presents a careful and incisive anal-
ysis of individual situations, reaching the result that the renvoi, while not recom-
mended for general application, is appropriate in certain cases dealing with rights in
land and in cases concerned with the recognition of foreign decrees of divorce or other
foreign decrees dealing with personal status.

Having determined that under our choice of law rule we have to resort to the rules
of the internal law of a certain foreign state, or country, we still may have to eliminate
from our consideration certain of these rules as procedural and thus not applicable in
our own courts, or as not applicable in our courts for some other reason. This problem
has been called by Robertson and other authors a problem of "secondary characteriza-
tion," Dean Falconbridge dislikes this term, but his reason for doing so has not be-
come quite clear to me. As a matter of fact, it is in this very connection that I do not
understand him and that I find it necessary to express doubts. In some way which I
just cannot understand, the author has tried to tie up the secondary characterization
with the characterization of the problem with which we have to start in every choice of
law case. He repeatedly emphasizes that in this characterization of the question we
should not look exclusively to the system of concepts prevailing at the forum but that
we should throw preliminary glances to the legal system of the country or countries
that may presumably turn out to be applicable and that in our characterization of
the question we should allow ourselves to be influenced by what we find in that pre-
sumably applicable foreign law. I have to confess not only that I do not understand
how this mental process is to be carried out but that I am also afraid that any effort
to follow this prescription will to a large extent undo the author's own efforts at
mental clarification.

While disagreeing with Dean Falconbridge's partial undoing of his own efforts, I
think, however, that I can see his motive. Dean Falconbridge is one of the few authors
in English-speaking countries who are familiar with the penetrating inquiries that
have been carried on in the field of conflict of laws in continental European countries.
He is particularly familiar with, and obviously impressed by, the work of Franz Kahn
of Germany and René Bartin of France, who were probably the two most acute
thinkers in the field at the turn of the century.

Both Kahn and Bartin were children of the liberal late Victorian age, with its belief
in the immediately possible achievement of international harmony in the political as

4 Collier v. Rivaz, (1841) 2 Curt. 855; Bremer v. Freeman (1857) 16 Moore P.C. 306;
In re Lacroix, (1877) 2 P.D. 94; In re Tru福特, (1885) 36 Ch. D. 600; In re Johnson, [1903]
1 Ch. 377; In re Annesley, [1926] 2 Ch. 692; In re Ross, [1930] 1 Ch. 377; In re Askew, [1930]
2 Ch. 259; In re O'Keefe, [1940] Ch. 124.

5 Gesetzeskollisionen, ein Beitrag zur Lehre des internationalen Privatrechts (1891) 30
Jherings Jahrbuecher, 1, repr. in 1 Kahn, Abhandlungen zum internationalen Privatrecht
(1928) 1.

6 De l'impossiblité d'arriver à la solution définitive des conflits de lois, 1897 Journ. Clunet
225; repr. Études de droit international privé (1899).
well as in the commercial and the economic fields. To the scholars of that age, the conflict of laws appeared as the technique by which the differences between the various legal systems of the world could be bridged over, and through which there could be achieved uniformity of decision, at least in individual cases. Wherever a case might happen to come up for decision, it should be possible, by means of properly developed choice of law rules, so these scholars hoped, to reach one and the same decision. The ideal was admirable, but it was exactly through Kahn and Bartin that the somewhat naive expectations were subjected to a shock. In his famous article on *The Impossibility of Reaching a Definitive Solution of the Conflicts of Laws,* Bartin proved that cases might be decided differently in different countries, even if the countries concerned all had literally the same choice of law rules. The reason for this disheartening discovery, which had shortly before also been made by Kahn, was the simple fact that one and the same case might be subsumed in different countries under different ones of the uniform choice of law rules, and that one and the same problem might, for instance, be characterized in one country as a problem of the law of matrimonial property and thus be referred to the law of the parties’ domicile at the time of the conclusion of the marriage, and in another country as a problem of the law of succession upon death and thus referred to the law of the place where the decedent was domiciled at the time of his death. Efforts to eliminate this source of possible diversity of decision have never ceased since, and Dean Falconbridge’s own ideas constitute a new attempt in this direction. Such efforts are of little avail because the goal of complete international uniformity of decision is unattainable. The end of the conflict of laws is a more modest one. For a long time to come laws will remain different in different countries. These differences, while they may occasionally be due to mere historical chance and accident, are very frequently based upon profoundly different social and political ideals. In the conflict of laws we cannot hope to do more than prevent glaring injustices which might result if a case were decided under a law with the application of which the parties could in no way reckon when they engaged in the activities out of which the later law suit arises. But in every country we shall continue to insist upon the enforcement of certain basic policies of our own and, to some extent, we may also be willing to help other states and countries in the prevention of the evasion of laws which they regard as important, for instance laws prohibiting certain marriages or limiting grounds for divorce. These statements are not meant, of course, to imply that we should completely lose sight of the ideal of uniformity of decision, but insofar as this ideal is obtainable at all, the remedy for the present shortcomings ought not to be sought in complicated and complicating theories of characterization or renvoi, but in a continuous refinement of the choice of law rules, which in their present underdeveloped state are of a generality and crudeness which would not be tolerated in any other field of the law. The way in which such refinement is to proceed is exemplified in numerous of the discussions of detailed problems in our book under review, for instance in the author’s chapters on contract and conveyance, on agency, authority and power, on succession and administration, or on mortgages. It is surprising that Dean

7 Ibid.

8 See the case from which Bartin started his discussion, Alger, 24 décembre 1889, 1891 Journ. Clunet 1771.

Falconbridge has not developed a more systematic approach to this problem, especially since he shows his familiarity with the work of Ernst Rabell and the late Robert Neuner. If the conflict of laws is to emerge from its present unsatisfactory state it has to proceed upon the lines shown by these profound and pioneering thinkers and in the techniques which have been developed and applied in this country by Lorenzen, W. W. Cook, the late Chief Justice Stone, and quite recently by V. Fowler Harper.

There is one other major point at which I feel myself compelled to take issue with the learned author. In an incisive discussion of the recent decision of the Judicial Committee of the Privy Council in *Vita Food Products v. Unus Shipping Company,* Dean Falconbridge inveighs against Lord Wright's holding that certain problems of the law of contracts, including problems relating to the very validity of an alleged contract itself or of a certain clause contained therein, shall be decided under the rules of the law the application of which has been stipulated by the parties themselves. In that respect agreeing with W. W. Cook, Lord Wright, in a statement which may perhaps be called a dictum, goes so far as to say that the parties may stipulate even a law with which the contract does not have any objective contact. Referring to Cook's discussion of the problem, Falconbridge observes that "it is doubtful, however, whether he [Cook] gives any example which quite touches the crucial point, namely, that the parties cannot by any contractual provision (whether by the incorporation of provisions of some foreign law or otherwise) render intrinsically valid a contract which is intrinsically invalid by its true proper law (ascertained on substantial considerations). . . . ." These last words "invalid by its true proper law" reveal the author's position and, it is respectfully submitted, the author's fallacy, with respect to which, it must be said, he finds himself in highly respectable company. However, the fallacy of that position has also been pointed out by at least equally respectable authority, and with such force and frequency that one can only be astonished that it has still not been generally recognized.

If we assume that the conflict of laws belongs to a higher legal order than the internal laws of the various countries and states, and if that higher system contains a choice of law rule declaring that problems of the law of contract are to be decided under the law of the place of contracting, or under the law of the place of performance, or under

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10 Conflict of Laws 47 (1945); also 5 Zeitschr. f. ausl. u. intern. Privatrecht 243 (1931); 1933 Revue de droit intern. privé 1.


15 P. 349.


17 See especially Nussbaum, Principles of Private International Law 157 (1943); Battifol, Les conflits de loi en matière de contrats (1938); Wolff, Private International Law 420 (1944); Cook, Logical and Legal Bases of the Conflict of Laws 389 (1942); see also Nussbaum, Conflict Theories of Contracts: Cases versus Restatement, 51 Yale L.J. 893 (1942).
the law of the place with which the contract has the most significant objective contacts, then it is, of course, justifiable to speak of a proper law of the contract the provision of which the parties do not have the power to eliminate by their own stipulation. The lack of such power does not follow, however, from any rule of the conflict of laws but from the internal proper law thus determined by the supra-state conflict of laws. The same lack of power exists where we conceive, as we all, including Dean Falconbridge, now generally do, of the rules of conflict of laws as parts of the various systems of national laws of the countries and states of the earth, and the conflict of laws of some particular country or state has unmistakably, perhaps by statutory fiat, adopted some one of the objective theories.

There are authors and courts who assert that some such rule is unmistakably contained in the conflict of laws of some or even all American states. There are other authors and courts, however, who deny the existence of such a rule and who maintain that with respect to contract problems the law is in such an unsettled state that none of the various rules from time to time proposed can be regarded as really constituting the clearly binding and settled rule. Among those who think that the question is still an open one there are some who believe that of all the competing rules the intention of the parties rule is the best, and who therefore advocate its general and clear-cut adoption. In England, the state of the literature and the cases even seems to allow the statement that the intention of the parties rule is the one which is actually in force, that polemics against the rule are too late unless they are aiming at its repudiation, and that discussion de lege lata must be limited to the details of the rule's application and to alleged exceptions. One of these alleged exceptions, which has found expression in a few American cases, but has been expressly refuted by Lord Wright in the Unus case, maintains that, if the parties are at all free to determine the law applicable to their alleged contract, they are limited in their choice to the laws of one of those countries or states with which the contractual relation has some real and objective contact.

The alleged exception seems to be as little justified as the objections against the intention of parties rule itself. Under modern conditions, as distinguished from those prevailing under the Holy Roman Empire, we have to start out upon the assumption that every state or country is free to choose those choice of law rules which to its lawmaking authorities appear to be the best suited to achieve justice as understood by them. In this situation there cannot be found any reason why a state, through its legislature or its courts, should not lay down the following rule: Whenever parties to a situation which is alleged by one to have given rise to a legally enforceable contract, have in some ascertainable way expressed the opinion that disputes which may later arise out of that relation shall be decided under the legal system of some particular state or country, such law shall be resorted to whenever such a dispute actually arises. This formulation may sound cumbersome, but, as it has been shown so convincingly by Cook and Falconbridge himself, in the conflict of laws we have occasionally to use cumbersome language lest we be misunderstood. Now, if we express our proposition in this form, it should be clear that there is no reason, at least of legal theory, why it

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8 See especially Cook, Nussbaum, and Battifol.
might not be adopted by a state or country. A state or country, in determining which choice of law rule it wishes to adopt for contract problems, must in its choice of law rule state some point of contact, and that point of contact must be expressed in factual terms. When we adopt as point of contact the place of contracting, we mean that place at which there have happened those factual events which, as defined in the internal contracts law of the state-in question, transform preliminary talks and negotiations into a legally enforceable contract, for instance, under German law the place where the letter of acceptance has become accessible to the offerer, or, under American law, the place where the letter of acceptance has been mailed. If a country adopts the place of performance rule, it refers the case to the law of that place at which, according to the words uttered by the parties and the rules contained in the internal law of the state in question, certain acts are to be done by one of the parties or by both. Why should it be "logically" impossible for a state to refer the decision of a contract problem to the law of that state of which the parties have ascertainably and jointly spoken or thought as determinative of controversies that may actually arise out of their relation? There simply does not exist any such "logical" reason. If a state adopts that rule, then the law thus determined by the parties is the proper law of the contract and it is inconsistent to say that, by their understanding, they cannot exempt their contract from the prohibitive or restrictive provisions of the proper law. The law to whose prohibitive, restrictive, and other provisions the alleged contract is subject is the law referred to by the parties, just because it is the proper law and it is the proper law simply because the choice of law rule of the forum declares it to be such.

The only objections which could properly be raised against the intention of the parties rule in the sense just stated are objections made upon grounds of legal policy. But before discussing such objections, let us first see what arguments can be made in favor of the rule. If we agree that it is one of the very basic policies of the conflict of laws to prevent the application of a legal system of which the parties could not have thought, or, to express the same idea in a positive way, if we regard it as one of the principal purposes of the conflict of laws to protect the justified expectations of the parties, then the intention of the parties rule is the one which fulfills that purpose better than any rival rule, and quite particularly better than the place of contracting rule. If the parties have agreed upon the application of some particular law, then they have thought and acted in accordance with it. The place of contracting, on the other hand, may be dependent upon completely accidental circumstances which have no connection whatsoever with the thoughts, disposition, and acts of the parties. We have hardly to refer to the often mentioned case of the letter of acceptance being left in the pocket of the offeree and mailed by him at some place accidentally touched upon in the course of a journey, or of the contract concluded in the smoker of a railroad train.

Insofar as it is not based upon invalid grounds of "logic," opposition to the intention of the parties rule has been motivated by the fear that the rule might too easily lend itself to evasion of the law. But which law is it that the opponents fear might be evaded? All the prohibitive and restrictive provisions of the law chosen by the parties apply because, under the intention rule, that law is the proper law of the contract. There are also applicable all those prohibitive and restrictive rules of that law which the plaintiff has invoked as the forum and which are regarded in that law as

sufficiently important to merit classification as rules of public policy. If a state thinks
that a contract should not be enforced because it was made in contravention of an
important prohibition of the place where the agreement was made, i.e., actually
negotiated and perfected, it can perfectly well do so by an appropriate exception to
the general intention of the parties rule, just as it can refuse to enforce a contract
whose performance is prohibited by some important rule of the place at which an es-
sential part of the performance activities is to be actually carried out. Just like any
other rule of the conflict of laws, the intention of the parties rule has to be refined by
sub-rules dealing with certain special situations. Life is too complex to be caught in a
few rules of appealing, but deceptive, simplicity. The intention of the parties rule must
also be supplemented by another choice of law rule to take care of those innumerable
cases in which no intention of the parties with respect to the applicable law can be dis-
covered. The best rule for such cases would seem to be that which refers the decision
of contracts problems to the law of that place with which the alleged contract has the
most significant actual contacts. To label this or any other law, the law which the
parties are presumed to have intended or which they would have selected hypotheti-
cally if they had thought of the problem, is nothing but a misleading playing with
words. Where ascertainably the parties have not given any thought to the problem,
the law has to step in with a rule of its own, just as it has to do in all those innumer-
able non-conflicts cases in which a testator or a contracting party has forgotten to
take care of a situation for which he might have provided but which has escaped his
foresight. Thus, the intention of the parties rule needs refinement and supplementa-

whether we should refine it by limiting the parties’ choice to those laws with
which their transaction has some factual connection is not a question of logic but of
legal policy. From that point of view some objections may indeed be made against the
choice of a law which does not have any connections with the transaction in question.
The choice of some unknown law may have been imposed upon one party to the
transaction by the other, especially where the latter is occupying an economically or
otherwise dominant position. That danger may be guarded against, however, by the
application of rules against duress, undue influence, or similar abuses, as they may be
found in every civilized legal system. There also remains the practical difficulty with
which the court may be faced when it is asked to ascertain and interpret some foreign,
conceivably exotic, law. This effort should not be asked of the court unless there are
some good, objective reasons. It ought to be considered, however, that the example of
the stipulation of the law of Afghanistan in a contract between parties in Illinois and
New York belongs to the realm of unreal horribles. If parties to a transaction stipulate
some law other than that of their respective places of business or domicile, they will
hardly do so without cause. In the Unus case itself Lord Wright pointed out that the
case had some real connections with English law, even though the transaction was one
of shipment of herring from Newfoundland to New York in a Nova Scotian ship. The
insurers of both ships and cargo were most likely to be English, and they are the parties
ultimately interested in the distribution of a loss resulting from shipwreck. In a well-
known American case Florida law had been stipulated in a contract made in Indiana
between a circus company and a circus artist, although none of the parties’ acts under
the contract was contemplated as performable in Florida. Should the court, before in-

22 Cf. Rheinstein, Cases on Decedents’ Estates 597 (1947).
validating the provision, not have considered the well-known fact that Sarasota,
Florida, is the circus capital of the United States? It is possible, of course, that this
very fact may have influenced Florida legislation to give undue advantages to circus
owners. If such a situation should be discovered, the court might well have refused to
enforce the Florida provision against the artist. But without such factual ascertain-
ment the decision appears to be unjustified. It may well have been that circus people,
by uniform stipulation of Florida law, would like to give to their contracts that cer-
tainty which the advocates of international uniformity are so anxious to achieve and
for which we should certainly strive as long as there are no really important counter-
policies.

I have dwelt at some length upon these two topics of characterization and intention
of the parties because I believe that Dean Falconbridge's book has such weight and
merit that it will have a considerable influence upon future developments in the con-
fusion of laws. In these two major, and also in a few minor, respects I am unable to agree
with the learned Dean of Osgoode Hall. I am offering these observations in the hope
that he may perhaps consider them when, as he undoubtedly will, he continues to
favor the profession with his pertinent discussions of current decisions.

Having stated my points of disagreement I should not like to fail to direct the reader's
attention to those parts of the book which appear to me to be particularly helpful and
clarifying. In addition to Dean Falconbridge's extensive treatment of the renvoi, the
reader will particularly enjoy his clarifying analysis of cases involving property ques-
tions. There the author shows not only the necessity of distinguishing between the
contract and the property aspects of such transactions, but also how this distinction
is to be carried out. He demonstrates the worthlessness for choice of law cases of the
distinction between real and personal property and the necessity to distinguish in such
cases between movables and immovables; he also furnishes the reader with a reliable
guide as to how this distinction is to be made in particular types of cases. There are
trenchant discussions of mortgage problems, of cases of family status, especially adop-
tion, and of torts. But to pick out any more special parts would be invidious. Dean
Falconbridge's monographs constitute in their totality a coherent and impressive
treatise of the conflict of laws. We are grateful that they have now been made so
easily accessible in this stately volume.

MAX RHEINSTEIN*


In no field of the law has there been a richer outpouring of distinguished writing in
the last five years than in the field of conflict of laws. England and Canada as well as
the United States have contributed. We have had from England Martin Wolff's Pri-
vate International Law, published in 1945, a penetrating treatment which draws sub-
stance from the soil of Continental scholarship. From Canada we have had this year
Dean Falconbridge's Essays on the Conflict of Laws, a collection of writings in which pre-
cise scholarship is wedded to good sense. In this country we have had Walter Wheeler
Cook's Logical and Legal Bases of the Conflict of Laws, published in 1942, notable for
its distinctive critical method, and Ernst Rabel's Conflict of Laws: A Comparative

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