Chapter 10: Conflict of Laws

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CHAPTER 10
Conflict of Laws
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§10.1. Service in diversity cases: Federal or state practice. The *Erie* rule governing choice of law in diversity jurisdiction cases is still marked by ambiguity of meaning and difficulty of application. The United States Supreme Court has attempted to ameliorate the situation in *Hanna v. Plumer*.1

The plaintiff, a citizen of Ohio, filed a complaint in the United States District Court for the District of Massachusetts against the executor, residing in Massachusetts, of a deceased Massachusetts resident. The suit was for damages for personal injuries resulting from an automobile accident in South Carolina allegedly caused by the negligence of the Massachusetts decedent.

Service was made upon the defendant by leaving copies of the summons and the complaint at his residence with his wife, in compliance with Federal Rule of Civil Procedure 4(d)(1).2 A Massachusetts statute provides, however, that an executor need not answer suits unless in-hand service is made upon him or notice of the action is filed in the proper registry of probate within one year of his giving bond.3 The defendant, accordingly, answered that the action could not be maintained because it had been brought in violation of this statute. The district court granted the defendant's motion for summary judgment, holding that the adequacy of the service was to be measured by Section 9, with which the plaintiff had not complied. On appeal, the plaintiff admitted noncompliance with Section 9, but argued that Rule 4(d)(1) defines the method by which service of process is to be effected in diversity actions. The United States Court of Appeals for the First Circuit, finding that "relatively recent amendments [to Section 9] evince a clear legislative purpose to require personal notification within the year," concluded that the conflict of state and federal rules was over "a substantive rather than a procedural matter," and unanimously affirmed.4

Since the service requirements in a number of states would not

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2 Fed. R. Civ. P. 4(d)(1) provides that service shall be made "upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ."
3 G.L., c. 197, §9. Section 9 is in part a statute of limitation. This part of the statute was not involved in the case since the action was timely commenced.
4 *Hanna v. Plumer*, 391 F.2d 157 (1st Cir. 1964).
necessarily be satisfied by compliance with Rule 4(d)(1), the decision of the appellate court posed a threat to the goal of uniformity of federal procedure. The United States Supreme Court, accordingly, granted certiorari. A unanimous Court, in an opinion by Mr. Chief Justice Warren, held that the adoption of Rule 4(d)(1), designed to control service of process in diversity actions, neither exceeded the congressional mandate embodied in the Rules Enabling Act nor transgressed constitutional bounds, and that the Federal Rule was the standard against which the district court should have measured the adequacy of the service. The Court therefore reversed the decision of the court of appeals.

This case presents a conflict between the policy favoring uniformity of federal procedure and the policy of insuring that the outcome of a litigation in a federal court exercising diversity jurisdiction shall be substantially the same as it would be if tried in a state court.

One of the purposes of the Federal Rules of Civil Procedure is to bring about uniformity in the federal courts by getting away from local rules. These Rules were promulgated by the United States Supreme Court pursuant to a congressional Enabling Act which authorizes the Court to prescribe rules for the “practice and procedure of the district courts of the United States in civil actions.” The Enabling Act contains the limitation that the rules “shall not abridge, enlarge or modify any substantive right ....” The year 1938, in which the Federal Rules of Civil Procedure became effective, was also the year in which the Erie rule had its birth. Erie R.R. v. Tompkins, overruling Swift v. Tyson, held that the Rules of Decision Act requires federal courts in diversity cases, when deciding nonfederal issues of substantive law, to follow state court decisions as well as state statutes.

The question of how procedural law is to be distinguished from substantive law thus became pertinent in view of the mandate in Erie and of the Enabling Act’s limitation. The Supreme Court attempted to draw the line in Guaranty Trust Co. v. York when it held that the policy in Erie requires a federal court to follow the state rule whenever disregarding it would substantially affect the outcome of the case. The York “outcome-determinative” test made it clear that Erie-type problems were not to be solved by reference to any traditional substance-procedure distinction. As a result federal courts have been forced to follow state law with respect to matters which for other purposes are often treated as procedural.

7304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).
841 U.S. (16 Pet.) 1, 10 L. Ed. 865 (1842).
In the present case the defendant argued that the *Erie-York* doctrine acts as a check on the Federal Rules of Civil Procedure; that, despite the clear command of Rule 4(d)(1), *Erie* and its offspring demand the application of the Massachusetts rule. The Court summarized the defendant's argument as follows:

Reduced to essentials, the argument is:
(1) Erie, as refined in York, demands that federal courts apply state law whenever application of federal law in its stead will alter the outcome of the case. (2) In this case, a determination that the Massachusetts service requirements obtain will result in immediate victory for respondent. If, on the other hand, it should be held that Rule 4(d)(1) is applicable, the litigation will continue, with possible victory for petitioner. (3) Therefore, Erie demands application of the Massachusetts rule. 12

In *Byrd v. Blue Ridge Rural Elec. Coop.*, 13 the Supreme Court had retreated from the York "outcome-determinative" test. In that case the Court ruled that although a state rule must be applied if it is an "integral part" of a substantive state right, in other instances of federal-state conflict a balancing of federal and state policies should determine whether state law controls. In the present case the Court, in rejecting the defendant's argument, referred to the *Byrd* decision and reiterated its holding that "outcome" is not the only consideration in deciding whether a federal court should follow state practice. The "outcome-determinative" test, the Court continued, must be read in the context of the twin aims of the *Erie* doctrine: discouragement of forum shopping and avoidance of inequitable administration of the law. Concededly, the choice of the federal or state rule would have a marked effect upon the outcome of the present case, and the same could be said of every procedural variation, no matter how trivial. The Court concluded, however, that permitting service of the defendant's wife to take the place of in-hand service of the defendant himself did not raise the sort of equal protection problems with which *Erie* was concerned, and that the difference between the two rules was not relevant to the choice of a forum. 14

The Court also disagreed with the defendant's assumption that the *Erie-York* doctrine constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The scope of the Enabling Act and the constitutionality of specific Federal Rules must be judged in light of the constitutional provision for a federal court system, which carries with it congressional power to make rules governing the practice and pleading in those courts.

*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from com-

12 380 U.S. 460, 466, 85 Sup. Ct. 1136, 1141, 14 L. Ed. 2d 8, 12 (1965).
parable state rules. . . . To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act. Rule 4(d)(1) is valid and controls the instant case.15

The present decision brings welcome clarification to the Erie doctrine as a choice of law rule in diversity actions. The Court's opinion does not remove all ambiguity from the Erie distinction between substance and procedure but, by underscoring what might be called the Byrd approach, it emphasizes the proper allocation of judicial power between the state and federal systems. Erie correctly commands that state law govern affairs which the Constitution leaves to state regulation. But the Constitution also gives Congress the power to provide uniform procedural law for the federal courts. The Court's decision, holding that the Erie-York policy does not mean a mechanical following of state practice, properly reserves a legitimate federal interest to federal regulation. The evident intent of the Massachusetts rule is to permit an executor to distribute the estate which he is administering without fear that further liabilities may be outstanding for which he could be held personally liable. Service of process, as defined by Rule 4(d)(1), would have no substantial effect upon the speed and assurance with which estates are distributed. The application of Rule 4(d)(1) did not, therefore, contravene Massachusetts policy and it promotes the goal of uniform procedure in the federal courts.

§10.2. Contributory negligence: Substance and procedure. The United States Court of Appeals for the First Circuit has applied Massachusetts choice of law rules in Independent Nail and Packing Co. v. Mitchell.1

The plaintiff Mitchell brought a diversity action against the defendant corporation in the United States District Court for the District of Massachusetts. The plaintiff had been assisting in the construction of a barn in Illinois, using nails manufactured by the defendant. As Mitchell struck a nail with a hammer a portion of it broke off and struck him, blinding him in one eye. The plaintiff's suit for damages for personal injury relied upon claims in both breach of warranty and negligence. The district court granted the defendant's motion for a directed verdict on the breach of warranty claim and the case was submitted to the jury on the negligence issue. The court entered judgment on the jury's verdict for the plaintiff.

The court of appeals, in the present case, affirmed the judgment of the district court, holding that whether the plaintiff had been guilty of contributory negligence and whether the defendant had negligently caused the failure of the nail through improper manufacture were questions for the jury.

15Id. at 473-474, 85 Sup. Ct. at 1145, 14 L. Ed. 2d at 16.

§10.2. 1 343 F.2d 819 (1st Cir. 1965).
§10.2 CONFLICT OF LAWS

Since jurisdiction in this case was based upon diversity of citizenship, the court of appeals noted initially that the *Erie* doctrine required it to apply the conflict of law rules that would be applied by Massachusetts courts. Established Massachusetts conflicts law in the torts field, following the customary substance-procedure characterization, was to the effect that the law of the place of the wrong governed matters of substance and that the law of the forum controlled procedural issues. The law of Illinois, the place of the injury, therefore applied as to the substantive rights of the parties. The matter of burden of proof of contributory negligence is ordinarily treated as procedural. Massachusetts law therefore governed the burden of proof of contributory negligence, and in this Commonwealth the burden of proof rests upon the defendant.

The court of appeals also considered another procedural aspect of contributory negligence — whether, under Massachusetts standards, it was proper to submit to the jury the question of contributory negligence. In applying the Massachusetts rule placing the burden of proof of contributory negligence upon the defendant, the Supreme Judicial Court of Massachusetts has evidenced a liberality in leaving the question of contributory negligence to the jury. The court of appeals concluded that Massachusetts law warranted the submission of this issue to the jury and that, on the facts, the jury was entitled to find for the plaintiff on the questions of contributory negligence and liability.

The Massachusetts rules applied in the present case under the *Erie* mandate represent traditional choice of law doctrine in this area of conflict of laws. Recent rejections of the substance-procedure dichotomy have been with a view to permit the substantive law of the state, which has a significant relationship with the transaction, to govern the rights of the parties. There has been no disposition to redefine "matters of procedure." Practical necessity requires that the forum apply its own procedural rules including those relating to the burden of persuasion with respect to contributory negligence. Otherwise, the

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7 The law of the forum determines whether an issue shall be tried by the court or by a jury. LeFlar, *Conflict of Laws* 111-112 (1959); Restatement of Conflict of Laws Second §594 (Tent. Draft No. 11, 1965).

efficiency of judicial administration would be impaired. The present decision, therefore, as it relates to the issue of burden of proof of contributory negligence, is in accord with current conflicts law.

The decision of the Supreme Judicial Court in *Brogie v. Vogel* also considered the substantive and procedural aspects of the issue of contributory negligence.

In *Brogie* the plaintiff, a resident of Massachusetts, sought to recover for personal injuries incurred when, while a social guest, he fell down the cellar stairs in the defendants' house in New Hampshire. The accident occurred when the plaintiff hung his coat up behind a door in the dimly lighted kitchen. The door, instead of leading to a closet, led to the cellar stairs. The trial judge denied the defendants' motion for a directed verdict and the jury returned a verdict for the plaintiff. The defendants took exception to the denial of the motion for a directed verdict.

The Court, applying applicable Massachusetts conflicts doctrine, held that the governing substantive law was that of New Hampshire. New Hampshire law determined whether the plaintiff's conduct constituted contributory negligence. The law of Massachusetts, the forum, controlled the procedural aspects of the issue of contributory negligence.

The Court noted that New Hampshire substantive law was more favorable to the plaintiff's case than that of Massachusetts. New Hampshire law requires the owner of premises to give a social guest reasonable information as to existing dangerous conditions, not open to the latter's observation, of which the owner knows or should know. New Hampshire law imposes only a limited duty with respect to social guests, that is, to refrain from acts of gross negligence. The Court found that the circumstances in the case precluded the trial judge from ruling that the plaintiff was guilty of contributory negligence as a matter of law, and that the jury was warranted in concluding that the plaintiff was not negligent in stepping into what appeared in the dim light to be a closet. The Court, therefore, overruled the defendants' exception.

§10.3. Wrongful death action: State with most significant relationship. The United States Court of Appeals for the Seventh Circuit has refused to apply the Massachusetts wrongful death statute in its entirety in *Gianni v. Fort Wayne Air Service, Inc.*


§10.3. 1962 F.2d 621 (7th Cir. 1965). The case involved two separate causes of action arising out of the death of two men in the same accident.

http://lawdigitalcommons.bc.edu/asml/vol1965/iss1/13
In Gianni, the plaintiff widows and administratrices brought diversity suits in the United States District Court for the Northern District of Indiana against the defendant company, an Indiana corporation with its principal office and place of business in that state. The plaintiffs sought damages under the Massachusetts wrongful death statute for the deaths of their husbands in an airplane crash in Massachusetts. The plaintiffs were residents of Connecticut. The alleged negligence in inspecting the airplane took place in Indiana.

The Massachusetts wrongful death statute requires that such actions shall be commenced within one year from the date of death.\(^2\) The Indiana wrongful death act has a two-year limitation.\(^3\) The suits in the present case were begun eighteen months after the accident. The district court, ruling that the Massachusetts one-year limitation was to be applied, entered orders dismissing the complaints.

On appeal, the court of appeals held that the actions were governed by the Indiana two-year limitation and reversed the orders of the district court. The court of appeals, with respect to the reasons for its decision in Gianni, merely referred to its decision in Watts v. Pioneer Corn Co.,\(^4\) handed down the same day.

The Watts case was a diversity action for wrongful death. The court of appeals held that where a Kentucky resident, whose beneficiaries were residents of Indiana, was killed in Illinois when his automobile collided with a truck owned by an Indiana corporation and driven by an Indiana resident, Indiana law and not Illinois law governed the amount of damages recoverable for the decedent's death. The court noted, on the evidence of recent cases from a variety of federal and state courts, that the traditional rules for choice of law in the tort area are being challenged. The current trend of decisions clearly indicates that the familiar place-of-impact rule is giving way to the view that the substantive law of the state which has significant contacts with the transaction governs the rights of the parties.\(^5\) The court of appeals held, therefore, that although the "contacts" rule was not yet part of Indiana conflicts law as related to tort questions, the courts of Indiana would abandon the lex loci delicti principle and apply Indiana law to the issue of damages. On the facts, the state of Indiana had the more significant relationship to the case.

In Gianni, with its incorporation of the rationale set forth in Watts, the federal court of appeals dealt with the Massachusetts wrongful death statute in the context of an interstate transaction, and it refused to apply the one-year limitation of that act. Indiana can now be added to the growing list of states that have abandoned the mechanical lex loci delicti approach in favor of the more flexible significant relation-

\(^2\) G.L., c. 229, §2.
\(^4\) 342 F.2d 617 (7th Cir. 1965).
\(^5\) See 1963 Ann. Surv. Mass. Law §8.1 for a lengthy consideration of this development, with particular reference to the rejection of the damages provision of the Massachusetts wrongful death statute in the celebrated Pearson case.
ship rule accepted by the Restatement of Conflict of Laws Second.\(^6\)

The latter rule more surely safeguards the right of states to effectuate their own individual interests. If the Massachusetts statute applied, the Indiana public policy embodied in the two-year limitation would have been frustrated by the fortuitous occurrence of the airplane crash in Massachusetts. The court of appeals properly held that the Indiana two-year limitation applied in the present case, for Massachusetts did not have a sufficiently substantial interest in the recovery of damages from an Indiana defendant for its alleged negligence in Indiana.

§10.4. Life insurance contract: Alteration and misrepresentation in application. In *Pahigian v. Manufacturers Life Insurance Co.*,\(^1\) the Supreme Judicial Court has again considered the question of what state’s law should govern the rights created by a life insurance contract.

On January 4, 1961, the insurance company (Manufacturers), a Canadian corporation doing business in Massachusetts, issued a life insurance policy to a domiciliary of Massachusetts. All the circumstances concerning the sale of the policy occurred in Massachusetts with the exception of the fact that the home office of the defendant Manufacturers in Canada made up the policy and sent it to the Boston office. The premiums were paid by the insured up to the time of his death on February 7, 1962. When the defendant refused to pay the amount of the policy, the plaintiff beneficiary brought suit.

Evidence introduced at the trial disclosed that the manager of the defendant’s Boston office, to whom the application had been delivered after the insured had signed it, inserted the words “good recovery” after the words “usual childhood diseases” and that this was done without the knowledge or authorization of the insured. The evidence also revealed extended treatment and hospitalization of the insured for Hodgkin’s disease which he failed to mention in his application. The trial judge ruled that the addition of the words “good recovery” constituted an alteration as a matter of law and brought into operation General Laws, Chapter 175, Section 131.\(^2\) The judge, having allowed the plaintiff’s motion to strike the application and all medical testimony from the record, directed a verdict for the plaintiff to which Manufacturers excepted.

The Supreme Judicial Court resolved the conflict of laws problem in considering Manufacturers’ argument that General Laws, Chapter 175, Section 151, was not applicable because the policy had been issued at the company’s head office in Canada. The Court, noting that everything except the formal issuance of the policy had occurred in

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2 G.L., c. 175, §131, provides: “Unless a correct copy of the application is endorsed upon or attached to a policy of life or endowment insurance, when issued, the application shall not be considered a part of the policy or received in evidence for any purpose. Every such policy which contains a reference to the application, either as a part of the policy or as having any bearing thereon, shall have endorsed thereon or attached thereto, when issued, a correct copy of the application.”
Massachusetts, concluded that "the contract was a Massachusetts contract." It held, therefore, that Section 131 was applicable to the transaction. It further held, however, that the phrase "good recovery" was an immaterial alteration which did not require the exclusion of the insured's application and the medical testimony from evidence under Section 131.

Massachusetts law also provides that misrepresentations by the insured which are made with actual intent to deceive or which increase the risk of loss will enable the company to avoid the policy. If it has been held, moreover, that misrepresentation as to certain diseases does require, as a matter of law, the conclusion that the risk is increased. The Court stated that Hodgkin's disease fell into the category of illnesses which, as a matter of law, increased the risk of loss and that the insured's misrepresentations entitled the insurer to avoid the policy. The Court, therefore, sustained the exceptions and gave judgment for the defendant.

The Court's opinion is significant with respect to the proper choice of law rules relating to the rights created by life insurance contracts. The usual position, following the traditional lex loci contractus rule, is that the validity, interpretation, and effect of a life insurance contract are governed by the law of the place where it is made. If traditional doctrine had been followed in the present case, it might have called for the application of Canadian law because the contract was probably completed there. The newer approach, which repudiates the mechanical use of the lex loci contractus, favors the application of the law of the state which has the most significant relationship with the insurance contract. The Supreme Judicial Court endorsed the significant relationship approach in the present case when it determined that Massachusetts had the important contacts with the contract and that Massachusetts law, therefore, was controlling.

Since the public policy expressed by insurance legislation is to protect the insured against the superior bargaining power of the company, the law of the state with the greatest interest in the insured should be applied to determine the rights of the parties. It is submitted that the Court's decision in the present case, giving full scope to Massachusetts public policy, is eminently correct.

§10.5. Modification of custody decree: Full faith and credit. The extent to which custody decrees are entitled to full faith and credit is still an undecided question. Since custody decrees do not enjoy the same extraterritorial effect as do final judgments, the courts of a second state have shown little hesitation in re-examining the decree of the state of rendition and in giving their own when the best interests

8 G.L., c. 175, §186.
of the child seemed to require this course of action. The decision of
the Supreme Judicial Court in Jones v. Jones\(^1\) illustrates the freedom
of action exercised by all courts in the child custody area.

Abigail and Thomas Jones were married in New Hampshire and
then went to California to live. Wendolyn was born there on April 23,
1960. With the deterioration of the marriage it was decided that Abi­
gail and Wendolyn should come to Massachusetts and visit with the
paternal and maternal grandparents. They arrived in Massachusetts in
June, 1961. Abigail decided to institute divorce proceedings in the
Virgin Islands and Wendolyn was to remain with her paternal grand­
parents until after the divorce became final and her mother was
settled. Wendolyn lived with her paternal grandparents in Massachusetts
since October, 1961. On December 18, 1961, the district court of the
Virgin Islands granted a divorce to Abigail and gave her custody of
the child. Thomas entered a general appearance and submitted to the
jurisdiction of the court. When Abigail continued to show indecision
concerning her future life and Wendolyn's place in it, Wendolyn's pa­
ternal grandmother filed a petition for temporary custody in April,
1963. This petition was assented to by the child's father and a decree
granting such custody was entered. In May, 1963, Abigail filed a peti­
tion to revoke the temporary custody decree and the grandmother filed
a petition for permanent custody. The probate court decreed that the
grandmother should have custody of the child and Abigail appealed.

The Supreme Judicial Court, in affirming the decree of the probate
court, assumed that the court in the Virgin Islands had jurisdiction to
decree the divorce and provide for the custody of Wendolyn.\(^2\) But the
Massachusetts probate court had jurisdiction to enter the present de­
cree required by the needs of the child,\(^3\) the foreign decree notwith­
standing. The Supreme Judicial Court, stating that the governing
principle by which it must be guided was the welfare of the child,\(^4\)
found that the circumstances subsequent to the Virgin Islands decree
justified the present decree changing custody. It concurred, therefore,
in the conclusion of the probate judge that the child should remain
in the custody of her grandmother.

The Court rejected Abigail's contention that the decree of the pro­
bate judge violated the full faith and credit clause of the Federal Con­
stitution.\(^5\) Full faith and credit does not require that a custody decree
be given greater effect in the forum state than it enjoys in the state of
rendition. Since, under the law of the Virgin Islands, the original de­
cree could have been modified on the basis of a subsequent change in
circumstances, the Massachusetts probate court could also modify this
deckire because of changed conditions.\(^6\)

\(\text{§10.5.} \) 1 1965 Mass. Adv. Sh. 849, 207 N.E.2d 922, also noted in §9.2 supra.


\(^3\) See G.L., c. 208, §29; Welker v. Welker, 325 Mass. 738, 745-746, 92 N.E.2d 373,


\(^5\) U.S. Const., Art. IV, §1.

\(^6\) See Goodrich, Conflict of Laws 271-274 (4th ed., Scoles, 1964); Restatement of
The freedom of action in the child custody field, which all courts claim and use, is probably required in order to effect the "welfare of the child" rule. The resulting confusion in this area of conflicts law, however, is regrettable.

§10.6 Testamentary trust of movables: Testator's domicile at death governs. In B. M. C. Durfee Trust Co. v. Franzheim\(^1\) the Supreme Judicial Court applied the usual conflict of laws rule that a testamentary trust of interests in movables is construed in accordance with the law of the state in which the testator was domiciled at the time of his death.

The testator created the trust in question by his will and he died domiciled in Rhode Island. The trust assets were at all times personal property and a Massachusetts trust company was designated as trustee. The testator made provisions for the termination of the trust and for a final distribution of the trust fund. Upon the termination of the trust under the terms of the will the trustee filed a petition for instructions concerning the distribution. The case was reserved and reported, without decision, to the Supreme Judicial Court by the probate judge.

Since the testator had not designated the law of a particular state to govern the construction of his will, the Court ruled that the will was to be construed (in matters not relating to administration) in accordance with the law of Rhode Island where the testator had been domiciled at the time of his death. The Court thus applied the usual choice of law rule pertinent to the construction of a will of movable property\(^2\) and the one endorsed by Massachusetts usage.\(^3\)

Although matters with respect to the administration of the trust were not in issue in the present case, the Court indicated that these were controlled by Massachusetts law. This conclusion followed from the fact that the testator, by designating a Massachusetts trust company as trustee, made it clear that he expected the trust to be administered in Massachusetts.\(^4\)

The Court, having disposed of the conflict of laws questions, then

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1. B. M. C. Durfee Trust Co. v. Franzheim
proceeded to construe the will under apposite Rhode Island law in order to determine the proper distribution of the trust fund.

It is obviously desirable that a trust estate of personal property be treated as a unit and, to this end, that all the movables in the trust be controlled by a single law. For this reason the common law of conflicts ordinarily refers the matter of the construction of a will of movables to the law of the testator's domicile at his death; that is, the law with which he was presumably most familiar. Since, however, the purpose of rules of construction is to carry out the probable intention of the testator, a court may apply the law of some other state if it finds—the Supreme Judicial Court did not so find in the present case—that the testator intended that the rules of construction of that other state should be applicable. The element of uncertainty in this area of the law makes it desirable that the trust instrument clearly indicate what state's law is to govern the problem of construction.

§10.7. Forum non conveniens: Massachusetts cause of action dismissed. The owner of a transitory cause of action often has a choice of forums in which to sue. Some of these forums may have very little connection with the case because the cause of action sued upon occurred outside the state of forum and neither the plaintiff nor the defendant resides in the state. The plaintiff, however, may bring suit in such a forum where he hopes to secure a larger award of damages, or where judicial procedure seems more favorable to him, or where the inconvenience of defending may induce the defendant to enter reluctantly into a settlement. In order to protect the defendant in these circumstances, the forum non conveniens rule has been developed whereby the court in its discretion will refuse to hear the case if it conceives itself to be a seriously inappropriate forum, as long as the plaintiff has a convenient forum elsewhere.\(^1\)

In *Michels v. McCrory Corp.*,\(^2\) the Supreme Court, Special Term, of New York applied the doctrine forum non conveniens in dismissing a tort action where the accident occurred outside New York and neither party was resident in the state. The dismissal, however, was subject to conditions to preserve the rights of the plaintiff.

The plaintiff, a resident of Massachusetts, was injured in this Commonwealth. The defendant company, a Delaware corporation, was doing business in both New York and Massachusetts. The plaintiff first brought suit for damages in Massachusetts. Thereafter, the plaintiff voluntarily discontinued the Massachusetts action without prejudice and brought suit in the New York court, contending that New York's discovery and disclosure procedures were better suited to protect the interests of the parties. The defendant corporation moved for an order declining jurisdiction upon the grounds that the parties

\(^1\) Leflar, Conflict of Laws 87-90 (1959); see Restatement of Conflict of Laws Second §117e (Tent. Draft No. 4, 1957); Stumberg, Conflict of Laws 166-170 (3d ed. 1963).

\(^2\) 44 Misc. 2d 212, 253 N.Y.S.2d 485 (Sup. Ct. 1964).
did not reside in New York and that the injury happened outside the state.

The New York court found that the case, involving a Massachusetts tort, could more conveniently be tried in Massachusetts. The plaintiff plainly was engaged in forum shopping since New York had only slight connection with the factual circumstances surrounding the suit. The court, in addition to calling attention to the locus delicti, noted the Massachusetts residence of the plaintiff and the Delaware incorporation of the defendant company. It concluded, therefore, that "the administration of justice will clearly be better served by not burdening this court with this Massachusetts case."

New York practice permits a court, in exercising its discretionary power to decline jurisdiction under the forum non conveniens rule, to impose appropriate conditions to safeguard the rights of the parties. The court in the present case granted the defendants' motion with the following qualifications:

The motion to dismiss is granted . . . on condition that, on or before settlement of the judgment herein, defendant shall stipulate that in the event plaintiff infant commences a suit in the State or Federal Courts of Massachusetts within six months after the determination of all appeals from the judgment to be entered herein or after the expiration of the time to appeal therefrom if no appeal be taken, defendant will waive any defense in such action of the statute of limitations and any defense based on the bringing and termination of the prior Massachusetts suit or this suit or both, and that in the event that within such period, the infant plaintiff seeks to vacate the discontinuance of the Massachusetts action and reinstate it, defendant will consent thereto.

The forum non conveniens rule is becoming increasingly important. The doctrine is now law in about half of the states and has been espoused by the Supreme Court of the United States. The principle of forum non conveniens also underlies the significant Section 1404(a) of the Judicial Code of 1948 which provides for the transfer of jurisdiction among the federal district courts. While the private interests of the litigants and factors of public interest justify the existence of the doctrine, an unfortunate result of its application is the delay which may bar the plaintiff's cause of action in other states owing to the running of the statute of limitations. The New York practice of conditional dismissal, as seen in the present case, is a desirable way of avoiding this difficulty.

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§ 10.7 CONFLICT OF LAWS

3 See C.P.L.R., Rule 3211(a)(2).
5 Ehrenzweig & Louisell, Jurisdiction in a Nutshell 52 (1964).
§10.8. Validation of marriage statute: Extraterritorial effect. In Russo v. Art Steel Co.\(^1\) the New York Supreme Court, Appellate Division, gave extraterritorial effect to a Massachusetts validation of marriage statute to validate a marriage performed in New York. The case came to the court on appeal from a decision of the New York Workers' Compensation Board which had found that the claimant was the legal widow of the decedent.

The deceased employee married the claimant in a ceremony performed on February 9, 1935, in New York City. He had been previously married and had procured a divorce from his first wife in Massachusetts. The interlocutory decree was entered on October 4, 1934, and did not become final until April 5, 1935.\(^2\) The claimant was unaware of her husband's prior marriage until about two months after their marriage. Immediately after the marriage the couple spent a few weeks living in Massachusetts. They returned to New York before the divorce decree became final and lived together as husband and wife for twenty-six years. Three children were born of the marriage.

The general conflicts rule is that a marriage which meets the requirements of the state of celebration is valid everywhere.\(^3\) If, however, a divorce decree is interlocutory, so that a prior marriage is not actually terminated until after the lapse of a set period of time, a second marriage would be bigamous and invalid everywhere.\(^4\) The New York marriage between the claimant and the decedent was, therefore, void.

There is a Massachusetts statute which provides for the validation of a marriage which takes place at a time when an impediment exists but where one of the parties acts in good faith and where the impediment is later removed.\(^5\) The Massachusetts decisions have made it clear that the statute is remedial in nature in order to protect persons who marry in good faith and to avoid the stigma of illegitimacy for innocent children when one parent is blameless of any conscious vio-

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\(^2\) See G.L., c. 208, §21.


\(^4\) LeFlar, Conflict of Laws §10 (1959); Restatement of Conflict of Laws Second §130, Comment b (Tent. Draft No. 4, 1957).

\(^5\) G.L., c. 207, §6, reads as follows: "If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents."
The question before the court in the present case was whether the void New York marriage could be validated by the operation of this Massachusetts statute.

The New York court, finding that the conditions prescribed by the Massachusetts act had been met, ruled that "the Massachusetts statute has extraterritorial effect and can be applied to parties who are married and live outside of Massachusetts." The marriage of the claimant and the decedent was validated by the statute after the interlocutory decree became final on April 5, 1935. The court held, therefore, that the marriage could be given effect for the purpose of granting workmen's compensation death benefits and affirmed the decision of the Workmen's Compensation Board.

The recognition by the New York court of General Laws, Chapter 207, Section 6, was consistent with giving full faith and credit to the interlocutory nature of the Massachusetts divorce decree. The application of the statute by the court did not prejudice any interest of Massachusetts. New York clearly had the paramount interest in the status of the claimant and a New York court could apply Massachusetts law to effect state policy of protecting innocent parties of void New York marriages. The net result of the court's decision was to make operative in New York the same liberal view followed in Massachusetts by its courts.
