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CHAPTER 10

Conflict of Laws

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§10.1. Bills and notes: Which law governs. In Shapiro v. Sioux City Dressed Beef, Inc.,¹ the defendant beef company deposited a draft, drawn on a Boston firm, in its checking account in the defendant bank in Iowa. The deposit slip contained the usual provisions that the bank acted only "as depositor's collecting agent. . . . [A]ll items are credited subject to final payment. . . . [T]his bank may charge back . . . any item drawn on this bank which is ascertained to be drawn against insufficient funds or otherwise not good or payable." The bank immediately credited the account and defendant drew on the credit. The draft was forwarded for collection to a Boston bank which, upon receipt of payment from the drawee, was served as trustee with a writ in an action of trustee process, brought by the plaintiff against the defendant beef company. The defendant bank was admitted as a party.² In reversing the Superior Court, the Supreme Judicial Court held that Iowa law governed the question of ownership of the funds, and that, under that law, the bank was a purchaser of the draft, regardless of the terms of the deposit slip.

It is settled Massachusetts law that the depository bank becomes merely an agent for collection³ until the depositor draws on the advanced credit, whereupon a lien is created in favor of the bank for any amount due from the depositor, and the bank becomes a holder for value of the note.⁴ Iowa law, on the other hand, considers an advance on an uncollected negotiable instrument as a termination of the principal-agent relationship and the bank becomes a purchaser.⁵

The principal Massachusetts case on the "place of making" theory is

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² Under G.L., c. 246, §33.
⁴ For an excellent discussion of the commercial aspects of this case, see Universal C.I.T. Credit Corp. v. Guaranty Bank and Trust Co., 161 F. Supp. 790 (D. Mass. 1958), wherein Judge Wyzanski summarizes the interpretations of these deposit slip terms throughout the country.
⁵ Note, Banks as Purchasers of Deposited Negotiable Items, 19 Iowa L. Rev. 338 (1933).
Thomas G. Jewett, Jr., Inc. v. Keystone Driller Co., which involved a conditional sales agreement, executed in Massachusetts, between a Pennsylvania corporation, through a local agent, and a Massachusetts corporation, with New Hampshire designated as place of delivery. The Supreme Judicial Court, after deciding that New Hampshire was the place of delivery, not of performance, held that Massachusetts law governed the nature, validity and interpretation of the contract, as the place where the contract was made.

Although the cases are infrequent, Massachusetts has previously applied this rule to the transfer and endorsement of negotiable instruments. In Brooks v. Bigelow the Supreme Judicial Court held that the law of the place of deposit governed as to title, once that law was placed into evidence. Thus, the law of the state where the deposit was made will govern as to that transaction, although the rights and liabilities of the parties to a check are governed by the law of the place where the check is made payable. The liability of each bank in a chain of correspondent banks engaged in the collection of commercial paper is fixed by the law of the state wherein it conducts its business.

§10.2. Divorce by estoppel. Under our system of law, jurisdiction, the judicial power to grant a divorce, is dependent upon the domicile of the parties. Thus when neither party to the marriage has been domiciled in the state, the courts of which are resorted to for divorce, the decree rendered by this court would be subject to direct attack as void for want of jurisdiction.

Dennis v. Dennis was a petition to vacate a decree of divorce which had been entered against the petitioner nine years before. Mrs. Dennis, the petitioner, and her husband had been married in New York and had lived there during their entire married life. In 1946 Dennis came to Massachusetts and filed a libel for divorce against the petitioner alleging desertion. The petitioner was served in New York and filed an answer denying the alleged desertion. She was represented by counsel and was physically present in the courtroom when her husband falsely testified that he had resided in Massachusetts for the five years last preceding the date of the filing of the libel. He had in fact, as the petitioner well knew, never resided in this Commonwealth, but the petitioner remained silent and did not interpose any objections to the granting of a decree nisi to her husband. She was awarded custody of

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8 282 Mass. 469, 185 N.E. 369 (1933).
7 142 Mass. 6, 6 N.E. 766 (1886). This case was decided on somewhat similar facts but does not contain a satisfactory discussion of the problem.
8 Restatement of Conflict of Laws §349, at p. 430, which states: "The validity and effect of a transfer of a negotiable instrument are determined by the law of the place where the instrument is at the time of its transfer."
9 9 C.J.S., Banks and Banking §214 (1938).

2 Restatement of Judgments §§5, 11.
the child of the marriage and was party to an agreement to set up a trust fund for the support of this child.

Dennis remarried and lived in New York. Nine years after the Massachusetts divorce Dennis died and the petitioner filed a claim in the Surrogate Court in New York claiming a widow's share in the estate of her deceased former husband. The New York court stayed the proceedings pending a determination of the marital status of the petitioner in the courts of this Commonwealth.

The petition to vacate was based upon the alleged fraud of Dennis which was averred to have been exercised both upon the Massachusetts court and the petitioner. The Probate Court dismissed the petition to vacate and this result was upheld by the Supreme Judicial Court.

In refusing to vacate the divorce decree, the Court took the position that the petitioner's participation in her husband's conduct would not alone bar relief. There is lack of jurisdiction which cannot be cured by any conduct of the parties nor by their consent and which constitutes a defect that may be brought to the attention of the court at any stage of the proceedings.

One would expect that the Court would have gone on to hold the divorce decree invalid. Instead the Court applied a doctrine of long standing in the courts of this Commonwealth, to the effect that events occurring after the granting of the decree may have the consequence of barring one in the position of the petitioner from maintaining any proceeding to set aside the decree. Specifically the Court pointed out that the remarriage of the parties or either of them thereby affecting the status and rights of innocent third parties has been held to be a bar to the proceeding to vacate the divorce decree. The Court quotes at some length from the opinion in Langewald v. Langewald, which bases the result "not upon the ground of a strict estoppel, but because her own conduct amounts to a connivance at, or acquiescence in, his subsequent marriage."

Perhaps a more adequate statement of the doctrine is that found in Chapman v. Chapman, in which the Court said:

[w]here a party has invoked the jurisdiction of a court and the other party has voluntarily appeared and submitted thereto, it is not consonant with ordinary conceptions of justice to countenance an attempt at repudiation of that jurisdiction, especially when the attempt would involve the receiving of considerable sums of money without consideration, the confession of bigamy and the unsettlement of other domestic relations presumably entered upon in innocent reliance upon the jurisdiction of such court.

The Court refrained from discussing the effect of the mere lapse of time without any other change in the position of the parties or whether the death of the party obtaining the decree would have affected the right to attack the decree.

4 234 Mass. 269, 125 N.E. 566, 39 A.L.R. 674 (1920).
The result is that the petitioner was precluded from both direct attack by the Massachusetts decision and from collateral attack by the ruling of the New York court. Under the doctrine of *Sherrer v. Sherrer*, and *Johnson v. Muelberger*, the decree of divorce in Massachusetts was entitled to full faith and credit in the pending New York proceedings, the former wife being foreclosed from any collateral attack in a sister state.

By thus insulating the local decree, Massachusetts in its utilization of a kind of estoppel in the interests of finality, illuminates the incongruity that

marriage may not be dissolved by consent of the parties, but they can, by their consent accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicile and wholly wanting in jurisdiction and may subsequently compel the courts of their domicile to give effect to such judgment.

The Court does not say, however, that the estoppel would cure the jurisdictional defect as to other parties. In an effort to solidify the validity of foreign decrees, estoppel might well be used to bar attack by a participating spouse and a second spouse except when a fraud is practiced on the first spouse with respect to the nature of divorce.

There is a tendency to consider children as strangers to the decree, not imputing an estoppel of the parties to them. In *Johnson v. Muelberger*, however, a child was precluded from attack in a sister state, indicating that the standing of the child and the nature of the child's interest would be determined by the standing accorded the child by the divorce-granting state. A child's legitimacy, however, and a right to support ought not to depend upon an estoppel raised against the parties to the divorce. These rights and other pre-existing interests

8 See cases cited in notes 6 and 7 supra, holding that a divorce predicated upon a hearing in which both parties have appeared in person or by attorney is entitled to full faith and credit.
9 Although the Court refrained from using the word estoppel in describing the effect of Mrs. Dennis's conduct, most courts have used the word estoppel in describing the legal effect of this type of conduct. See Note, Enforcement by Estoppel of Divorce without Domicil: Toward a Uniform Divorce Recognition Act, 61 Harv. L. Rev. 928 (1948). Other courts have been careful, however, to point out that the estoppel described was not a true estoppel. See Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940).
10 Note Old Colony Trust Co. v. Porter, 324 Mass. 581, 88 N.E.2d 135 (1949), cited by the Court in the Dennis case, in which executors were allowed to attack collaterally a decree, even though principles of res judicata bind original parties and thus limit them to methods of direct attack.
12 See In re Lindgren, 293 N.Y. 18, 55 N.E.2d 849 (1944) (child not barred by suit of parents to challenge Florida domicile).
14 See Johnson v. Muelberger, note 13 supra.
15 See Weiss, A Flight on the Fantasy of Estoppel in Foreign Divorce, 50 Colum. L. Rev. 409 (1950); Baer, Law of Divorce Fifteen Years After Williams v. North
are not extinguished by the divorce decree. Otherwise due process objections might well arise when full faith and credit requirements disappear.

§10.3. Enforcement of an alimony decree. In *De Gategno v. De Gategno*, the Supreme Judicial Court for the first time interpreted the amendment to G.L., c. 208, §35, enacted by Acts of 1950, c. 57. The Court held that the effect of the amendment is to authorize the Probate Courts of this Commonwealth to enforce the alimony decrees of foreign courts. Appreciation of the effect of the *De Gategno* case requires a brief glance at the background of the cases and statutes which preceded the 1950 amendment.

*Weidman v. Weidman* held that the Probate Courts of this Commonwealth were without jurisdiction to enforce the alimony decrees of foreign courts. Shortly after this case, the General Court amended G.L., c. 215, §6 by the enactment of Acts of 1933, c. 237, §1, which conferred jurisdiction on the Probate Courts "to enforce foreign judgments for the support of a wife."

In *Seltman v. Seltman*, the Court held that this amendment did not apply to situations in which the marital relationship had been terminated, for in such cases the former wife had an adequate remedy at law. The Court said, "That it was the intention of the Legislature that the operation of the statute was to be limited to cases where the marital relationship still continued is further demonstrated by the fact that in the absence of such relationship a remedy at law would be available and adequate."

In the *De Gategno* case it appeared that Mrs. De Gategno, a resident of New York, brought a petition in equity in the Berkshire Probate Court under G.L., c. 208, §35 against the respondent, her former husband, to secure enforcement of a Nevada divorce decree which contained a provision for weekly payments for the support of Mrs. De Gategno and the child. Beginning in 1941, the petitioner and the respondent had been domiciled in New York. In 1948, the petitioner went to Nevada and obtained a divorce in that state. The respondent entered an appearance in the divorce proceeding. The Nevada court incorporated into the divorce decree a property and support agreement made by the parties. The respondent complied with the support terms of the Nevada decree until May of 1954, after which he made no further support payments.

The petitioner prayed that respondent be ordered to comply with the Nevada decree and pay all sums in arrears thereunder. The respondent demurred, and after a hearing, the Probate Court entered an order requiring the respondent to pay the sums in arrears under the terms of the Nevada decree. The respondent appealed from the order.

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§10.3. 1 236 Mass. 426, 146 N.E.2d 497 (1957).
overruling his demurrer and from the final decree of the Probate Court. The Supreme Judicial Court affirmed the interlocutory and final decrees.

The problem presented to the Court was the interpretation of Acts of 1950, c. 57, which provided: "The Court may enforce decrees, including foreign decrees, for allowance, alimony or allowance in the nature of alimony, in the same manner as it may enforce decrees in equity." In the De Gategno case, the Court said that the purpose of the addition of the italicized words, was undoubtedly to remove the effect of the decision in Seltman v. Seltman, so as to authorize the Probate Courts of the Commonwealth to enforce the alimony decrees of foreign courts. Accordingly, an ex-husband who desires to escape the payment of alimony by crossing state lines will be well-advised to seek refuge elsewhere than in Massachusetts.

Thus the efforts of the General Court to overcome the hardship arising from the inadequacy of the remedy at law and the impracticability of extradition have received the judicial approval of our court of last resort.4

§10.4. Uniform Reciprocal Enforcement of Support Act. Phillips v. Phillips1 is a case arising under the Uniform Reciprocal Enforcement of Support Act.2 The proceeding was initiated in the Superior Court of Cumberland County, Maine, by the State of Maine Department of Health and Welfare on behalf of the petitioner, the divorced wife of the respondent, to seek support for their four minor children from the respondent, a resident of Massachusetts. Although the petition filed in the Superior Court in Maine was not in the record before the Supreme Judicial Court in this Commonwealth, the Court took the position that it must be assumed that the petition complied with the requirements of the uniform act. The procedure under the uniform act provides that the court in which the proceeding is initiated shall forward certified copies of the petition to the court where jurisdiction of the respondent is obtained (in this case the Third District Court of Bristol).3

4 See, on this point, Monsman, Equitable Enforcement of Foreign Alimony, 34 Mass. L.Q. No. 4, p. 9 (1949), wherein it is pointed out that the remedy at law, i.e., execution, is inadequate because it is easy for the husband to secrete all his personal property or to give it to trusted friends. Extradition is also impractical because it uproots the husband from the state where he has set up a business or is employed and returns him to a state where he has no employment and no desire to be.

2 G.L., c. 273A.
3 The procedure to be followed in enforcing the duty of support under the uniform act is set out in G.L., c. 273A, §§6-9. The one seeking support commences the action by filing a petition stating the name and address of the respondent and all other pertinent information in the District Court within whose jurisdiction he or she is a resident. This court then holds a hearing to determine if the petition states a cause of action and if a court of a responding state may obtain jurisdiction over the respondent or his property. If it so finds it then sends a certified copy of the petition, any evidence which it has, and a certificate of its findings to the court of the responding state which, upon receipt, docket the cause, obtains jurisdiction of the respondent, schedules a hearing and if so disposed assigns a probation officer to the case.
The only evidence came from the respondent, who was present under summons and was ordered to take the stand over his objection.\(^4\) The District Court made a support order. The Appellate Division dismissed the report and its order was affirmed by the Supreme Judicial Court.

The respondent's main argument was that the uniform act is criminal in nature and thus he should not have been compelled to take the stand and testify against himself. This argument was rejected by the Court which said: "This contention cannot be sustained. The proceedings were civil in character."\(^5\)

Though the Court gave no reasons for reaching this conclusion the decision is sound. The distinction between a civil and a criminal statute is that the prime purpose of the latter is punishment and deterrence, while the purpose of a civil statute is the adjustment of the rights of the parties as between themselves with respect to the wrong alleged. This principle has long been recognized in Massachusetts. The Court has stated:

In the present case, we think the action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for neglect or breach of duty operate to a certain extent as punishment, but the distinction is, that it is prosecuted for the purpose of punishment, and to deter others from offending in a like manner. . . . [T]he one is remedial and seeks indemnity against a party made liable by law to repair the loss he has occasioned, the other is penal and seeks to punish the party for the violation of a duty imposed by law . . . .\(^6\)

The uniform act is designed to provide a procedure to enforce the obligation to support dependents which rests upon one who has removed himself to a state other than that in which the obligation arose and where the dependents are to be found.\(^7\) The remedy thus provided by this statute is in addition to and not in substitution of already existing procedures. While the obligor of the duty to support remains within the state where the obligees of the duty reside, the local law is adequate to secure enforcement of the duty. It is when the obligor leaves that jurisdiction, whether to avoid the obligation or for other reasons, that the uniform act may be brought into play so as, in effect, to extend the enforcement of the duty across state lines. In fact the statute was intended to provide a more facile procedural device to solve the social problem created by the great increase in the number of run-
away husbands seeking to evade their legal obligation to support their dependents.\(^8\)

Prior to the enactment of the Uniform Reciprocal Enforcement of Support Act, which has been adopted by all forty-eight states, the common method of enforcing the duty of support against the fugitive husband was through criminal sanctions and extradition. In some states the extradition feature has been retained in their version of the uniform act. In Massachusetts, however, the extradition provision is omitted. Our statute provides:

The Court, when the Commonwealth is the responding state, may subject the respondent to such terms and conditions as it deems proper to assure compliance with its orders, and may require the respondents to make payments at specified intervals to a probation officer assigned by the Court to the same extent as is provided by law for contempt in any suit or proceeding.\(^9\)

Even in those jurisdictions in which the extradition provision has been retained, the best authority extant considers the reciprocal law to be nevertheless civil in character or at most of a penal nature falling somewhere between the civil and criminal but partaking principally of a civil nature. As one writer has stated: "It is submitted that the act is civil or equitable procedurally with criminal penalties as a last resort."\(^10\) The act thus is chiefly civil in character, containing in some jurisdictions criminal provisions, probably separable, to be employed only in the event of the failure in particular cases of the civil provisions. Thus, while in the past the criminal remedy provided the sole means of enforcement, under the uniform act, when they are retained they are relegated to a subordinate role which will be probably only that of a minatory function.

A recent amendment to the uniform act should be noted.\(^11\) It provides that service of process under the act may be made by an officer authorized to serve criminal process. This amendment, however, in no way affects the proceedings and adds little or no weight to the contention that the statute is criminal.

A second contention by the respondent was that the judge erred in denying his request for a ruling that the burden is on the petitioner to prove the allegation in her petition. The Supreme Judicial Court held that even if the request was technically correct, its denial did not harm the respondent. "The case can be proved out of the respondent's own mouth."\(^12\)

The statute not being criminal, no right of confrontation exists. The uniform act requires no more than that the court of the respond-

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\(^9\) G.L., c. 273A, §12.


\(^12\) 336 Mass. 561, 564, 146 N.E.2d 919, 921 (1958).
§10.4 CONFLICT OF LAWS

The petitioning state shall hear evidence submitted to it by the parties. Thus the petitioner may use means of establishing her case other than her own testimony, as was done in the *Phillips* case. Another means can be suggested. This would be the taking of her own testimony by deposition and forwarding it to the responding state. In this case, however, it would seem that notice to the respondent would be required in order to render the deposition admissible into evidence. Of course she can also appear in person and testify, but one of the purposes of the uniform act is to avoid the necessity for this course. In a word, no reason is seen why petitioner may not avail herself of all the paraphernalia provided for proof in any civil matter.

13 General Laws, c. 273A, §3 provides that the duty to support binds the obligor regardless of the presence or residence of the obligee.