proceedings,"[41] the same considerations should apply when the divorce court makes no provisions for alimony.[42]

The *Estin* decision, in effect, may make the adoption of the more enlightened policy a constitutional requirement. It is not to be regretted that a state may perhaps no longer permit an unscrupulous spouse to shed an obligation which the state itself has imposed. For the Court's apparent holding on the due process issue prevents not only the lax divorce laws of foreign jurisdictions, but also the possible unconcern of the domicil for the welfare of its residents, from affecting a prior separate maintenance award.

CHOICE OF LAW BY CONTRACTUAL STIPULATION

The plaintiff's decedent, an aviation pilot employed by the defendant airlines, a Delaware corporation, was killed when his plane crashed at Birmingham, Alabama. His widow filed suit in a federal district court in Tennessee, claiming damages for negligence on the part of the defendant.[1] The latter defended on the ground that the terms of the decedent's contract of employment precluded an action for damages in the event of his death or injury.

The deceased's employment contract, a form which all flying personnel were required to sign, provided that all rights and obligations of the parties should be governed by the laws of Pennsylvania, including the Pennsylvania Workmen's Compensation Act. The Compensation Act limited the recovery for injury or death of an employee to certain fixed amounts and excluded negligence actions for damages on behalf of the employee against any employer subject to the Act. However, the Act was specifically applicable only to accidents occurring in Pennsylvania unless the injured person was a "Pennsylvania employee" temporarily outside the state.

The particular interstate flight in which the decedent was killed originated in New York, but by far the major portion of his flying service had been over the state of Pennsylvania. Each of his flights required a junction point stop at Pittsburgh, where the defendant maintained a large operating base. Two other Penn-

[41] Ibid., at 1216.

[42] The court in Bowers v. Bowers, 132 N.J. Eq. 431, 28 A. 2d 515 (1942), felt that failure of the wife to ask for alimony in a divorce proceeding which she initiated before a New Jersey court was a mere procedural defect, inasmuch as she had already been awarded alimony in a prior New Jersey separate maintenance proceeding. But the court in Holmes v. Holmes, 155 F. 2d 737 (App. D.C., 1946), terminated payments under a prior separate maintenance decree in a similar situation, stating, "In asking for a final decree, it does not seem to us too much to require that the right to receive alimony be asserted and judged in the light of the new or pending status of the finally divorced parties. This duty is rightly that of the moving party." Ibid., at 739.

[1] The defendant airline was allegedly negligent in ordering the aircraft to proceed from Knoxville to Birmingham under extremely hazardous weather conditions and in attempting to land the plane at Birmingham from too high an approach, at an excessive speed, with the plane out of control, under the direction of a pilot whose orders the plaintiff was required to obey.

sylvania bases were also maintained and operated by the airlines company, although its principal office was in Washington, D.C.

The district court dismissed the plaintiff's suit on the ground that damage actions against employees were barred by the Pennsylvania Compensation Act.[2] On appeal, the Court of Appeals for the Sixth Circuit reversed that judgment, holding that since the deceased was killed outside the state of Pennsylvania and was not a "Pennsylvania employee" according to judicial definition of that term, the Pennsylvania Workmen's Compensation Act was not applicable to the instant case. The court further concluded that, in accordance with the stipulated intent of the parties, the rights of the plaintiff and defendant should be determined by the general laws of Pennsylvania. In remanding the case to the lower court for trial on the merits, it was directed that decision be made on the basis of the laws of Alabama, because the Pennsylvania choice of law rule in dealing with tort problems was that the rights of the parties should be determined by the law of the state where the accident occurred. *Duskin v. Pennsylvania-Central Airlines Corporation.*[3]

The several conflict of laws issues raised by the instant case stem from the major problems of the effect and interpretation to be given to stipulations of contracting parties that the law or the particular laws of a certain state shall determine rights and obligations under their contract. In every case in which such a stipulation is considered by a court, the initial question is whether the circumstances are such that it will be given effect under the choice of law rules of the forum. In the event that the express intention of the parties is honored, the court faces a further question as to whether the contracting parties meant the whole body of law of the chosen state, including the conflict of laws rules of that jurisdiction, or whether they meant only that the domestic or internal law of the stipulated jurisdiction should control. In addition to these two basic considerations, the court in the *Duskin* case was required to interpret the meaning of the more specific stipulation that the Pennsylvania Workmen's Compensation Act was included in the law governing the parties' contract. The rationale or lack of rationale used by the court in deciding each of these issues invites comment on the decision against the background of the general problems stemming from contractual provisions that a given law shall be applicable.

Although leading theoretical writers in the field of conflict of laws have criticized the view that litigation arising under a contract shall be decided under the rules of the law whose application is intended by the parties,[4] the "intention"

[2] Duskin v. Pennsylvania-Central Airlines Corp., 71 F. Supp. 867 (Tenn., 1947). In the lower court, the compensation act was held to apply even though the accident occurred outside the state of Pennsylvania, the court ruling that the decedent was a "Pennsylvania employee" within the meaning of the act.

[3] 167 F. 2d 727 (C.C.A. 6th, 1948).

[4] Beale, Goodrich, and Lorenzen have been the main opponents of the "intention" theory in this country. 2 Beale, Conflict of Laws § 332.2, at 1079 (1935); Goodrich, Conflict of Laws 278 (2d ed., 1938); Lorenzen, Validity and Effects of Contracts in the Conflicts of Laws, 30 Yale L.J. 565, 658 (1921). Beale and Lorenzen object mainly on the ground that allowing

theory has been given frequent expression in American courts[5] and has been even more generally recognized in other countries.[6] However, in cases where express intent has been allowed to govern, the parties' choice has been limited by the requirements that it be made in good faith[7] and that it not violate any public policy of the forum.[8] Another limitation to be found in American cases has been that the state whose law is stipulated have some substantial contacts with the contract.[9] This latter exception to the "intention rule" was rejected by way of dictum in the much celebrated English decision of *Vita Food Products, Inc. v. Unus Shipping Company, Ltd.*[10] However, there apparently has been no square holding in Anglo-American law that such a stipulation will be given effect even in the absence of substantial contacts with the contract.[11]

In this context the language of the court in the instant case would be exciting were it not for the fact that the state of Pennsylvania actually had very substantial connection with the agreement of the parties. The court, in holding the stipulation of the parties valid, said: "There seems no more justification for

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parties to choose their law in this regard involves a delegation of sovereign powers to individuals. Goodrich, while agreeing with this view, does point out that there is no difficulty in allowing the parties to stipulate what rule shall be referred to in interpreting their language.

[5] 2 Beale, Conflict of Laws § 332.52, at 1173 (1935); see, for example, Connecticut General Life Insurance Co. v. Boseman, 84 F. 2d 701 (C.C.A. 5th, 1936), aff'd 301 U.S. 196 (1937); Liberty Nat'l Bank & Trust Co. v. New England Investors Shares, Inc., 25 F. 2d 493 (D.C. Mass., 1928); Mutual Life Insurance Co. v. Hill, 193 U.S. 551 (1904). Contra: E. Gerli and Co. v. Cunard S.S. Co., 48 F. 2d 115 (C.C.A. 2d, 1931). In the latter case the court said, "Some law must impose the obligation and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes." Ibid., at 117.

[6] 2 Rabel, The Conflict of Laws: A Comparative Study 369 (1947). ". . . summary of the laws of the different countries shows that they are practically agreed upon the adoption of the intention of the parties as the fundamental rule governing the validity and effects of contracts . . . in the conflict of laws." (Referring to summary of the laws of England, the continental countries, Latin-American countries, and Japan). Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L.J. 565, 572 (1921); see also Cook, The Logical and Legal Bases of the Conflict of Laws 389 (1942).

[7] Andrews v. Pond, 13 Pet. (U.S.) 64 (1839). Following this case, the courts accepted the statement that parties' agreement upon a rule must be bona fide. 2 Beale, Conflict of Laws § 332.2, at 1081 (1935). This rule has been most often applied in usury cases.

[8] Mutual Life Insurance Co. v. Hill, 193 U.S. 551, 554 (1904); see 112 A.L.R. 124 (1938).

[9] Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 192 Atl. 158 (1937); Brierly v. Commercial Credit Co., 43 F. 2d 724 (D.C. Pa., 1929); Bundy v. Commercial Credit Co., 200 N.C. 511, 157 S.E. 860 (1931); see also Seeman v. Philadelphia Warehouse Co., 274 U.S. 403 (1927); Merchants' and Manufacturers' Securities Co. v. Johnson, 69 F. 2d 940 (C.C.A. 8th, 1934); Crawford v. Seattle, Renton and S.R. Co., 86 Wash. 628, 150 Pac. 1155 (1915); 2 Beale, Conflict of Laws § 332.2, at 1081 (1935); but see Hurwitz v. Hurwitz, 216 App. Div. 362, 215 N.Y. Supp. 184 (1926); Boole v. Union Marine Ins. Co., Ltd., 52 Cal. App. 207, 198 Pac. 416 (1921).

[10] [1939] A.C. 277.

[11] As a practical matter, the parties are usually confined in their choice to the law of the place of making of the contract, the law of the place of performance, or in some instances the law of the state of domicil of one of the parties or the law of the place of the situs of the security. 2 Beale, Conflict of Laws § 332.2, at 1081 (1935).

precluding parties to a contract from stipulating that the laws of any jurisdiction, even if foreign to the elements of the contract, should govern the rights and obligations of the parties, where not against public policy, than for precluding them from stipulating in express terms what interpretation should be placed upon certain terms, clauses or provisions of the contract."[12] But since the defendant operated large bases in Pennsylvania, and since the deceased had flown mainly over that state, the above language can at best be considered strong dictum even though the court preferred to give effect to the stipulation of Pennsylvania law without formally determining the presence of actual contacts with the contract.

The merits of the question as to whether the limitation of substantial contact should apply to stipulations have been thoroughly discussed by leading writers on both sides of the issue,[13] so that further comment is unnecessary within the scope of this note. Nevertheless, it is interesting to consider that the approach adopted by the court in the principal case is not in accord with previous case law[14] and that it was obviously arrived at without knowledge of (or at least without reference to) Lord Wright's extensive discussion of the problem in the *Unus* case.[15] In the light of this development it may be that the *Duskin* case signifies a new point of departure for American decisions regarding the freedom with which parties may stipulate the law under which contractual rights and obligations will be determined.

More difficult than the decision as to the validity of the stipulation was the present court's problem of interpreting the same stipulation. The first phase of the court's task was a determination of the meaning of the stipulation of the "Pennsylvania Workmen's Compensation Act." The defendant argued that, even though the facts of the case might put the litigation outside the scope of the Act, its only liability was the *amount* provided by the Act for the death of an employee. But the court's holding that the parties did not intend to use the Act's provisions merely as a measuring stick of liability appears the most logical conclusion in the instant case.

The actual intent of the parties, especially that of the deceased as the mere signer of a form contract, is not ascertainable from their actions.[16] Consequently,

[12] Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 730 (C.C.A. 6th, 1948).

[13] The "anti-intention" writers, of course, favor limitation on the breadth of the parties' choice; see 2 Beale, Conflict of Laws § 332.2, at 1081 (1935). However, even Professor W. W. Cook, who favored the "intention" theory, sanctioned the substantial contract limitation on the grounds of convenience to the court of the forum. Cook, The Logical and Legal Bases of the Conflict of Laws 412 (1942). On the other hand, one well-known writer in the field has recently urged that no reason exists for the substantial contact limitation on the choice of contracting parties, stating that the alleged exception seems as little justified as the objections against the intention of parties rule itself. Rheinstein, Book Review, 15 Univ. Chi. L. Rev. 478, 487 (1948), reviewing Falconbridge, Essays in the Conflict of Laws.

[14] Note 9 supra; see 112 A.L.R. 124 (1938).

[15] [1939] A.C. 277, 290. There is no reference to the Unus case in the instant decision.

[16] The court recognized this fact, stating, "What the actual intent of Duskin was, we have no way of knowing. He just signed a certain form contract.... Shortly afterward

the most honest analysis of the situation may be that the parties never thought of what the stipulation did mean. As in all such cases, the court must substitute its own idea of what the parties would have meant had they thought of the contingency.[17] The substantial connection of the state of Pennsylvania with the contract, coupled with the fact that the parties could just as easily have stipulated that the defendant pay the *amounts* established by the Compensation Act in case of death or injury, indicate the soundness of the court's decision to apply the Act in its totality or not at all. Of course, under a different factual situation, it would be just as possible that the most logical interpretation of the stipulation of a particular workmen's compensation act would be as a pure measure of liability of employer to employee.[18]

The present case sharply emphasizes the necessity for careful draftsmanship where parties wish to take advantage of the liability measurements established in a particular workmen's compensation act. Since the compensatory provisions of these acts are closely tied up with their administrative and procedural provisions,[19] the acts will be of no use to the parties unless the latter requirements are met. To avoid this possible inapplicability, the parties must provide by appropriate language that the act shall simply be a quantitative guide for determining employer liability in case of injury or death of an employee.

Of much greater significance than the problem discussed immediately above is that of interpreting the meaning of a stipulation that the laws of Pennsylvania (or of any state or country) shall govern the rights and obligations of the parties under the contract. The court in the instant case, in construing such a stipulation to include the conflict of laws rules as well as the domestic law of Pennsylvania within the meaning intended by the parties, achieved an unorthodox and rather startling result. This phase of the decision seems quite incongruous in an otherwise well-considered opinion, since it appears that the question of interpretation never occurred to the court here, but that it automatically

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he signed another form contract.... In all probability, he did not notice the difference between the contracts, and may not even have read them." Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 731 (C.C.A. 6th, 1948).

[17] "Where ascertainably the parties have not given any thought to the problem, the law must step in with a rule of its own as it has to do in all those ... cases in which ... a contracting party has forgotten to take care of a situation for which he might have provided but which has escaped his foresight." Rheinstein, Book Review, 15 Univ. Chi. L. Rev. 478, 487 (1948), reviewing Falconbridge, Essays on the Conflict of Laws.

[18] Assume, for example, that a contract is entered into in France between a French pilot and his employer, a French airline, whereby the parties provide that all rights and obligations of the parties will be determined by the Illinois Workmen's Compensation Act. The only logical conclusion would be that the parties did not intend the application of the act in its totality.

[19] In general, an award may be made only by a board or commission to employees who come within the definition of that term in the act. Only injuries that arise out of, and in the course of, employment are compensable, and the acts usually stipulate the parties who may sue and to whom payment can be made. See 71 C. J. Workmen's Compensation (1935).

assumed that the "laws of Pennsylvania" meant the totality of that state's laws, and not just its internal or domestic rules.[20]

The uniqueness of the application of conflict of laws rules of a jurisdiction whose "law" has been stipulated in a contract is evidenced both by the dearth of case material on the subject[21] and by the uniform conviction of leading conflict of laws authorities that parties stipulating for an applicable law intend only the internal law to be applied in litigation arising under the contract.[22] In cases where the stipulated law has been given effect, other courts have automatically applied the internal rules of the selected law.[23] This practice is reflected by the comment of Dean Falconbridge in his recent treatise on the conflict of laws that "it is almost inconceivable that when the parties say that the contract is to be governed, for example, by English law, that they mean some law to be selected by the court in accordance . . . [with the conflict of laws rules of England]."[24] Walter Wheeler Cook, in discussing the same subject, concludes that "the intention theory, when limited so as to give effect to the 'expressed intention' of the parties merely enables them to provide that the measure of their respective rights and duties shall be the same as that established by the foreign state in question for *similar but purely domestic transactions*. What rights and duties the conflicts rule of the foreign state would attach to the transaction in question is entirely immaterial."[25]

Professor Cook bases his conclusion on the argument that the stipulation of a foreign law is "comparable to the insertion into agreements of stipulations which do not refer to 'laws' of other states, but merely alter what would otherwise be the legal consequences of the agreement."[26] Under this view, parties to a contract merely fix its terms and do not "legislate" in the sense that the law of a foreign state will actually control the contract, as the critics of the "intention theory" seem to suppose.[27] Several American cases give at least indirect support to Cook's analysis of the problem.[28] In *Mutual Life Insurance Co. v. Hill*[29] a life in-

[20] Duskin v. Pennsylvania-Central Airlines Corp., 167 F. 2d 727, 732 (C.C.A. 6th, 1948).

[21] Obviously the reason that the question has not been expressly decided in most cases is that it never occurs to either courts or parties that the conflicts rules of the stipulated law were intended to be applied. As a matter of fact, Dean Falconbridge asserts that the matter would not even be worth discussion were it not for the Unus decision, discussed in text at note 32 infra. Falconbridge, Essays on the Conflict of Laws 213 (1947).

[22] 2 Rabel, The Conflict of Laws: A Comparative Study 387 (1947); Falconbridge, Essays on the Conflict of Laws 213, 341–44 (1947); Cook, The Logical and Legal Bases of the Conflict of Laws 399 (1942); Cheshire, Private International Law 65 (2d ed., 1938). The brevity of the discussions afforded the problem by these writers and the fact that many leading authorities do not even consider the issue give some indication of the unanimity of feeling on the question.

[23] See, for example, cases cited note 5 supra; Cook, The Logical and Legal Bases of the Conflict of Laws 399 (1942).

[24] Falconbridge, Essays on the Conflict of Laws 213 (1947).

[25] Cook, The Logical and Legal Bases of the Conflict of Laws 400 (1942).

[26] Ibid., at 399.

[27] Note 4 supra.

[28] Mutual Life Insurance Co. v. Hill, 193 U.S. 551 (1904); Louis-Dreyfus v. Paterson Steamships, Ltd., 43 F. 2d 824 (C.C.A. 2d, 1930); Mutual Reserve Fund Life Ass'n v. Minehardt, 72 Ark. 630, 83 S.W. 323 (1904).

[29] 193 U.S. 551 (1904).

surance policy executed in the state of Washington provided that the "contract shall be held and construed at all times and places to have been made in New York." Certain specific provisions in the contract which conflicted with a New York statute were given effect by the court, which said, "In determining the effect of such a stipulation it must be borne in mind that the applicability of other laws than those of the place of contract is a matter of agreement, and that the agreement may select laws and also limit the extent of their application. The case is precisely like one in which the parties, without mentioning laws or state, stipulate that the contract shall be determined in accordance with certain specified rules."[30]

Perhaps the only well-known decision in which a court has interpreted a stipulation of foreign laws to include the conflict of laws rules is, oddly enough, the *Unus* case again. There the law selected was that of England, but the court, instead of referring directly to English internal law, applied the English choice of law rule that contract problems are to be decided under the "proper law of the contract." This analysis has been severely criticized by Dean Falconbridge.[31] Fortunately, the "proper law" was held to be that intended by the parties, so that English domestic law eventually was applied. But resort to the Pennsylvania conflict of laws rule in the instant case had no such fortuitous results. It is hard to believe that the parties intended anything but the domestic laws of Pennsylvania to apply, and determination of their rights according to Alabama tort law would directly frustrate this intention. Generally, the purpose of parties in stipulating a foreign law is to settle in advance any doubts as to which internal law will be applied. There is little purpose in a liberal intention theory as advanced by the court in the *Duskin* case if the intention of the parties is to be subject to the vagaries of the choice of law rules of the stipulated law. The possibility of variance between the substantive internal law of the jurisdiction stipulated and that of the state to which a court is referred by the conflict of laws doctrine of that jurisdiction may substantially alter the result of the case. It is this possibility which makes the *Duskin* decision an unfortunate precedent.

Perhaps one additional observation should be made concerning the instant opinion. As in the *Unus* case, there is the possibility that the court is sanctioning the doctrine of renvoi[32] as universally applicable in the sense that a reference to the law of a foreign state always means a reference to its conflict rules. This seems hardly likely, however, in view of the almost universal rejection of the renvoi doctrine in America.[33] In addition, the *Duskin* case does not present a

[30] Ibid., at 554–55.

[31] Falconbridge, Essays on the Conflict of Laws 213, 341–44 (1947).

[32] The renvoi problem normally arises when the choice of law rules of the forum refer the court to the whole body of law of a second state and the conflict of laws rules of the latter jurisdiction refer the problem back to the law of the forum (or to the law of a third state). Consequently there might be a continuous reference back and forth without ever a decision possible through application of the internal law of either state.

[33] Rest., Conflicts of Laws § 7 (1934). The Restatement accepts the renvoi theory in two instances, however: where the title to land is in question [§ 8(1)] and where the validity of a decree of divorce is challenged [§ 8(2)]. "When the conflict of laws rule of the forum refers to

true renvoi situation,[34] since an express stipulation, in the final analysis, presents a problem of determining the intent of the parties rather than a question of application of a judicial policy. The court's failure to discuss either this problem or that of the meaning of a stipulation of the law to be applied indicates a regrettable insensitivity to critical conflict of laws issues.

CONFLICT OF LAWS PROBLEMS IN MULTI-STATE LIBEL

A Columbia University professor brought a libel action against the publishers of *Life* magazine in the District Court for the Eastern District of Pennsylvania, alleging that the defendant had printed an article associating him with certain people indicted "for fascist activities." *Life* magazine is circulated throughout the United States and in most other civilized countries. Several suits instituted by the plaintiff in other jurisdictions had been unsuccessful, apparently because of the local statutes of limitation. The district court in the present case held that the single cause of action which existed was barred by the Pennsylvania statute of limitations. Upon appeal to the Third Circuit Court of Appeals, the decision was affirmed in part and reversed in part.[1]

Pennsylvania law provides that when a cause of action is barred by the statute of limitations of the "state or country in which it arose, such bar shall be a complete defense to an action thereon . . . ." in Pennsylvania.[2] In deciding when and where the cause of action "arose," the circuit court determined that Pennsylvania regards the printing and distribution of all copies of each issue of a periodical having nation-wide circulation as but a single "publication"[3] and as giving rise to but one cause of action for libel.[4] The court concluded that this "single" cause of action "arose" in Illinois, where the publication of the alleged

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the law of a foreign state, the reference has generally been taken to be the internal law of that foreign state and not to its conflict of laws rules." Goodrich, Conflict of Laws 12 (2d ed., 1938).

[34] The true renvoi situation only arises when the law of another state or country is directly referred to by the choice of law rules of the forum. Where the parties stipulate a law, it is always possible, of course, that they actually mean the whole law, including the conflict of laws rules.

[1] Hartmann v. Time, Inc., 166 F. 2d 127 (C.C.A. 3d, 1948), cert. den. 68 S. Ct. 1495 (1948). The defense of res judicata was also raised. This question was remanded to determine whether or not plaintiff's unsuccessful suit in Massachusetts was actually decided on the merits.

[2] Pa. Stat. Ann. (Purdon, Supp., 1947) tit. 12, s. 39.

[3] "Publication" as used in libel cases is a term of art referring to the communication of defamatory matter to one other than the person defamed. See Rest., Torts § 577 (1938).

[4] The court relied on Bausewine v. Norristown, 351 Pa. 634, 641, 41 A. 2d 736, 740 (1945); Sarkees v. Warner-West Corp., 349 Pa. 365, 37 A. 2d 544 (1944); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 196, 8 A. 2d 302, 309 (1939). The leading cases supporting this doctrine are Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1922); Wolfson v. Syracuse Newspapers, 254 App. Div. 211, 4 N.Y.S. 2d 640 (1938); Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344 (1943); see also 148 A.L.R. 469 (1944); 37 A.L.R. 898 (1925).