EDITORIAL NOTES

THE SCHOOL OF LAW

Professor Israel Treiman is on leave of absence to become Chief Attorney of the St. Louis division of the Federal Office of Price Administration.

The curriculum of the School of Law has been placed upon an accelerated basis during the national emergency. The present senior class will be graduated in April, and a twelve week summer session will be offered between June 15 and September 3, in which students may earn twelve semester hours of credit.

NOTES

FEDERAL APPLICATION OF STATE CHOICE-OF-LAW RULES AND DUE PROCESS

A Texas citizen made application in New York to a New Jersey corporation for insurance on his life. The policy named as beneficiaries members of a New York common law association, who were then creditors, and the insurer delivered the policy to the applicant in New York. The association ceased to do business and a new one was created in New York for the sole purpose of paying premiums on the earlier policy; a trustee was appointed to receive the benefits. Subsequently the right to change beneficiaries was relinquished, in consideration for which the wife of the insured was irrevocably given a share in the proceeds. Thereafter three members of the association executed an assignment of their interests to previously disinterested parties in New York. On the death of insured his administrator instituted a claim to the proceeds in a federal court in Texas. Under a rule of policy which obtains only in Texas a beneficiary cannot prevail unless he has an insurable interest at the time of death, and the benefits inure to the estate of the insured.[1] The administrator therefore claimed that public policy made the law of Texas applicable in the federal courts.[2] The insurance company inter-

1. Cheeves v. Anders (1894) 87 Tex. 287, 28 S. W. 274; Wilke v. Finn (1931) 39 S. W. (2d) 836. See Hallen, The Texas Rule of Insurable Interest in Life Insurance (1931) 9 Tex. L. Rev. 333, 339.

2. There has been no Texas case deciding that Texas public policy makes the Texas rule of insurable interest in life insurance cases applicable in a

pleaded the trustee of the association, deposited the amount due, and was discharged. The district court found the transaction to be a New York contract and held, as a conflict of laws rule, that the law of New York controlled; judgment was rendered for the defendant, trustee. The circuit court of appeals affirmed this judgment and stated that application of the Texas rule would violate the due process of laws provision of the Fourteenth Amendment.[3] The Supreme Court of the United States reversed this decision and held that, under the rule in *Erie R. R. v. Tompkins*,[4] federal courts must apply the conflict of laws rule of the state in which the court is sitting;[5] the case was remanded with directions that the conflict of laws rule of Texas be determined and applied. The opinion considered the constitutional question which would be raised if the federal district court in Texas were to find that Texas public policy required application of its local rule of insurable interest in this conflict of laws situation; the court indicated that application of Texas law would not violate the Constitution.[6]

The decision makes necessary a re-examination of this question: In what choice-of-law situations will the Supreme Court of the United States hold that application of the law of the forum violates the due process clause of the Fourteenth Amendment?[7]

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conflict of laws situation: see the dissenting opinion of Judge Clark in New England Mutual Life Ins. Co. v. Spence (C. C. A. 2, 1939) 104 F. (2d) 665, 668.

3. Griffin v. McCoach (C. C. A. 5, 1940) 116 F. (2d) 261.

4. (1938) 304 U. S. 64, 114 A. L. R. 1487.

5. The applicability of *Erie R. R. v. Tompkins* to state choice-of-law rules was left open in Ruhlin v. New York Life Ins. Co. (1938) 304 U. S. 202, 208. But later cases have held that a federal court is bound to follow the conflict of laws rule of the state in which it is sitting: Klaxon v. Stentor Elec. Mfg. Co. (1941) 313 U. S. 487; Sampson v. Channell (C. C. A. 1, 1940) 110 F. (2d) 754, 128 A. L. R. 394, noted in (1941) 26 WASHINGTON U. LAW QUARTERLY 244; Note (1941) 9 U. Chi. L. Rev. 113. Compare New England Mutual Life Ins. Co. v. Spence (C. C. A. 2, 1939) 104 F. (2d) 665.

6. Griffin v. McCoach (1941) 313 U. S. 498, 507.

7. For a further treatment of the problems arising under the due process clause of the Fourteenth Amendment and the full faith and credit clause in conflict of laws situations, see: Hilpert & Cooley, The Federal Constitution and the Choice of Law (1939) 25 WASHINGTON U. LAW QUARTERLY 27; Ross, "Full Faith and Credit" in a Federal System (1936) 20 Minn. L. Rev. 140; Ross, Has the Conflict of Laws Become a Branch of Constitutional Law (1931) 15 Minn. L. Rev. 161; Langmaid, The Full Faith and Credit Required for Public Acts (1929) 24 Ill. L. Rev. 383; Field, Judicial Notice and Public Acts Under the Full Faith and Credit Clause (1928) 12 Minn. L. Rev. 439; Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws (1926) 39 Harv. L. Rev. 533; Cook, The Powers of Congress under the Full Faith and Credit Clause (1919) 28 Yale L. J. 421.

It is to be noted that a question of due process may possibly arise in several situations: (1) When the forum applies its statutory law in disregard of the properly applicable statutory law of a sister-state. The clause has several times been held to be violated.[8] (2) When the forum applies its statutory law in disregard of the properly applicable judge-made law of a sister-state. Several cases have held the clause to be violated.[9] (3) When the forum applies its judge-made law in disregard of the properly applicable statutory law of a sister-state. There has been no case squarely holding the clause to be violated, but numerous *dicta* support the view that the Supreme Court will apply the constitutional sanction should this situation arise.[10]

8. New York Life Ins. Co. v. Cravens (1900) 178 U. S. 389; Home Ins. Co. v. Dick (1930) 281 U. S. 397, 74 A. L. R. 701 (Involving a statute of a foreign country); Hartford Accident & Indemnity Co. v. Delta & Pine Land Co. (1934) 292 U. S. 143, 92 A. L. R. 928. A number of other cases indicate that the due process clause may successfully be invoked in this type of situation, though the Court has often used language pursuant to the full faith and credit clause: New York Life Ins. Co. v. Head (1914) 234 U. S. 149; Aetna Life Ins. Co. v. Dunken (1924) 266 U. S. 389. Hilpert & Cooley, supra note 7, at 50, state: "* * * An erroneous application of the statute law of the forum in disregard of the statute law of a sister-state may be at the same time a denial of due process and of full faith and credit." See also dicta in Alaska Packers Ass'n v. Industrial Accident Comm. (1935) 294 U. S. 532, 544, and Pacific Employers Ins. Co. v. Industrial Accident Comm. (1939) 306 U. S. 493, 500.

9. New York Life Ins. Co. v. Dodge (1918) 246 U. S. 357; but see contra Mutual Life Ins. Co. v. Liebing (1922) 259 U. S. 209. Other cases hold the due process clause properly applicable to this type of situation though the Court only made vague references to the statute in the sister-state: New York Life Ins. Co. v. Head (1914) 234 U. S. 149; Aetna Life Ins. Co. v. Dunken (1924) 266 U. S. 389. Hilpert & Cooley, supra note 7, at 50, state: "There seems to be no reason to question that the same result would be reached in any case where the local statute was improperly applied, regardless of whether the competing law was statutory or judge-made, * * *."

10. Home Ins. Co. v. Dick (1930) 281 U. S. 397, 74 A. L. R. 701; Hartford Accident & Indemnity Co. v. Delta & Pine Land Co. (1934) 292 U. S. 143, 92 A. L. R. 928; Alaska Packers Ass'n v. Industrial Accident Comm. (1935) 294 U. S. 532; Pacific Employers Ins. Co. v. Industrial Accident Comm. (1939) 306 U. S. 493; Griffin v. McCoach (1941) 313 U. S. 498. When the sister-state rule is statutory (whether the forum rule is common law or statutory) the full faith and credit clause would more likely be applicable. See: Bradford Elec. Co. v. Clapper (1932) 286 U. S. 145; Clark v. Williard (1934) 292 U. S. 112, (1935) 294 U. S. 211; Broderick v. Rosner (1935) 294 U. S. 629; John Hancock Mutual Life Ins. Co. v. Yates (1936) 299 U. S. 178. But see: Ohio v. Chattanooga Boiler & Tank Co. (1933) 289 U. S. 439; Alaska Packers Ass'n v. Industrial Accident Comm. (1935) 294 U. S. 532; Pacific Employers Ins. Co. v. Industrial Accident Comm. (1939) 306 U. S. 493; Klaxon v. Stentor Elec. Mfg. Co. (1941) 313 U. S. 487; Pink v. A. A. A. Highway Express (1941) 62 S. Ct. 241.

But full faith and credit is not applicable when the forum refuses to apply a statute of a foreign country: Aetna Life Ins. Co. v. Tremblay (1912) 223 U. S. 185; Home Ins. Co. v. Dick (1930) 281 U. S. 397. When a statute of a foreign country is involved, unless the due process clause were

(4) When the forum applies its judge-made law in disregard of the properly applicable judge-made law of a sister-state. It is conceivable that the Fourteenth Amendment would be violated, but no case has squarely so held.[11]

If the Supreme Court were to hold that the due process clause is available as a basis for review in *each* of the above mentioned situations, conflict of laws would then become a mere matter of constitutional law.[12] But the Supreme Court, by self-imposed limitations, has refused to extend constitutional review to the entire field of possible misapplication of proper rules.[13] *Thus far* the Court has refused to apply the sanction of the due process clause, which is considered herein, except when broad national interests have been involved;[14] even in such situations the Court

applicable, there would be no constitutional sanction preventing unreasonable application of the local law. Compare Santovincenzo v. Egan (1931) 284 U. S. 30; Missouri v. Holland (1920) 252 U. S. 416.

11. It has been asserted that the Supreme Court of the United States will not hold the due process clause applicable to this type of situation. This view is premised upon Kryger v. Wilson (1916) 242 U. S. 171, and Marin v. Augedahl (1918) 247 U. S. 142 which have never been expressly overruled. The Supreme Court will not hold an error of a state court in determining its own common law to be a violation of the due process clause; this doctrine has been suggested as the reason why the Supreme Court will not hold the clause applicable to this type of *conflict of laws* situation. For a criticism of the doctrine itself, see Schofield, The Supreme Court of the United States and the Enforcement of State Law by State Courts (1908) 3 Ill. L. Rev. 195. It does not necessarily follow from the doctrine that the due process clause may not be violated by an improper application of local common law in a choice-of-laws situation. Several writers have suggested that the due process clause should apply. See: Ross, supra note 7, 15 Minn. L. Rev. 161, 180; Hilpert & Cooley, supra note 7, at 51. The latter supported their position by citing dicta from Bigelow v. Old Dominion Copper Mining & Smelting Co. (1912) 225 U. S. 111, 137; Young v. Masci (1933) 289 U. S. 253, Erie R. R. v. Tompkins (1938) 304 U. S. 64, 79-80, and John Hancock Mutual Life Ins. Co. v. Yates (1936) 299 U. S. 178, 182.

Griffin v. McCoach (1941) 313 U. S. 498, 134 A. L. R. 1462, however, clearly suggests that a due process question may be raised in this type of situation; it is true that the clause was not successfully invoked in the *Griffin* case but it is equally apparent that the Supreme Court did not refuse to apply the clause because it involved the application of the common law of the forum.

12. Hilpert & Cooley, supra note 7, at 57, state: "* * * it may be said that the Court's decisions have exposed a power in the Constitution which, applied to its logical extreme, would enable the Court to dictate the proper, and the only proper, result in each case. But, at the same time, the Supreme Court in revealing this power has laid the basis for rules restricting its expansion to that logical extreme."

13. Ibid.

14. It has been suggested that the Supreme Court of the United States will not apply the constitutional sanctions except when broad national interests are involved. See: Note (1930) 40 Yale L. J. 291, 299; Comment (1937) 22 WASHINGTON U. LAW QUARTERLY 430, 432. This assertion is also based upon Kryger v. Wilson (1916) 242 U. S. 171. This note does not consider the merits of the suggestion but for a very persuasive reply to the assertion, see Hilpert & Cooley, supra note 7, at 49.

must deem misapplication of the local law to have been unreasonable and prejudicial before that clause may successfully be invoked.[15] But when will the Court deem application of the law of the forum to be "unreasonable" and "prejudicial"? The content of these terms will depend upon the approach by the Supreme Court to the problem; hence an examination of particular cases is essential.

The fundamental approach by the Supreme Court in determining the properly applicable law has undergone no material change in the development of the due process sanction to this type of problem. A balancing of jurisdictional contacts of the respective states was essential in determining which law applied, even in the earliest cases. The consequences of this initial balancing appeared in the decision that the transaction was or was not properly governed by the law of the forum; but the language in the opinions did not express the fact that the Court had considered the jurisdictional contacts. The opinions indicate only that one law properly applied to a given transaction. It is believed that these results merely announced conclusions on prior considerations by the Court which were not made express in the opinions. Thus when the Supreme Court declared that the law of the forum constitutionally applied, the opinions do not necessarily mean that the law of the sister-state might not have been held equally applicable had the sister-state been the forum. The opinions in the early cases rely upon only a few jurisdictional contacts, whereas recent opinions evidence consideration of a large variety of factors from which the governmental interest of the forum is spelled out and determined to be sufficient or insufficient. It is noteworthy that a substantial number of due process cases have involved insurance contracts.

The first decision under the due process clause of the Fourteenth Amendment was that in *Allgeyer v. Louisiana.*[16] Application of a Louisiana statute penalizing any act done in that state to effect marine insurance on property then in Louisiana with a company not authorized to do business in that state was held to violate the Fourteenth Amendment. An open marine policy had

15. Hilpert & Cooley, supra note 7, at 56, state: "To the litigant this means that his contentions as to choice of law will involve constitutional issues only in extreme cases where a state court has done more than commit error in interpreting conflict of laws dogma. He must have suffered treatment which seems plainly prejudicial and based on no proper interest of the state which has jurisdiction of his case." See also dissenting opinion of Mr. Justice Brandeis in New York Life Ins. Co. v. Dodge (1918) 246 U. S. 357, 383.

16. (1897) 165 U. S. 578.

been applied for and delivered in New York and the insured later mailed from Louisiana a communication causing the policy to attach to designated property within that state. The mere act of notification and the presence of the property within the forum were deemed insufficient to justify legislative jurisdiction[17] over a contract held to be made, executed, and performable in New York.[18] Conversely, the restraint of the due process clause was not applied in *New York Life Ins. Co. v. Cravens*.[19] It was there held that Missouri properly applied its non-forfeiture statute to a life insurance policy applied for by and delivered in Missouri to a citizen of that state. The Court was influenced by the public policy behind non-forfeiture legislation,[20] and the opinion in the *Cravens* case relied chiefly upon the factor of the place of delivery. But narrow and rigid language relating to the rule of the place of delivery did not adequately explain the decision and unfortunately occasioned great difficulty in later cases.

In *New York Life Ins. Co. v. Head*[21] a citizen of New Mexico, temporarily in Missouri, made application to a New York corporation for insurance on his life; the policy was to be delivered to a friend in Missouri and subsequently to be turned over to the insured when he again came to Missouri. Nine years later in New Mexico the insured transferred the policy to his daughter, also domiciled in that state; thereafter she made application in New Mexico for a loan on the policy. The loan was not repaid and the policy was forfeited in accordance with the law of New York and New Mexico, but not according to provisions of a Missouri statute. After death of the insured, the daughter brought suit on the policy in Missouri and the state court held in her favor. But the Supreme Court, assuming Missouri's control over the contract of insurance, held that such control did not justify application of the Missouri non-forfeiture statute to the subsequent loan agreement made elsewhere between non-residents

17. Legislative jurisdiction has been defined as the right or competence of a state by its laws to control the consequences of given events. See Restatement, *Conflicts* (1934) §§59-64. It is said that the problem is the same whether "laws" are statutory or judge-made. See Ross, supra note 7, 15 Minn. L. Rev. at 178.

18. See Osborn v. Ozlin (1940) 310 U. S. 53, 66, wherein Mr. Justice Frankfurter doubted the validity of the *Allgeyer* case as still being law.

19. (1900) 178 U. S. 389.

20. All too frequently forfeitures had caused policy-holders to lose their accumulated reserves as well as their policies; even those who did not lose their policies were adversely affected by inadequate supervision of funds and dubious participating and gambling schemes under the tontine and semi-tontine policies. See Hendrick, *The Story of Life Insurance* (1905).

21. (1914) 234 U. S. 149.

of the forum. The *Head* case rests upon peculiar facts and cannot be said necessarily to hold that loan agreements are to be treated as separate and independent from the contract of insurance. There the premiums, and possibly the benefits, were payable in New Mexico and none of the parties was resident in Missouri; on such facts it would be essentially unfair to apply Missouri law to the loan agreement made elsewhere by non-residents simply because the insurance policy had been fortuitously but technically made in Missouri. On the other hand, when the policy is clearly controlled by the forum the same jurisdictional factors which justify a sufficient governmental interest in that contract also justify control of the loan agreement applied for in that state.[22]

The unfortunate and unnecessary inference of separability in the *Head* case[23] was followed in *New York Life Ins. Co. v. Dodge.*[24] That case declared that a loan agreement, made between a resident of Missouri and a New York corporation and pursuant to an admittedly Missouri policy, was improperly controlled by the Missouri non-forfeiture statute. Mr. Justice Brandeis, dissenting, made express what was implicit in the opinions in the *Cravens* and *Head* cases; namely, in determining whether the forum had misapplied its law, there was a balancing of jurisdictional contacts from which a sufficient or insufficient legislative jurisdiction was determined. Mr. Justice Brandeis denied that the loan agreement should be treated as independent of the original insurance contract and asserted that the test of constitutionality should be based upon the Court's answer to the following questions:

> Is the subject-matter within the reasonable scope of regulation? Is the end legitimate? Are the means appropriate to the end sought to be obtained? If so, the act [of the

22. The loan agreement cases involve the question of whether, on default of premium payments, the loan operates to reduce the benefits payable under the converted policy or the accumulated reserve of the original policy, or both. If it is to be paid out of the accumulated reserve, a reduction in the amount to be applied to the purchase of a converted policy would result; thus there would be a reduction in the amount to be paid the beneficiary if the reserve were taken for paid-up insurance, or there would be a reduction in the length of time the insurance would be in effect if the reserve were taken for extended insurance.

If the loan agreements are held to be separate and independent from the contract of insurance, the forum's legislative jurisdiction over the policy itself could be effectively defeated.

23. It is noteworthy that the question of separability was left open in New York Life Ins. Co. v. Head (1914) 234 U. S. 149, 165.

24. (1918) 246 U. S. 357.

> forum] must be sustained, unless the court is satisfied that it is clearly an arbitrary and unnecessary interference with the right of the individual in his personal liberty.[25]

The *Dodge* case is inconsistent with considerations which largely influenced the decisions in the *Cravens* and *Head* cases;[26] it is apparent that the Court was in difficulty because the underlying factors compelling those decisions had not been expressly stated. This difficulty is further illustrated in the decisions by the Supreme Court in *Mutual Life Ins. Co. v. Liebing*[27] and *Aetna Life Ins. Co. v. Dunken.*[28] In the *Liebing* case it was held that the loan provisions in a Missouri insurance policy constituted an irrevocable offer which was accepted by the later application for a loan made in Missouri by a citizen of that state; hence the Missouri non-forfeiture statute was properly applicable to the loan agreement. Mr. Justice Holmes distinguished the *Dodge* case on the narrow ground that the policy in the *Liebing* case contained a binding promise to make the subsequent loan, whereas the policy in the *Dodge* case merely contemplated a loan. The policy in the *Dodge* case provided that "cash loans can be obtained,"[29] while in the *Liebing* case the policy provided that "the company will * * * loan amounts within the limits of the cash surrender value," *etc.*[30] The distinction made is technically possible but very tenuous. In *Aetna Life Ins. Co. v. Dunken*[31] the Court held that Texas courts could not constitutionally apply a local statute to a loan contract based upon an insurance policy issued upon a demand emanating from Texas pursuant to a convertible provision in a prior Tennessee contract. The subsequent insurance policy and loan agreements were held to be subsidiary agreements and properly controlled by the law of the original contract, despite the fact that insured was a resident of Texas at the time of applications for the converted policy and for the loan under it; and, by analogy to the *Liebing* case, the insured had a right to the loan which, although applied for in Texas, was subject to the rules relating to the Tennessee contract.

As indicated above, the unfortunate rigidity of language in early opinions gave rise to an improper result in the *Dodge* case, and made technical refinements necessary in order to reach satis-

25. Id. at 382.
26. See notes 20 and 22, supra.
27. (1922) 259 U. S. 209.
28. (1924) 266 U. S. 389.
29. New York Life Ins. Co. v. Dodge (1918) 246 U. S. 357, 373.
30. Mutual Life Ins. Co. v. Liebing (1922) 259 U. S. 209, 214.
31. (1924) 266 U. S. 389.

factory results in the *Liebing* and *Dunken* cases. However these refinements indicate a growing recognition of the many underlying factors on which the forum may rest its claim for legislative jurisdiction. In the opinions in the foregoing cases the Court had not frankly revealed the balancing of jurisdictional contacts, and there was still no indication that each of several states might have a sufficient governmental interest to justify application of its law if it were the forum. On the other hand, the more recent opinions dealing with the scope of both the due process and full faith and credit clauses in conflict of laws situations[32] have made explicit the same fundamental approach which was implicit in the early opinions; furthermore, the Court has frankly revealed the underlying jurisdictional contacts influencing the decisions and, in a number of instances, has abandoned the rigid language which caused so much trouble in the early cases. An analysis of the decisions indicates that the law of either of several states might properly be applied to the same factual transaction if the state asserting control were the forum and had a sufficient governmental interest.

One illustration of the modern treatment may be seen in *Home Ins. Co. v. Dick*,[33] which at first glance would seem to conflict with *Griffin v. McCoach*.[34] A Mexican insurance company insured a tug owned by a Mexican resident; re-insurance was effected with the Home Insurance Co. and the Franklin Fire Insurance Co., New York corporations. Premiums and loss settlements were payable in Mexico. Thereafter the policy was assigned to Dick, a resident of Texas. More than a year after loss he brought suit in Texas. The court refused to recognize a contractual provision

32. In a number of cases decided under the full faith and credit clause the Court has actually discussed the due process clause as being very closely interrelated, and dicta in full faith and credit cases frequently indicate the scope of the due process clause. See Alaska Packers Ass'n v. Industrial Accident Comm. (1935) 294 U. S. 532; John Hancock Mutual Life Ins. Co. v. Yates (1936) 299 U. S. 178; Pacific Employers Ins. Co. v. Industrial Accident Comm. (1939) 306 U. S. 493; Pink v. A. A. A. Highway Express (1941) 62 S. Ct. 241. Several opinions do not clearly show whether due process or full faith and credit is relied upon in the decision. New York Life Ins. Co. v. Head (1914) 234 U. S. 149, 161, contains language which would indicate that it rested upon the full faith and credit clause. New York Life Ins. Co. v. Dodge (1918) 246 U. S. 357, 376, asserted that the *Head* case was based on the due process clause. See Hilpert & Cooley, supra note 7, at 49. Likewise Aetna Life Ins. Co. v. Dunken (1924) 266 U. S. 389 does not clearly set out the clause relied upon. These cases, however, are generally treated as due process cases; the confusion arises from the fact that *either* a due process or a full faith and credit question, *or both*, may be raised out of the same transaction.

33. (1930) 281 U. S. 397, 74 A. L. R. 701.

34. Griffin v. McCoach (1941) 313 U. S. 498, 134 A. L. R. 1462.

for a one year limitation, valid in Mexico, and applied a local statute voiding contractual limitations for periods shorter than two years. The Supreme Court of the United States held that application of Texas law improperly created a new and additional liability against the defendant insurer, and therefore violated the Fourteenth Amendment. Quantitatively Texas had some interest in the transaction; the assignee was domiciled in that state, the statute was said to relate to remedy, and suit was in the Texas court. But qualitatively the Court found these insufficient to justify application of the Texas statute.

The Court took a similar position four years later in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*[35] A Tennessee corporation indemnified itself against its employees' defalcations by a fidelity bond negotiated in Tennessee with a Connecticut corporation. The bond provided that the contract would be inoperative unless claim be made within fifteen months after termination of the contract, and the limitation was permitted by Tennessee statute. Later the Tennessee corporation moved its main offices to Mississippi where the insurer was also doing business. Eighteen months after the bond was terminated an action was brought in Mississippi for the defalcation in Mississippi of an employee. The Mississippi court allowed recovery by applying local statutes declaring insurance policies on property in Mississippi to be contracts of that state and subject to periods of limitation longer than that specified in the contract. The Supreme Court held that application of the Mississippi statutes violated the due process clause. The facts that the former Tennessee employer had been reincorporated in Mississippi, that the insurer was doing business in Mississippi, that payment was to be made in Mississippi, and that the defalcation of the employee occurred there, were insufficient to justify application of the Mississippi statutes. In holding application of the local statute to be a violation of the due process clause, the *Delta & Pine* case goes much further than the *Dick* case; the forum possessed many more jurisdictional contacts in the *Delta & Pine* case and qualitatively they were more important than in the *Dick* case. It is significant that both cases involved limitations incorporated in contracts made in a sister-state or foreign country between parties who were then non-residents of the forum. In the *Delta & Pine* case the Court stated as follows:

> A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts else-

35. (1934) 292 U. S. 143, 92 A. L. R. 932.

> where validly consummated and to convert them *for all purposes* into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.[36]

It is to be noted that the Court stated that the contract cannot be brought under the law of the forum "for all purposes." This indicates that the Court felt that a foreign contract may be controlled by the forum *for some purposes* when a proper jurisdictional interest is deemed to be present.[37] For the purpose of imposing its own rule of limitations the forum may not control what is otherwise properly a foreign contract, thereby creating a liability where none existed under the foreign law.[38]

It was suggested above that the Court, at first implicitly and in recent opinions explicitly, has imposed the constitutional sanction of the Fourteenth Amendment when it has deemed the forum not to have a sufficient governmental interest in the transaction; but it was also pointed out above that more than one state may have a sufficient governmental interest in the subject matter, in which case either may constitutionally apply its own law. The Supreme Court has determined the sufficiency of a forum's governmental interest by balancing the jurisdictional contacts of the respective states with the transaction; a particular contact will be important or unimportant depending upon the type of transaction involved.[39]

The foregoing considerations directly bear upon another question which must be raised: May the forum constitutionally apply its own substantive law merely upon the basis of public policy, and unsupported by other jurisdictional contacts, when the constitutional question has been raised and the foreign law properly pleaded and proved?[40] The scope of governmental interest is not

36. Id. at 150. (Italics added.)

37. See also Pacific Employers Ins. Co. v. Industrial Accident Comm. (1939) 306 U. S. 493. Compare Alaska Packers Ass'n v. Industrial Accident Comm. (1935) 294 U. S. 532.

38. The factor of place of making may be a very important one in matters of contractual limitations, yet in other situations, e. g., the industrial compensation cases, it is not as important as the interest of a state in the life and safety of its citizens and its interest in accidents sustained within the state. See Pacific Employers Ins. Co. v. Industrial Accident Comm. (1939) 306 U. S. 493. Thus a single jurisdictional contact will not be given the same weight by the Court in all cases; a multiplicity of factors may enter into the determination, and the relative importance of each factor depends upon the type of transaction involved.

39. Ibid.

40. It is well established that the foreign law must be properly pleaded and the constitutional question raised. Hartford Life Ins. Co. v. Johnson (1919) 249 U. S. 490. See 3 Beale, *Conflict of Laws* (1935) 1667, §621.4.

yet clearly determined by the available cases and they show that it may well shift according to the types of situations in which it is questioned; but the cases and language in the opinions indicate that there must be *some* governmental interest which will justify application of a public policy of the forum.

In the early development of conflict of laws in this country the comity theory was a conditioning factor shaping state choice-of-law decisions.[41] This theory was stated by Mr. Justice Story:

> In the silence of any positive rule, affirming or denying or restraining the operation of any foreign laws, courts of justice presume the tacit adoption of them by their own governments, *unless they are repugnant to its policy, or prejudicial to its interests.*[42]

Under the comity theory the forum was privileged to refuse recognition of foreign law on grounds of public policy alone. Although the limits are not clear, it is apparent that constitutional limitations have cut into state freedom of action based upon public policy.[43] In *Bond v. Hume*[44] the Supreme Court left open the question whether, on grounds of public policy, a state court would be justified in *applying* its own law. It has long been recognized that a state court may constitutionally refuse to take jurisdiction of a cause of action in which the law properly governing the subject matter is repugnant to the public policy of the forum;[45] this leaves the parties free to seek a remedy elsewhere. But a refusal to take jurisdiction is far different from the question here considered; here the forum insists upon the right to take jurisdiction, to apply its own law to a transaction, and to render a judgment on the merits.

The Supreme Court has consistently used language indicating that mere public policy, unsupported by other sufficient interest

41. See Dodd, supra note 7, at 535.

42. Story, *Conflict of Laws* (8th ed. 1883) 35, §38. (Italics added.)

43. See Fauntleroy v. Lum (1908) 210 U. S. 230, wherein the Supreme Court required that full faith and credit be given a judgment of a sister-state despite a very strong public policy in the forum. See also: Huntington v. Attrill (1892) 146 U. S. 657; Broderick v. Rosner (1935) 294 U. S. 629; Milwaukee County v. M. E. White Co. (1935) 296 U. S. 268; John Hancock Mutual Life Ins. Co. v. Yates (1936) 299 U. S. 178.

44. (1917) 243 U. S. 15.

45. See Home Ins. Co. v. Dick (1930) 281 U. S. 397, 74 A. L. R. 701; Bradford Electric Co. v. Clapper (1932) 286 U. S. 145; Hartford Accident & Indemnity Co. v. Delta & Pine Land Co. (1934) 292 U. S. 143, 92 A. L. R. 928. However, it is not meant to be inferred that there is no problem here; there are a number of problems which arise even though the court merely refuses to take jurisdiction. See Broderick v. Rosner (1935) 294 U. S. 629. See also Hilpert & Cooley, supra note 7, at 35.

in the subject matter, is not enough to justify application of the law of the forum. Thus in *Home Ins. Co. v. Dick*[46] it was unsuccessfully urged that the Texas statute was declaratory of its public policy and therefore the law of Texas should be applied. The Court stated that the forum

> * * * may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them.[47]

In the *Delta & Pine* case the Court cited *Bond v. Hume*[48] for the proposition that

> Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to *its vital interests* as to justify enforcement in a different manner.[49]

The *Delta & Pine* case expressly stated that public policy would not justify application of the local law, when there was only a "slight connection" with the subject matter.[50] *Dicta* may be found in closely related cases dealing with full faith and credit which require that there be sufficient governmental interest despite the existence of a public policy in the forum.[51] In *Alaska Packers Ass'n v. Industrial Accident Comm.*[52] and *Pacific Employers Ins. Co. v. Industrial Accident Comm.*[53] the Supreme Court carefully set out what it there recognized as sufficient governmental interest before it allowed application of the law of the forum on grounds of local public policy.

It may be questioned whether *Griffin v. McCoach*[54] has given an affirmative answer to the question here considered: namely, whether public policy unsupported by other proper governmental interest will justify application of the law of the forum.[55] There

46. (1930) 281 U. S. 397, 74 A. L. R. 701.
47. Id. at 410.
48. (1917) 243 U. S. 15.
49. Hartford Accident & Indemnity Co. v. Delta & Pine Land Co. (1934) 292 U. S. 143, 150, 92 A. L. R. 928. (Italics added.)
50. Ibid.
51. Bradford Electric Co. v. Clapper (1932) 286 U. S. 145, 164; Alaska Packers Ass'n v. Industrial Accident Comm. (1935) 249 U. S. 532; Pacific Employers Ins. Co. v. Industrial Accident Comm. (1939) 306 U. S. 493.
52. (1935) 294 U. S. 532, 542.
53. (1939) 306 U. S. 493, 503.
54. (1941) 313 U. S. 498, 134 A. L. R. 1462.
55. It has been asserted that the *Griffin* case has in effect overruled prior decisions "which undertook to limit the states' freedom to apply their own rules to foreign contracts." Comment (1941) 9 U. Chi. L. Rev. 141, 142. It is submitted that the *Griffin* case on its facts does not have this effect; moreover, it has not been so treated by the Supreme Court. In the recent case of Pink v. A. A. A. Highway Express (1941) 62 S. Ct.

are strong reasons for believing that no such conclusion can be drawn from the *Griffin* case and that this conclusion was not meant to be inferred. The Supreme Court remanded the case to the district court to determine if there is a Texas public policy requiring application of its peculiar rule in the conflict of laws situation there presented. The opinion indicated that application of the Texas rule would not violate the due process clause. Although the opinion in the *Griffin* case did not emphasize them, it is apparent that the forum had actual and potential jurisdictional contacts with the case. Some states hold that the place of performance of the insurance contract, in the sense of the place where the principal sum is payable, is at the residence of the beneficiary.[56] If it were shown that Texas followed this rule, the forum could be the place of performance since the wife, beneficiary, resided there. Moreover it is to be noted that the administrator, the heirs of the insured, and the *cestui que vie* were all domiciled in Texas.

In view of the cases relied on by Mr. Justice Reed in the *Griffin* case, the factor of domicil is highly significant. The opinion emphasized *Union Trust Co. v. Grosman*[57] in which a Texas married woman executed a guaranty contract in her own

241, 247, the Supreme Court applied the rule of public policy expressed in the *Griffin* case and referred to the *Dick* case for the principle that "The undue extension of the statutes and authority of a state beyond its own borders by the expedient of rendering a judgment against non-citizens over whose persons or property the state has acquired jurisdiction, may infringe due process."

The most recent decision applying the rule of the *Griffin* case is Meinsen v. Order of United Commercial Travelers of America (D. C. W. D. Mo. 1942) 6 Life Cases 848. There the court gave effect to public policy of the forum on facts somewhat similar to those in the *Dick* case; the court distinguished the latter decision but did not refer to Hartford Accident & Indemnity Co. v. Delta & Pine Land Co. (1934) 292 U. S. 143 which dealt with a similar problem. It is to be noted also, that the *Meinsen* case did not arise on interpleader, as did the *Griffin* case.

56. In Clark v. Policyholders' Life Ins. Ass'n (1934) 32 P. (2d) 653, 655, the court stated: "The very nature of a policy of insurance strongly implies that in the event of a loss within its terms, the amount coming due will be delivered to the beneficiary. The most reasonable inference is that this delivery is to take place where the beneficiary resides or is to be found. Common experience and usual custom are in accord with such a procedure." In Expressman's Mutual Ben. Ass'n v. Hurlock (1900) 46 Atl. 957, 959, the court stated: "'Matters connected with * * * performance are regulated by the law of the place of performance. * * *' It would follow, therefore, that, even if, * * * these certificates were completed contracts when signed in New York, yet the rights of the parties thereunder must be determined by our [Maryland] law." See Carnahan, The Delivery of a Life Insurance Policy; Function and Scope of the Delivery Concept for Conflict of Laws Purposes (1941) 26 Minn. L. Rev. 50.

57. (1918) 245 U. S. 412.

name while temporarily in Illinois. Suit was brought in a federal district court in Texas. Under Texas law defendant was without contractual capacity but under the statute of Illinois the contract was binding. Although constitutional law issues were not involved, the Supreme Court held that, on grounds of public policy, Texas might properly refuse to recognize a married woman's statute of Illinois because Texas had an interest in the protection of its own citizens and because the woman was only temporarily absent from the Texas domicil. The Court held that the local rule should also be applied by a federal court in Texas. Mr. Justice Holmes stated:

> It is one thing for a court to decline to be an instrument for depriving citizens belonging to the jurisdiction of their property in ways not intended by the law that governs them, another to deny its offices to enforce obligations good by the *lex domicilii* and the *lex loci contractus* against women that the local laws have no duty to protect.[58]

The Supreme Court in the *Griffin* case stated that the Texas rule of insurable interest is based on "* * * a public policy which protects citizens against the assumed dangers of insurance on their lives held by strangers."[59] Obviously this is more important than an interest in protecting property as in the *Grosman* case. It is apparent that the Court in the *Griffin* case deemed the domicil of the *cestui que vie,* among other contacts, to be a narrow but sufficient governmental interest on which Texas might rest its public policy. This is given additional support by the Court's language used to distinguish the *Dick* case. The Court stated that the rule, allowing state courts to apply their own law when the foreign law is obnoxious to its public policy, was not applied in the *Dick* case

> * * * where the parties to the contract acquired rights beyond the state's borders with no relation to anything done or to be done within the borders.[60]

Thus the Court must have deemed a sufficient interest to exist in the *Griffin* case, whereas the interest in the *Dick* case was insufficient; therefore the opinion in the *Griffin* case is entirely consistent with prior decisions by the Supreme Court.

As indicated at an earlier point, no case has yet squarely answered the question: May the forum constitutionally apply its

58. Id. at 416.
59. Griffin v. McCoach (1941) 313 U. S. 498, 507, 134 A. L. R. 1462.
60. Ibid.

own substantive law, unsupported by jurisdictional contacts other than mere public policy, when the constitutional question has been raised and the foreign law properly pleaded and proved? It was suggested above that the facts of the *Griffin* case do not raise, nor does the opinion purport to answer, this question. It would be raised if the facts in the *Griffin* case were changed in several respects. If the administrator, the heirs of the insured, and the *cestui que vie* were domiciled in a third state and suit were instituted in the federal or state court of Texas, the opinions indicate that mere public policy would be insufficient to justify application of the Texas rule of insurable interest.

The forum in the *Dick* case and in the *Delta & Pine* case was attempting to create and to impose a *new* liability on the insurer when no liability existed under the law of the place of making. Application of Texas law in the *Griffin* case would not impose a new liability on the insurance company which interpleaded, thereby admitting liability. Nor would a new liability be created against the trustee; application of Texas law would be only a refusal to recognize the trustee's right to recover, and Texas had a sufficient governmental interest to justify this result under the facts of the *Griffin* case.

The fact that the action of the Court in the *Griffin* case created no new liability against the insurance carrier suggests a number of problems, as yet undecided. The remedy of federal interpleader,[61] which protects a stakeholder against possible double liability to claimants residing in different states, is of great importance in the hypothetical situations hereafter considered. If an insurance company is sued in Texas by an administrator and has knowledge that a trustee also claims the fund, the insurer may interplead the trustee and thereby protect itself against possible double liability by reason of a later suit by the trustee in another state. This was the situation in the *Griffin* case. If the insurance company, knowing of the conflicting claims, does not make the trustee a party, the administrator might still prevail in Texas, because its governmental interest is identical with that in the *Griffin* case. In this situation, if the insurer is later sued in another state by the trustee, the insurance company may be subjected to double liability because, knowing of the adverse claims, the company was negligent in not exercising the protective remedy of interpleader. If, without being sued, the insurance company were voluntarily to pay the administrator, knowing of the trustee's claim, it might be

61. Fed. Interpleader Act (1936) 49 Stat. 1096, 28 U. S. C. A. §41(26).

subjected to double liability by reason of its negligent failure to bring an action under the interpleader statute. If the trustee were to sue the insurer in New York or, indeed, in any jurisdiction except Texas, the trustee would probably prevail by reason of the forum's adoption of the law of New York, as properly governing the insurance contract. In that situation if the insurance company failed to make the administrator a party, it might then be held liable in a later suit in Texas by the administrator because, knowing of its possible liability to the administrator, the insurer may be said to have negligently failed to take steps to protect itself; but if the carrier were to interplead the administrator, it could not be subjected to a later suit.

It is apparent that the insurance company will know of the trustee's claim, since he was named beneficiary; thus there will be no situation in which the insurer will pay the administrator and not be apprised of the conflicting claim of the trustee. But when the trustee-beneficiary claims the fund, the insurance company may be unaware of the possible claim of an administrator; here it is suggested that the company may safely pay the trustee, whether on suit or voluntarily. In the latter situation, by analogy to the *Dick* and *Delta & Pine* cases, it is probable that the Texas court in a later action in that state by the administrator could not constitutionally apply its own law, thereby creating a new liability against the innocent insurance company. In this situation the Supreme Court might hold that the interest of Texas was insufficient to justify application of the Texas rule of insurable interest. This is consistent with the holdings of the *Dick* and *Delta & Pine* cases that no new liability can be created, even though some jurisdictional interest exists in the forum, whereas the *Griffin* case did not create a new liability.

One last point raised by the *Griffin* case remains to be considered. Under the rule of *Erie R. R. v. Tompkins*[62] it is now established that the federal district courts must apply the conflict of laws rule of the state in which they are sitting. This question had been expressly left open in *Ruhlin v. New York Life Ins. Co.*[63] and it has occasioned considerable difficulty. When there are state decisions in which the point has been raised and decided, the federal court must apply the law as found in the state cases; but when the point has not been decided by the state courts, the *Erie* rule poses a difficult problem. Theoretically the federal courts must decide what the state rule would be had the

62. (1938) 304 U. S. 64, 114 A. L. R. 1487.
63. (1938) 304 U. S. 202.

cause of action arisen in the state court. This problem was avoided by lower federal courts in *Sampson v. Channell*[64] and *New England Mutual Life Ins. Co. v. Spence*.[65] In those cases the federal courts had opportunity to consider the point at issue as falling into one of several possible categories, which could be governed by different conflict of laws rules; the methods and rules by which courts deal with such situations are technically known as "qualification." In the cases just referred to, the courts applied state rules to the points in issue, which rules were properly applicable after the qualification had been made. In the *Griffin* case and in *Klaxon v. Stentor Electric Mfg. Co.*,[66] decided the same day, the problems did not lend themselves to qualification and in each instance the Supreme Court remanded the case to the district court with instructions that the state law be *found* and applied. In formulating and applying a conflict of laws rule a state court must not violate provisions of the federal Constitution; federal courts, applying state law, under the rule of the *Erie* case, may not apply even theretofore accepted state rules if the latter would violate the Constitution. It is for this reason that the *dicta* in the *Griffin* case, relating to the constitutional scope of Texas rules of public policy, are of great importance even though the narrow decision was that the district court must, under *Erie R. R. v. Tompkins*,[67] ascertain the scope of the Texas rule of public policy.

HORACE S. HASELTINE.

THE FIRST AMENDMENT AND THE N. L. R. A.

1. INTRODUCTION

(a) *The Problem*

There are few phrases in the parlance of democracy which are surrounded with such an aura of sanctity as that which envelops the phrase "freedom of speech." And, of course, the wisdom of so regarding it has long since been removed from the field of debate. However, conceding the wisdom, and in fact the absolute necessity, of preserving to the utmost degree the integrity of freedom of speech, there remains the task of definition. Ordinarily, we experience no difficulty in determining when freedom of speech has been denied. The history books abound with ex-

64. (C. C. A. 1, 1940) 110 F. (2d) 754, noted in (1941) 26 WASHINGTON U. LAW QUARTERLY 244.
65. (C. C. A. 2, 1939) 104 F. (2d) 665.
66. (1941) 313 U. S. 487.
67. (1938) 304 U. S. 64, 114 A. L. R. 1487.