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JUSTICE HALPERN'S CONTRIBUTION TO CONFLICT OF LAWS

IN the *Paradoxes of Legal Science* Cardozo called Conflict of Laws one of the most baffling subjects of legal science.¹ Small wonder that the interest of Justice Halpern, a legal scholar of greatest resourcefulness, imagination and inspiration was greatly aroused by problems of that subject. His genuine desire of keeping up with new approaches everywhere in the field of law without shutting out his multifarious interests in all other fields of knowledge, is particularly reflected in his opinions dealing with conflict-of-laws problems. His enormous reading offered him guidance; and the following discussion of his opinions will show that their significance lies in the originality of his formulations and solutions.

The seven opinions deal with notice and proof of foreign law; the question of continuing jurisdiction over non-residents as to causes claimed in amendments to the original action; the enforceability of extra-national divorce and support decrees out of the domestic spendthrift trust income of the judgment debtor; fraud in obtaining jurisdiction over a non-resident defendant; the full faith and credit effect of a probate decree as to jurisdiction; collateral estoppel between co-defendants of the first action; and, finally, the impact of policy considerations in preferring the rule of the *lex fori* over the case to that of the *lex loci*. Only the last mentioned opinion was a dissent; and only the first one was made by him sitting in *nisi prius*. Among the other opinions four of them were written when he was a member of the Third Department of the Appellate Division while the last two were written for the Fourth Department.

I

The conflict-of-laws aspect in the first case, *Bril v. Suomen Pankki Finlands Bank*,² is reflected in the much disputed problem of what law should be applied by a New York judge who is confronted with a question which in his view is governed either by the law of the foreign state *A* or by that of the foreign state *B* when neither of the parties "has directed the court's attention to any statement of the law of either state."

The case arose out of an international transaction concerning the sale of Cuban raw sugar to be shipped from Cuba to Helsinki, a transaction which was negotiated in Finland between the seller-plaintiff's agent and the Ministry of Supply of Finland as buyer. In the contract evidenced by a memorandum signed by the Ministry, it was provided that payment was to be made through a "confirmed irrevocable letter of credit in freely transferable sterling to be opened in the name of Hampton Co., Ltd. in London—seller's nominee—beneficiary Marine Trust Company, Buffalo, New York or Cuba . . ." Thereafter, the defendant bank in Finland was instructed by the Ministry to cause the credit to be opened whereupon the bank instructed its correspondent, the

1. Cardozo, *The Paradoxes of Legal Science* 68 (1928).

2. 199 Misc. 11, 97 N.Y.S.2d 22 (Sup. Ct. 1950).

Hambros Bank in London, to open such credit. However the latter needed, under the then controlling British currency regulations, permission from the Bank of England for "establishing" an irrevocable credit of £ 215,325 on behalf of the Finnish bank.

One can say that the whole transaction ended with the Bank of England's refusal to grant the permission and the defendant bank's cable to the Hambros bank cancelling the request for the issuance of the letter of credit. But, as so often happens, the end of the transaction was the curtain raiser for the legal play.

Upon the theory that instruction sent by the defendant bank to the Hambros bank constituted a letter of credit which was anticipatorily breached by the former, plaintiff sued for damages in New York with defendant making an appearance. The Justice dismissed the action, with an opinion which is highly exact and instructive.

Restricting our attention to the conflict problems, it may be sufficient to say that the Justice put the question of whether that inter-bank instruction was a letter of credit, in proper dimensions. He pointed out that the opening of a credit by inter-bank communication does not by itself create an obligation in favor of the beneficiary; for the obligation arises only by the issuance of a letter of credit by one of the banks *and* its delivery to the beneficiary. This view was documented by references to authorities.³

The Justice rejected plaintiff's argument which construed a letter of credit out of the inter-bank letter of instruction, of which, in the course of the dispute which arose after the collapse of the transaction, plaintiff had procured a copy.

What law controlled the interpretation of the letter of instruction sent from Finland to the Hambros Bank in England? Certainly New York had nothing to do with that letter. However neither party claimed the application of foreign law and failed to present the slightest shred of information concerning such law. It is true that the *lex fori*—then the Civil Practice Act (CPA) of New York § 344-a, now Civil Practice Law & Rules (CPLR) of New York, Rule 4511(b)—gives the court discretionary power to take judicial notice of the law of foreign countries even in the absence of any suggestion by the parties. However, shall a judge apply to his decision rules of a foreign legal system—*e.g.*, Finnish law—where such system is essentially different in its structure and concepts from the *lex fori*? Can he follow the rules of such systems because he might discover them by his private research where they remain undisclosed to the parties who are not given the opportunity of testing the correctness by experts and cross examination? It is highly probable that for these reasons Justice Halpern refused to undertake any "independent research as to Finnish or British law." Justice Walter had arrived at the same result in *Arams v. Arams*.⁴

3. See also Uniform Commercial Code § 5-106(1)(b).

4. 182 Misc. 328, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

But there arises the next question: shall the court dismiss the action for the reason alone that plaintiff did not refer to the foreign rules and therefore failed to establish a material element of his case? The U.S. Court of Appeals in *Walton v. Arabian-America Oil Co.*,⁵ answered the question in the affirmative.

Should not rather a court in order to avoid such a denial of justice apply its own law—the *lex fori*—particularly if the foreign law applicable in its view to the case is in close affinity to the *lex fori*? It was the approach which the Justice took. Since the credit was to be opened in London, he regarded British law as the law which had the strongest contacts with the case. Relying on the presumption that the common law of England is the same as the common law of the forum, he justified the dismissal of the action on its merits by the above discussed New York rules concerning letters of credit. His approach in the conflict question was the same which the U.S. Court of Appeals for the Second Circuit later took in *Siegelman v. Cunard White Star Lines*.⁶

II

Now let us turn to the opinion in the next case. It was *Chapman v. Chapman*.⁷ The situation was as follows: On February 14, 1950 *W* (wife) brought an action in Vermont, the last matrimonial domicile, for separation (called there divorce from bed and board) for a limited period of four years and for separate maintenance. At that time the defendant *H* (husband) had already moved to New York where he was served. He filed a general appearance and answer through a Vermont attorney. Finally the trial was scheduled for December 17, 1951. It seems that the notice of the trial, sent to a Pittsburgh address given him by the attorney simultaneously with the notice of the latter's withdrawal from the case, never reached *H* who meanwhile had become a domiciliary of Florida. Plaintiff *W* had filed on December 13, *i.e.*, four days prior to the trial, a motion to amend her action to one for an absolute divorce and suitable alimony. On December 17, this motion was granted together with *H*'s attorney's motion to withdraw; a divorce decree was rendered to *W* together with a lump sum of \$25,000.00 in lieu of alimony.

A few weeks prior to that divorce decree, on November 23, *H* had obtained a divorce decree in Florida in a proceeding on extra-state service on *W* who did not appear. Strangely enough, *H* did not bring his divorce to the attention of the Vermont court, neither by amending his answer nor in any other way.

When later *W* brought action in New York to recover a judgment for the \$25,000.00 under the alimony provision of her Vermont divorce decree, *H* interposed an answer. The trial court denied *W*'s motion for summary judgment and, on her appeal, the Justice speaking for a unanimous court affirmed the denial.

5. 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956).

6. 221 F.2d 189 (2d Cir. 1955).

7. 284 App. Div. 504, 132 N.Y.S.2d 707 (3d Dep't 1954).

The Justice faced directly the very important jurisdictional and constitutional problems of the case. The claim in Vermont for absolute divorce had presented a new cause of action which was different from that of the original claim for a separation limited to four years. Where the cause of action involved in a judgment by default is outside of the cause of action stated in the original complaint, such judgment is void and therefore subject to collateral attack not only in the forum but even in the state of rendition, if the defendant was not given reasonable opportunity to appear and defend *W*'s plea for a divorce. (*H* learned only after the trial date of the amendment of *W*'s complaint.) It may be recalled that Justice Douglas' opinion in the first *Williams* case conditioned the applicability of the new rule espousing the sufficiency of plaintiff's domicile for divorce jurisdiction, upon compliance "with the requirements of procedural due process."⁸

While the Vermont court's jurisdiction could have been regarded as sustainable with respect to the divorce demand if procedural due process requirements had been met, things were different as to the question of assumption of personal jurisdiction concerning the alimony claim which had not been raised in the original action in which *H* had appeared.

The procedural possibility to amend a pleading, by the amendment as of right or by leave, does not exist in a jurisdictional vacuum. Professor Weinstein and his co-authors do not "see any impediment, jurisdictional or constitutional, to adding a new cause of action against a non-resident who has appeared generally";⁹ but many others do. The Restatement of Judgments in comment *g* of section 5 states that by making a general appearance a defendant subjects himself only to such amendments of the complaint as do not change or substitute additional causes of action. A lump sum of \$25,000.00 could not have been granted in the separation action; the new demand for that sum was based on divorce, a cause of action which was entirely different from that for maintenance for the separation for four years.¹⁰

The Justice arrived therefore at the result that Vermont could acquire personal jurisdiction over *H* as to the new causes of action only if service had been made upon him personally within the State of Vermont or if he had entered a new appearance. It is noteworthy that the Restatement (Second), Conflict of Laws, Tentative Draft Number 3 (1956) has taken in its section 76 comment *b*, at page 58, the same view. It referred to the opinion of the Justice; it declined to accept the contrary view taken by the first Restatement (section 82, comment *d*), which had already been rejected, as we saw, by the Restatement on Judgments.

Many years later, the Court of Appeals holding that the defendant cannot

8. *Williams v. Williams*, 317 U.S. 287, 303 (1942). See also Restatement, Judgments § 8, comment *c* (1942).

9. 3 Weinstein, Korn & Miller, *New York Civil Practice* § 3025.10 (1963).

10. There is no need to discuss a later decision of the court below dealing with a question of fact, *Chapman v. Chapman*, 4 Misc. 2d 64, 158 N.Y.S.2d 674 (Sup. Ct. 1956).

rely on the statement in a summons, so that the complaint, being first original pleading, may contain other causes of action, stated in its opinion: "It may well be that if an action has been commenced against a non-resident by the service of summons and complaint, the complaint cannot be amended by adding new causes of action after the defendant has left the state."¹¹ The court referred to the Justice's opinion. To all appearance his view taken in such a remarkable way has been accepted by the highest judicial authority of New York.

III

Also, *In re Littauer's Estate*¹² is a very important and interesting case. It shows again the characteristic talent of the Justice to analyze complicated legal situations. The case presented a nice combination of problems of jurisdiction, spendthrift trusts, and enforcement of extra-national support decrees through remedies other than execution.

The principal respondent in the proceedings had been the only beneficiary of a New York testamentary spendthrift trust. His wife had obtained a divorce decree in Cuba upon the ground of non-support and the decree directed the husband to pay \$150.00 a month for the support of the child. In view of the past difficulty in collecting the support, she petitioned the Surrogate's Court, under whose supervision the trust had been administered in New York, for an order directing the trustees to pay that amount out of the trust income which was about \$23,000.00 a year.

Concerning the law-of-trust aspect, there was far more in the opinion of the Justice than a splendid display of judicial knowledge. For more than two decades the law of trusts was one among the great fields in which he by the effectiveness of his presentation, the never-failing depth of analysis in the dissection of actual and supposititious cases, not only admirably explained principles and rules but also stimulated the interest of his audience and—*docendo discimus*—tested his own approaches. All is reflected in the opinion of the *Littauer* case.

The Justice speaking for a unanimous court in affirming the denial of the petition (which had relied on a few unreported decisions of Surrogate Foley) proved the fallacy of an assumption of a general power of the court controlling the administration of a spendthrift trust to make an allocation of the trust income for the support of the family of the beneficiary. The matter is put by him in illuminating perspective by his scholarly classification of the only three categories in which courts have sustained the satisfaction of support claims out of the income of such trusts. These categories are: express provisions in the trust instrument for support of the beneficiary's children, assign-

11. *Everitt v. Everitt*, 4 N.Y.2d 13, 16, 148 N.E.2d 891, 893, 171 N.Y.S.2d 836, 838 (1958).

12. 285 App. Div. 95, 135 N.Y.S.2d 582 (3d Dep't 1954).

ment within the family unit, or a domestic divorce judgment containing a support feature.

It was obvious that the case did not fall under the first two categories. As for the third category, it is true that by the *lex fori*, *i.e.*, New York, an order can be granted directing a trustee to pay part of the income for the effectuation of a New York divorce decree providing for payment of support.¹³ Concerning equitable remedies such as sequestration or receivership, they are available as the quoted statutory provisions show, for a decree of this kind of a sister state but only if such foreign decree has been made a judgment of a New York court and is based upon grounds of divorce recognized in New York, *i.e.*, adultery. But under the interpretation placed upon those statutes by the Court of Appeals, such equitable relief has been denied to extra-national divorce decrees.

In the Justice's view this result proved that the instant case did not even fit under the third of the above categories; for an order directing the trustees to pay is nothing else than a short-cut to equitable relief for sequestration or receivership. If the latter are out of the question for an extra-national decree, so must be the former.

The decision was limited to the question of securing the payment of future support. Where the enforcement of past-due support installments is desired, this purpose could, as the Justice explained, be achieved by bringing suit for the amount due on the foreign decree. The domestic judgment then rendered may at least partly be enforced against the income of the trust.¹⁴

IV & V

In two cases, the Justice had to deal with other aspects of jurisdiction. The possibility for a spouse to obtain a divorce in another state—it was Pennsylvania—than that of the last matrimonial domicile—this was New York—which the other spouse continued, facilitated the commission of the fraud in its procurement. The species of extrinsic fraud underlying this case was plaintiff's untrue allegation of his desertion by his wife. He combined this statement with the lie that her whereabouts were unknown and with referring to a fictitious address as the address of the wife while in reality it was his own address. Thus, he succeeded in a Sheriff's return showing the latter's inability to serve the wife.

Confronted with such foreign divorce decree interposed as defense in the divorce action brought by the wronged wife in New York, the Justice in *Hoyt v. Hoyt*¹⁵ affirmed the decision of the court below who had rejected the defense. The foreign divorce decree was of course held to be subject to collateral attack; for it was void on due-process grounds even in the court of rendition itself.¹⁶

13. N.Y. Civ. Prac. Act § 1171 (now N.Y. Dom. Rel. Law § 243).

14. See N.Y. Dom. Rel. Law § 244; N.Y. CPLR §§ 5201(c)(2), 5205(d), (e)(1).

15. 286 App. Div. 580, 146 N.Y.S.2d 133 (3d Dep't 1955).

16. See *Levin v. Gladstein*, 142 N.C. 482, 55 N.E. 371 (1906).

In addition, the New York forum not only can, but must deny full faith and credit to a decision which is tainted with violation of due process.

As the Justice stated, the foreign court had never obtained jurisdiction over the wife. Consequently the present demand of the wife for a divorce was granted. To the attack of the husband's appeal alleging lack of proof of adultery, the Justice succinctly replied that the proof that the appellant, subsequently to the fraudulently obtained Pennsylvania divorce, had remarried and had been residing with the alleged second wife "was sufficient to authorize an inference of adultery."

On the other hand, ingenious legal maneuvering, devoid of fraud, might produce an assertion of jurisdiction which could not be successfully attacked. In *Jaster v. Currie*,¹⁷ Justice Holmes found no fraud with a party's initiating pre-trial disclosure in a foreign court for the secret purpose of service of process on his non-resident adversary.

The question of unassailability of the foreign jurisdiction was the subject of Justice Halpern's opinion in *Matter of Kane*.¹⁸ There, the jurisdictional ground on which the Probate Court in Bristol, Connecticut, probated the will of the testatrix who was a domiciliary of New York, was the submission of her son to the jurisdiction of that court by placing his signature on a paper containing a waiver of any notice or hearing before that court. The paper was enclosed in a letter sent to him by the Connecticut attorneys of his sister. She and he were the only children and testamentary heirs. The unsuspecting brother signed the paper, being not endowed with the prophetic gift to know that his sister would afterwards assert a claim against the estate in an amount sufficient to wipe out most of its assets. Thus, bitterly disappointed, he petitioned the Surrogate's Court of the pertinent county in New York, the last domicile of his mother, for letters of administration. His petition was dismissed on the ground that the Connecticut probate had become *res judicata* and was entitled to full faith and credit.

On his appeal the order was affirmed. It was true that the sister's attorneys in their letter, mentioned previously, stated that the mother was a domiciliary of Connecticut. However, the Justice did not consider such a statement as fraud because "it could not have misled the appellant who knew all the facts as to her domicile."

But it seems to be quite likely that a persuasive case for "extrinsic fraud" could have been made because of the non-disclosure of the sister's claim when she asked for the brother's waiver of hearing and notice. It is difficult to believe that he would have signed such a waiver if the assertion of such a claim had been made known to him. It is, of course, possible that the Justice would have dealt with this question if the appeal had brought it up.

Concerning the problem whether the foreign probate decree ought to be

17. 198 U.S. 144 (1905).

18. 3 A.D.2d 337, 160 N.Y.S.2d 487 (3d Dep't 1957).

recognized as *res judicata* and therefore as binding with respect to the jurisdictional question, it seems that the Justice was not concerned with the influence of a total absence of litigation concerning this question upon the applicability of collateral estoppel doctrines.

VI

The effect of the rendition of a judgment against *A* as defendant in the subsequent proceeding instituted by *A* as plaintiff against *B*, a party who was not the plaintiff in the first action, but a co-defendant therein, constitutes again a problem of collateral estoppel. This is illustrated in the opinion written by the Justice (concurring in result) in *Ordway v. White*.¹⁹

P, a passenger in a car owned and operated by *A*, recovered a judgment in her action against *A* and against *B*, with whose tractor-trailer *A*'s car had collided. The judgment was based on the negligence of both *A* and *B*. Was the subsequent suit brought by *A* against *B* to recover for his personal injuries barred by the defense of *res judicata*? NO, said the Appellate Division in 1931, because co-defendants were considered as adversaries only to the plaintiff, and not to each other.²⁰ However, the Justice in the instant case took a different view. He believed that *B*'s plea of *res judicata* lay. Why? In the first place, the possibility of the recovery of a contribution from the other makes co-defendants true adversaries. In the second place, there is no reason to have the same issue—*A*'s negligence—relitigated; for he *against* whom the plea is asserted was a party to the first action. He had his day in court. Against such a party the plea can be sustained even where the pleader was no party in the first action.²¹

As Justice Halpern put it, the requirement of mutuality of estoppel has been virtually abandoned and the only absolute requirement at least for the defensive use of *res judicata* is the identity of issues.

There was no conflict-of-laws situation involved in this case; but the result reached is particularly important in such a situation.

VII

The last record of great distinction left by the Justice in the field of conflict of laws is his dissent in *Babcock v. Jackson*.²² It is a highly scholarly and original discussion on the necessity for breaking away, at least in certain situations, from the dogmatic postulate of the *lex loci delicti* as choice-of-law rule in the field of torts.

The Justice departed from his brothers because "under the modern view now prevailing in many States and in large measure adopted in this State in

19. 14 A.D.2d 498, 217 N.Y.S.2d 334 (4th Dep't 1961).

20. *Glaser v. Huette*, 232 App. Div. 119, 249 N.Y. Supp. 374 (1st Dep't 1931).

21. See *Bernhard v. Bank of America Nat'l S. & T. Co.*, 19 Cal. 2d 807, 122 P.2d 892 (1942). See also *Israel v. Wood Dolson Corp.*, 1 N.Y.2d 116, 134 N.E. 97, 151 N.Y.S.2d 1 (1956).

22. 17 A.D.2d 694, 230 N.Y.S.2d 114 (4th Dep't 1962) (4-1 decision).

*Kilberg v. Northeast Airlines*²³ it did not necessarily follow that although the accident occurred in Ontario the Guest Statute of this Province should bar the claim of a guest passenger, a New York resident, against the executrix of defendant deceased who was likewise a domiciliary of New York and there insured against liability by a New York insurer.

The Justice offered various doctrines for support of his thesis that the decision calls, under its particular circumstances, for the application of the *lex fori* which was simultaneously the *lex domicilii* of each and every party.

In the last analysis, the policy conflict was not a clash as to the question what is right or wrong. The conflict concerned the question of denying remedial relief because the wrongdoer and the victim stood in the specific relationship of host and guest. The same conflict of policies is presented by other specific relationships. We have only to think of the denial of relief to an employee under the co-fellow-servant rule or of the refusal to grant damages to a wife against her husband because of the inter-spousal immunity. At the time when New York law denied the wife help although the *locus law*, e.g., Connecticut would give her relief, the New York Court of Appeals in *Mertz v. Mertz*²⁴ applied the *lex fori* and *domicilii*, and not the *lex loci*. It is well to note that the Court came to its decision by giving strongest consideration to the then policy of New York adhering to the principle of inter-spousal immunity.

Fortifying his conclusions with the legislative history of the Ontario Guest Statute, Justice Halpern showed that the interest of Ontario in having the statute applied to non-residents is minimal. By contrast, New York has by its repeated refusal to enact a guest statute evinced a strong state policy against attaching significance to the relationship of host and guest with respect to recovery of damages by the latter from the former. Thus, balancing the interests of New York against the interests of Ontario, the Justice came to the result that "the interest of New York is obviously the dominant one."

This writer's discussion does not do full justice to the importance of the opinion of the Justice. However, much more important than these rather summary lines is the attention given the opinion from the moment of its rendition.²⁵ It is a matter of general knowledge that the Court of Appeals following the Justice's dissent, reversed, on plaintiff's appeal, the majority decision of the Appellate Division.²⁶

Also the Tentative Draft Number 8 of the Restatement (Second), Conflict of Laws § 379(1), comment *c* (1963) subsequently to the Justice's opinion points out that in the case of inter-family immunities and guest statutes different aspects of a case will be governed by the law of different jurisdictions. This

23. *Id.* at 695, 230 N.Y.S.2d at 116, citing *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 527, 211 N.Y.S.2d 133 (1961).

24. 271 N.Y. 466, 3 N.E.2d 597 (1936).

25. See, e.g., Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1, 34-38 (1963); Delamater, *A Proposed Step Toward Reasoned Adjudication of Torts in the Conflict of Laws*, 12 Buffalo L. Rev. 359 (1963).

26. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

means, as the Justice showed, that the question of negligence might be controlled by the *lex loci*, but the question of the guest's recovery is a question for the *lex domicilii* when all parties had the same domicile.

This last great contribution of the Justice sparkles with the brilliant flashes of his great intellectual powers and his zeal for just and equitable solutions. May this writer who had the privilege of gaining the friendship of this great man close this discussion by saying that the juristic world has lost a man who was great, good and excellent in any regard. He will not be with us any longer but his spirit is with us.

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