

Apparently it is possible for a national court to accomplish the herculean task of recognizing, even in time of war, that "the seat of judicial authority is indeed local, but the law [international] itself has no locality."¹⁷ England was at war when *The Zamora* was decided, as was Canada thirty years later when the Quebec Court of King's Bench was faced with *Rose v. The King*. The executive departments in each case asserted a right in contravention of international law to jurisdiction over property obtained by force. Such jurisdiction was conceded by one tribunal in the interest of the safety of the state, and denied by the other despite the existence of a national emergency similar to that which the Canadian court felt gave such peculiar force to the policy of short run expediency.

The decision in *Rose v. The King* is illustrative of the ambiguous position of international law in that, although the court admits its existence, the holding that it could be disregarded at will by an interested sovereign state seems to deprive it of the essential characteristics of law.¹⁸ Diplomatic immunity has been recognized as one of the most important elements in the preservation of peace in the world community of nations.¹⁹ It is in times of international tension that international law should be most doggedly adhered to in order to avoid possible retaliation and eventual resort to self-help. *Rose v. The King* is a disturbing precedent in that "as among men, so among nations, the opinions and usages of the leading members in a community tend to form an authoritative example for the whole."²⁰

FULL FAITH AND CREDIT: A CONTROL OVER CHOICE OF LAW

The defendant, a fraternal benefit society incorporated in Ohio, issued a certificate of life insurance in South Dakota to a domiciliary of that state. After the death of the insured, the plaintiff brought suit in South Dakota as assignee of the beneficiary under the certificate. The terms of the certificate included a provision, valid in Ohio,¹ limiting the period within which such suits could be

¹⁷ *The Maria*, 1 C. Rob. 340 (1799).

¹⁸ See 26 Am. J. Int. L. 280 (1932) for an excellent discussion of the law of the land doctrine evolved by the English common law courts when dealing with a conflict between municipal and international law as contrasted with the prize court solutions of the same problem. It is there suggested that the law of the land doctrine in origin seems to have been entangled with the question of diplomatic immunity and particularly with the statute 7 Anne, c. 12 (1708).

¹⁹ Secretary of State Hull made the statement that "it should be obvious that the unhampered conduct of official relations between countries and the avoidance of friction and misunderstanding which may lead to serious consequences are dependent in a large measure upon a strict observance of the Law of Nations regarding diplomatic immunity." Department of State Press Release 497, 498 (Nov. 7, 1935).

²⁰ Pollock, *The Sources of International Law*, 2 Col. L. Rev. 511 (1902); see also Hyde, *International Law* 9 (1945).

¹ Ohio Code Ann. (Throckmorton, 1940) §§ 9462-70, 9481; *Appel v. Cooper Ins. Co.*, 76 Ohio 52, 80 N.E. 955 (1907); *Bartley v. National Business Men's Ass'n*, 109 Ohio 585, 143 N.E. 386 (1924).

brought.² The plaintiff claimed that the time limitation in the insurance certificate was void under South Dakota law³ and that the suit was therefore not barred, since the period fixed by the South Dakota statute of limitations had not expired.⁴ A judgment for the plaintiff was affirmed by the South Dakota Supreme Court.⁵ The Supreme Court of the United States held, on certiorari, that South Dakota was required to give full faith and credit⁶ to the public acts of Ohio authorizing the constitution and by-laws of fraternal benefit societies. *Order of United Commercial Travelers v. Wolfe*.⁷

Supreme Court decisions defining the circumstances under which a state is bound to apply the law of a sister state under the full faith and credit clause of the federal Constitution are few and comparatively recent. So long as most states followed substantially the same common law rules, there were not many material differences in their laws. Even after statutory changes had caused considerable divergence, it was some time before it occurred to litigants to rely upon the full faith and credit clause when appealing state decisions in choice of law cases.⁸ Not until 1909 did the Court first assume jurisdiction to review the decision of a state court on the basis of the appellant's allegation that full faith and credit had been denied to a statute of another state, but the value of this decision, for the purpose of determining the scope of the clause, was lessened by the finding that full faith and credit had been accorded.⁹

Probably the only unequivocal holding that an action founded upon a state statute must be entertained by the courts of every other state was *Broderick v. Rosner*,¹⁰ decided in 1935. There a New Jersey court was compelled to hear an action brought by the statutory representative of a corporation's creditors to recover from certain stockholders the assessments levied upon them pursuant to New York law, although a New Jersey statute positively forbade the main-

² "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee." From the society's constitution, as printed on the back of the original certificate issued.

³ S.D. Code (1939) § 10.0705.

⁴ S.D. Code (1939) § 33.0232.

⁵ 18 N.W. 2d (S.D.) 755 (1945).

⁶ U.S. Const. Art. 4, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof."

⁷ 67 S. Ct. 1355 (1947).

⁸ Apparently the first such reliance was in *Chicago & Alton R. Co. v. Wiggins Ferry Co.*, 119 U.S. 615 (1887). The Court agreed with the contention that full faith and credit should have been given to the statute in question, but its remarks were obiter.

⁹ *Atcheson, T., & S.F.R. Co. v. Sowers*, 213 U.S. 55 (1909). New Mexico was then a territory. But *Tennessee Coal, Iron, & R. Co. v. George*, 233 U.S. 354 (1914), was a decision on the same grounds involving an Alabama statute.

¹⁰ 294 U.S. 629 (1935).

tenance of such an action. Several other cases¹¹ were like *Broderick v. Rosner* in that they involved actions to recover assessments from stockholders under the law of an incorporating state, and in that the courts of other states were constrained to entertain the actions in spite of their own contrary policy. In each of those cases, however, the creditors' representative had been appointed in a judicial proceeding in which the total assessments necessary to meet claims was also determined. The cases may therefore be interpreted as being only extensions of the requirement that full faith and credit be given judgments, the courts of other states being obliged to respect the statutory powers of the representative in order to give the proceeding the effect it would have in the state where rendered.

The same observation may be made, although with somewhat less force, with regard to a line of cases involving fraternal benefit societies.¹² These decisions turned on whether a provision in the society's constitution and by-laws, which had been declared valid in a judicial proceeding in the state of incorporation, was binding in the forum. The Supreme Court treated the decision in the incorporating state as controlling but did not indicate clearly whether the judgment or the statute or both was being accorded full faith and credit. In both the stockholder assessment and fraternal benefit society cases, however, the effects of the judicial proceeding and of the statute authorizing that proceeding were so closely tied together that it can be and has been said that these cases give full faith and credit to state statutes;¹³ and the language of the opinions is not concerned with any possible distinction. Another opinion strongly indicating that the full faith and credit clause may in a proper case control the choice of statutory law was *Bradford Electric Co. v. Clapper*,¹⁴ although it should be noted that the case was initially brought in a federal court.

In several cases the choice of law was constitutionally limited by the due process clause, the Supreme Court ruling that the forums had violated the clause by deciding the case under their own law.¹⁵ It has been persuasively argued that such a holding necessarily implies that full faith and credit had been denied to some law which should have been applied;¹⁶ if so, due process cases might be

¹¹ *Converse v. Hamilton*, 224 U.S. 243 (1912); *Chandler v. Peketz*, 297 U.S. 609 (1936); *Hancock National Bank v. Farnum*, 176 U.S. 640 (1900) (clearly treated by the Court as a matter of giving full faith and credit to a judgment).

¹² *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925); *Sovereign Camp v. Bolin*, 305 U.S. 66 (1938).

¹³ Justice Brandeis, speaking for the Court in *Broderick v. Rosner*, 294 U.S. 629, 644 (1935); Langmaid, *The Full Faith and Credit Required for Public Acts*, 24 Ill. L. Rev. 383, 393-402 (1929). Langmaid closely analyzes the earlier cases. His cautious conclusion is that the full faith and credit clause "is not a dead letter so far as it concerns public acts."

¹⁴ 286 U.S. 145 (1932).

¹⁵ *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914).

¹⁶ *Dodd*, *The Power of the Supreme Court To Review State Decisions in the Field of Conflict of Laws*, 39 Harv. L. Rev. 533, 561 (1926).

used as full faith and credit precedents. Indeed, *Aetna Life Insurance Co. v. Dunken*¹⁷ shows the relation between the two series of precedents by relying on both. Finally, two decisions reversed state courts on constitutional grounds for applying their own law, but the Court did not make the precise ground clear.¹⁸

Thus the cases did not set forth either clearly or comprehensively the circumstances under which an erroneous choice of law by a state court would present a constitutional question. Nevertheless it may be said that the Court's attitude was one of willingness to assume jurisdiction in an increasing number of conflict of laws cases, and there was some promise that the Court would eventually evolve an adequate body of choice of law rules under the Constitution.¹⁹ The trend was arrested in 1935 by the decision in *Alaska Packers Association v. Industrial Accident Commission*,²⁰ in which a unanimous Court announced that it would henceforth decide each case by appraising the conflicting governmental interests and not by giving automatic effect to the full faith and credit clause. This new doctrine has since been many times reiterated with approval²¹ and remains the last general pronouncement on the operation of the full faith and credit clause.

While the decision in the instant case may only be an example of a recognized exception to the *Alaska Packers* doctrine,²² the case may well signify a change in the Court's attitude and portend an eventual repudiation of the doctrine. True, Justice Burton, speaking for the majority, denied any inconsistency and made some attempt to show that Ohio's interest was the greater. The Court relied mainly, however, upon the fraternal benefit society precedents,²³

¹⁷ 266 U.S. 389 (1924).

¹⁸ *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914); *Western Union Tel. Co. v. Chiles*, 214 U.S. 274 (1909). The former, at least, apparently relied in part on the commerce clause.

¹⁹ See Dodd, *op. cit. supra* note 16; Corwin, The "Full Faith and Credit" Clause, 81 U. of Pa. L. Rev. 371 (1933); Ross, Has the Conflict of Laws Become a Branch of Constitutional Law? 15 Minn. L. Rev. 161 (1931).

²⁰ 294 U.S. 532 (1935). See Note, A Factual Approach to the Constitutional Law Aspect of the Conflict of Laws, 35 Col. L. Rev. 751 (1935), in which it was suggested that the Court would not abandon the choice of law rules it had already made, but would be disinclined to go further in making broad general rules. The Court, in fact, did decide *Broderick v. Rosner*, 294 U.S. 629 (1935), and *Sovereign Camp v. Bolin*, 305 U.S. 66 (1938), after the *Alaska Packers* case. See also Cook, The Logical and Legal Bases of the Conflict of Laws 78-81 (1942).

²¹ *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Pink v. A.A.A. Highway Express*, 314 U.S. 201 (1941); *Williams v. North Carolina*, 317 U.S. 287 (1942); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1942); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943).

²² See note 20 *supra*.

²³ *Supreme Council of Royal Arcanum v. Green*, 237 U.S. 531 (1915); *Modern Woodmen v. Mixer*, 267 U.S. 544 (1925); *Sovereign Camp v. Bolin*, 305 U.S. 66 (1938); *Broderick v. Rosner*, 294 U.S. 629 (1935).

which had conceived of membership in a fraternal benefit society as a "complex and abiding relation"²⁴ which must be governed by a single law—that of the state granting incorporation—if uniformity of rights and obligations was to be assured. Under this conception, the contract of insurance is merely one incident of the relation. Justice Black, dissenting, denied that such an insurance contract differs in any important respect from contracts made with commercial companies, and maintained that the interest of a policyholder's state in protecting him against an unequal contract is as great in one case as in the other.²⁵ If the *Alaska Packers* doctrine is still good law, his argument is a convincing one.

The principal case, although not persuasive in itself, may be a part of a larger pattern, namely, a renunciation of the *Alaska Packers* doctrine and the beginning of a conscious use of the full faith and credit clause to effect a more uniform and predictable administration of law throughout the nation. Justice Jackson has shown an awareness of the potentialities of the clause and would seem to favor more aggressive use of it as a unifying principle.²⁶ Since the opinion contains no hint of his proposals, the other members of the Court may not yet be ready to accept his views without reserve. Yet the fact remains that the Court went out of its way²⁷ to reaffirm old precedents, which could be interpreted as the laying of a foundation for such a structure as Justice Jackson envisions. It is to be noted that the instant case gives a broader effect to the full faith and credit clause than any of those upon which the majority rely.²⁸ Two of those cases involved assessments under the law of the incorporating state—on members of a fraternal benefit society in *Supreme Council of Royal Arcanum v. Green*,²⁹ and on stockholders of a bank in *Broderick v. Rosner*.³⁰ The incorporating state is likely to bear the heaviest burden if the corporation becomes insolvent, and it should have power to protect itself by regulating assessments. In *Sovereign Camp v. Bolin*³¹ the issue had already been decided against the member's contention in a class suit brought in the courts of the incorporating state, so that the decision could have rested on the principle of *res judicata*. In addition, the controversy concerned a provision directly affecting the substan-

²⁴ *Modern Woodmen v. Mixer*, 267 U.S. 544, 551 (1925).

²⁵ 67 S. Ct. 1355, 1378-82 (1947).

²⁶ Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 1 (1945).

²⁷ Since the Court professed not to abandon the *Alaska Packers* case, they might have relied wholly upon it, and with considerable force in view of the facts that the plaintiff in the instant case was actually the assignee of the original beneficiary and was a citizen of Ohio, so that South Dakota's interest in the controversy was actually slight.

²⁸ The relevant features of these cases are briefly summarized *infra*. They are analyzed in greater detail by Justice Black, dissenting, 67 S. Ct. 1355, 1379-81, (1947), and in Harper, *The Supreme Court and the Conflict of Laws*, 47 Col. L. Rev. 883, 897-99 (1947), criticizing the result of the instant case.

²⁹ 237 U.S. 531 (1915).

³⁰ 294 U.S. 629 (1935).

³¹ 305 U.S. 66 (1938).

tive rights of claimants. In *Modern Woodmen v. Mixer*³² the member had not been a resident of the forum state at the time he joined the society. The provision there in question defined the circumstances under which death benefits would be paid—again a matter of direct substantive right. In the instant case the provision in question was in form and effect a statute of limitations, which, in questions of conflict of laws, would yield to the law of the forum.³³ To ignore the provision would have had less effect on the substantive rights of members in general than in any of the cases cited as precedent. Finally, the provision had never been declared valid in any Ohio judicial proceeding to which the plaintiff might be considered privy.

There is much to be said for those who support the instant case in the hope that it foreshadows an increased absorption of choice of law rules into constitutional law.³⁴ Unquestionably, Congress and the courts have failed to employ all the powers given them by the full faith and credit clause.³⁵ The resulting confusion, injustice, and inconvenience in the administration of justice clearly necessitate a greater degree of certainty and uniformity among our numerous legal systems. Yet uniformity may be attained at too great a cost, if the full faith and credit clause is used to impose choice of law rules which in themselves create confusion and injustice. Conflict of laws is as yet hardly out of its infancy,³⁶ and agreement exists on only a few choice of law rules.³⁷ The inadequacy of the present body of principles has led some writers to oppose a uniformity which they fear would be blindly mechanical and to prefer use of

³² 267 U.S. 544 (1925).

³³ Without entering into the validity of the usual classification of statutes of limitation as "procedural" rather than "substantive" for conflict of laws purposes, it must be said there is high authority for the classification. *McElmoyle v. Cohen*, 13 Pet. (U.S.) 312 (1839).

³⁴ For general discussions of the full faith and credit clause, its meaning and history, with constitutional and practical arguments for its increased implementation and proposals for legislative and/or judicial action, see Cook, *The Logical and Legal Bases of the Conflict of Laws* 90-107 (1942); Jackson, *op. cit. supra* note 26; Corwin, *op. cit. supra* note 19; Ross, *op. cit. supra* note 19; Dodd, *op. cit. supra* note 16; Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 *Yale L.J.* 421 (1919); Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 *Yale L.J.* 656 (1918).

³⁵ For the history of the clause, see Cook, *The Logical and Legal Bases of the Conflict of Laws* 91-95 (1942); Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 *Ill. L. Rev.* 1 (1944); Jackson, *op. cit. supra* note 26, at 4; Corwin, *op. cit. supra* note 19, at 373. The framers, however, had no clear idea of the problems which would arise under the clause. The common law was then common and the need for a law of conflict of laws slight. Their views, therefore, are of little help in determining precisely how far the clause should displace local conflicts law—a question on which the writers cited *supra* note 34 differ considerably.

³⁶ Strictly speaking, of course, conflict of laws is not and cannot be a part of the law of full faith and credit, and Justice Jackson quite properly warns against equating the two. *Op. cit. supra* note 26, at 30. But the Court in the past has often found its choice of law rules, for better and for worse, in conflicts doctrine, and will doubtless continue to do so to a great extent.

³⁷ See Rheinstejn, *Book Review, Falconbridge, Essays on the Conflict of Laws*, 15 *Univ. Chi. L. Rev.* 478 (1947).

discretion by individual courts to secure a politic result in each case.³⁸ Very probably the changed attitude of the Court which gave rise to the *Alaska Packers* decision resulted in part from a similar distrust of inadequate choice of law principles and from a dislike of the results of the Court's previous decisions.³⁹ Therefore, the Court would do well to progress slowly and to consider carefully the policies to be served by any choice of law rules they may impose. From that point of view the wisdom of the rule of the instant case and its precedents is open to serious question, for conceivably a rule could be laid down to serve a more desirable policy without sacrificing uniformity and certainty. It is true that in European countries, unless the parties have provided otherwise, insurance problems are decided under the law of the country in which the company has its main office, in order to simplify business operations and risk calculations.⁴⁰ But experience in this country with the results of unequal bargaining power between insurer and insured has led the legislators of many states to believe that a maximum protection of the insured is essential. Seemingly, the policy of those states is one which should be fostered, and problems of the construction and effect of insurance contracts should therefore be uniformly decided under the law of the state in which the insured resided when the policy was issued.

JUDICIAL RECOGNITION OF NAZI ACTS OF STATE

The plaintiff, a former German national of the Jewish faith, was the owner of the shares of stock in a shipping corporation. In January 1937, he was imprisoned in Hamburg, Germany, on charges of unlawful disposition of foreign currencies. Because he was led to believe by "Nazi officials" that, unless he gave up his shipping interests, his life and remaining property would be imperiled, he transferred his shares to one Marius Boeger, a "Nazi designee." Subsequently, Boeger, acting for the shipping line, sold a ship to the defendant, a Belgian corporation, under conditions allegedly sufficient to put the defendant on notice of the circumstances of the coerced transfer. The ship was sunk during the war, and insurance proceeds were collected for the defendant by the Belgian corporation, which owned a claim against a debtor in New York. The plaintiff levied an attachment on this debt owed the defendant as a preliminary to an action for conversion and loss of use of the vessel. The proceeding, begun in the

³⁸ See Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 *Yale L.J.* 1155 (1947); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 *Yale L.J.* 468 (1928).

³⁹ Decisions depending upon the concept of substantive due process can probably be considered overruled at the present time. In that connection it is interesting to note that in the instant case the Court expressly refused to rely on the place of making of the contract as determinative, thus avoiding any question of due process.

⁴⁰ Wolff, *Private International Law* 442 (1945); cf. Von Bar, *The Theory and Practice of Private International Law* 661 (1892).