Chapter 9: Conflict of Laws

Francis J. Nicholson S.J.
CHAPTER 9

Conflict of Laws

FRANCIS J. NICHOLSON, S.J.

§9.1. Construction of federal change of venue statute: Transferee district required to apply state law of transferor district. In *Van Dusen v. Barrack*¹ the United States Supreme Court held that wrongful death actions begun in the United States District Court for the Eastern District of Pennsylvania could be transferred to the United States District Court for the District of Massachusetts under the federal change of venue statute, and that the federal court in Massachusetts, in the event of such a transfer, must apply applicable Pennsylvania state law including its conflict of laws rules.

The case arose from the crash of a commercial airliner into Boston Harbor on October 4, 1960. Over 150 suits for wrongful death and personal injury were brought against the airline and several manufacturers as a result of the accident, more than one hundred of them in the United States District Court for the District of Massachusetts and more than forty-five in the United States District Court for the Eastern District of Pennsylvania.

The plaintiffs in the present case were Pennsylvania fiduciaries representing the estates of Pennsylvania decedents killed in the crash. The defendants moved under Section 1404(a) of the Judicial Code of 1948² to transfer the plaintiffs' wrongful death actions from the Eastern District of Pennsylvania to the District of Massachusetts where, allegedly, most of the witnesses lived and where the other actions were pending. The district court granted the motion, holding that the transfer was justified irrespective of whether the transferred actions would be governed by the laws and choice of law rules of Pennsylvania or of Massachusetts.³ The district court also specifically held that transfer was not precluded by the fact that the plaintiffs had not qualified to sue as representatives of the decedents under Massachusetts law. The plaintiffs sought a writ of mandamus from the United States Court of Appeals for the Third Circuit to restrain

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² 28 U.S.C. §1404(a) (1958). In permitting a change of venue within the federal judicial system, §1404(a) provides that: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
the transfer. The court of appeals ruled that a Section 1404(a) transfer could be granted only if, at the time the suits were brought, the plaintiffs had qualified to sue in Massachusetts. Section 1404(a) restricts transfers to those federal districts in which the action "might have been brought." Since the plaintiffs had not obtained ancillary appointment in Massachusetts when their suits were brought in Pennsylvania, they were unable to initiate their actions in Massachusetts. Therefore, the appellate court concluded that Massachusetts was not a permissible forum under the "might have been brought" limitation and directed the district court to vacate its order of transfer.4

The United States Supreme Court granted certiorari5 and, in an opinion by Mr. Justice Goldberg for a unanimous Court, held that the judgment of the court of appeals must be reversed, that both the court of appeals and the district court had erred in their assumptions regarding the state law to be applied to a Section 1404(a) transfer, and that, accordingly, the case must be remanded to the district court.

With regard to the issue as to where the action "might have been brought," the Court pointed out that the purpose of Section 1404(a) was to allow transfers of suits from one federal district to another for the convenience of parties and witnesses and in the interest of justice.6 The Court said that it could not agree that the "might have been brought" clause was intended to limit the availability of convenient federal forums by referring to state-law rules such as those concerning capacity to sue. The court of appeals' decision, the Court continued, would give personal representatives bringing wrongful death actions the power unilaterally to reduce the number of permissible federal forums merely by refraining from qualifying as representatives in states other than the one in which they wished to bring suit. Accordingly, the Court held that the words "where it might have been brought" must be construed with reference to the federal laws of venue and jurisdiction and not with reference to laws of the transferee state concerning the capacity of fiduciaries to sue.7

The next question that faced the Court was whether a change of venue within the federal system was to be accompanied by a change in the applicable state law. The district court had held that a transfer could be ordered irrespective of whether the transferred actions would be governed by the laws and choice of law rules of Pennsylvania or of Massachusetts. The Massachusetts Death Act

4 Barrack v. Van Dusen, 309 F.2d 953 (3d Cir. 1962).
7 Id. at 621-624, 84 Sup. Ct. at 812-813, 11 L. Ed. 2d at 953-954. As the Court had already noted, there was no question concerning the propriety either of venue or of jurisdiction in the District of Massachusetts, the proposed transferee forum. Id. at 617, 84 Sup. Ct. at 809, 11 L. Ed. 2d at 950.
based the recovery of damages upon the degree of the tort-feasor's culpability with a $20,000 limit.\textsuperscript{8} The Pennsylvania Act followed the compensation principle without any limitation as to the amount of damages.\textsuperscript{9} The plaintiffs contended, therefore, that the change to the Massachusetts district, with the likelihood of a change to Massachusetts state law prejudicial to the plaintiffs, was precluded by the "interest of justice" clause of Section 1404(a).

The Court disagreed with the district court's assumption that a transfer would be permissible even if accompanied by a significant change of law and stated that the decisions of the lower federal courts construing Section 1404(a) had protected plaintiffs against a prejudicial change in state laws through transfer. The Court, specifically endorsing the view adopted in \textit{Headrick v. Atchison, T. & S. F. Ry.},\textsuperscript{10} and further developed in \textit{H. L. Green Co. v. MacMahon},\textsuperscript{11} held that in cases in which the defendants seek transfer, the transferee district court must apply the state law that would have been applied if there had been no change of venue. This meant, in the present case, that the federal district court in Massachusetts would be required to apply Pennsylvania state law, including its choice of law rules, to the wrongful death actions. It also meant that the plaintiffs' capacity to sue would also be governed by the laws of Pennsylvania.\textsuperscript{12}

The final question dealt with by the Court was whether the proposed transfer could be justified on the grounds of convenience and fairness. The district court, in its opinion, had assumed that transfer to Massachusetts would facilitate the consolidation of these cases with those pending in the District of Massachusetts. Since, however, Pennsylvania law would govern the trial of the transferred cases, insofar as this law might be different from the law governing the cases already pending in Massachusetts, consolidation might no longer be feasible.\textsuperscript{13} Accordingly, the Court remanded the case to the district court so that the motion to transfer could be reconsidered in the light of all the factors bearing upon the desirability of transfer.\textsuperscript{14}

\textsuperscript{8} The Massachusetts statute has since been amended to raise the upper limit of recovery to $30,000. G.L., c. 229, §2.
\textsuperscript{10} 182 F.2d 905 (10th Cir. 1950).
\textsuperscript{11} 312 F.2d 650 (2d Cir. 1962), \textit{cert. denied}, 372 U.S. 928 (1963).
\textsuperscript{13} Such might be the result, the Court noted, if Pennsylvania law did not subject the transferred suits to the Massachusetts culpability and damage limitation provisions. In this situation the plaintiffs might be dependent upon compensatory damage witnesses more conveniently located for trial in Pennsylvania.

In a decision rendered after the present case, \textit{Griffith v. United Air Lines, Inc.}, 416 Pa. 3, 203 A.2d 796 (1964), the Pennsylvania Supreme Court abandoned the strict lex loci delicti rule in order to apply Pennsylvania law to the issue of damages in an action brought on behalf of the estate of a Pennsylvania decedent who died in a Colorado plane crash. The court, noting that the estate could recover little under Colorado law but might recover a substantial amount under Pennsylvania law, held that Pennsylvania, the domicile of the decedent and his family, had a greater interest in the amount of recovery than had Colorado.

\textsuperscript{14} 376 U.S. 612, 643-646, 84 Sup. Ct. 805, 823-824, 11 L. Ed. 2d 945, 965-967
The present decision brings welcome added precision to the interpretation of Section 1404(a) of the Judicial Code. More specifically, it removes some of the confusion remaining after the Court's decision in *Hoffman v. Blaski.* In *Hoffman* the Court denied transfer, ruling that the action might not have been brought in the transferee district because at the time the complaint was filed in the transferor court the transferee forum lacked both venue of the action and power to command jurisdiction over the defendants. Mr. Justice Goldberg distinguished *Hoffman,* stating that in *Van Dusen* both venue and jurisdiction were proper in Massachusetts. The critical issue, as the Court saw it, was whether the limiting words of Section 1404(a) refer not only to federal venue statutes but also to state laws that might further restrict the availability of convenient federal forums. The Court refused to extend the *Hoffman* decision by concluding that the limiting clause of Section 1404(a) makes no such reference to state law. This result seems proper in view of the federal policy of facilitating litigation in convenient federal courts.

It is interesting to note, too, that the present decision is in accord with the accepted interpretation of the increasingly important forum non conveniens rule. The Restatement of Conflict of Laws Second acknowledges that the plaintiff ordinarily controls choice of forum, and that his choice of the place of suit is not to be disturbed unless it is seriously inappropriate and an alternative forum is available. It is submitted that the Court's holding that the transferee district must apply the law of the transferor forum accords to the plaintiffs the advantages accruing to them under the forum non conveniens doctrine.

It should be observed, finally, that the Court's ruling that the transferee court should apply the law of the transferor forum is not an absolute norm for all situations. Such an interpretation of the Court's holding would, obviously, encourage the abuse of forum shopping. The Court was aware of the necessity of placing limitations upon its ruling when it stated the following:

In so ruling, however, we do not and need not consider whether in all cases §1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under §1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of forum non conveniens.

(1964). Mr. Justice Black noted that he concurred in the reversal but he believed that, under the circumstances shown in the opinion, the Court should now hold it was error to order the actions transferred to the District of Massachusetts. 15 383 U.S. 335, 86 S. Ct. 1084, 14 L. Ed. 2d 1254 (1960).

16 Restatement of Conflict of Laws Second §117e, Comment c (Tent. Draft No. 4, 1957).

The fact that the decision to grant or deny a motion to transfer is discretionary with the district judge\(^\text{18}\) should, in any case, obviate the danger of misuse of the federal change of venue statute.

\section{Minority stockholder's derivative suit: Federal Investment Company Act of 1940 and choice of law rule.} In \textit{Levitt v. Johnson}\(^\text{1}\) the United States District Court for the District of Massachusetts applied Massachusetts law in dismissing a stockholder's derivative suit brought on behalf of a Massachusetts corporation and based upon a federal statute.

The plaintiff stockholder, at the time when the complaint was filed, was executor for the estate of an owner of stock in the Massachusetts corporation, letters testamentary having been issued to him by an Illinois probate court. He had not, at this time, been appointed ancillary administrator by a Massachusetts probate court.

The plaintiff claimed that the directors of the corporation and outside investment advisers had injured the corporation by violations of the federal Investment Company Act of 1940\(^2\) and by waste of corporate assets. Most of the claimed violations and waste were related to allegedly excessive advisory fees which, according to the complaint, constituted embezzlement in violation of Section 37 of the federal act.\(^3\) The complaint stated that it would have been futile for the plaintiff to make demand upon the corporate directors because they were among the alleged wrongdoers. The plaintiff also claimed that a demand upon the other stockholders to bring action was unnecessary and would be futile.\(^4\)

The plaintiff thereupon requested the court to declare the advisory fee contracts void and to order the defendants to repay all fees to the corporation. The defendants moved to dismiss the complaint on the grounds, inter alia, that it failed to state a claim upon which relief could be granted. The federal district court dismissed the complaint for failure to state a cause of action because of the failure of the plaintiff to plead that he had complied with Massachusetts law as to prior demand upon the other shareholders in the corporation before instituting the derivative suit. The court held that this Massachusetts rule had to be complied with even though the plaintiff's claim was based upon a federal statute.


\(\text{3}\) 15 U.S.C. §§80a-36 (1958) states in part as follows: "Whoever steals, unlawfully abstracts, unlawfully and willfully converts to his own use or to the use of another, or embezzles any of the moneys, funds, securities, credits, property, or assets of any registered investment company shall be deemed guilty of a crime."

\(\text{4}\) The reasons given for the asserted futility included: the transactions complained of were illegal and therefore incapable of ratification by a majority of the stockholders; under the charter and by-laws of the corporation the shareholders could not require the directors to bring suit; and a demand upon more than 48,000 stockholders would place an unreasonable financial burden upon the plaintiff.
The court found that it had jurisdiction of the action. It also ruled that the plaintiff executor had capacity to bring the derivative suit although he had not been appointed ancillary administrator in Massachusetts when he filed the complaint. The law recognizes that an executor may bring suit in a personal rather than representative capacity outside the state of his appointment when the cause of action in behalf of the estate arises out of transactions occurring after the death of the decedent. Since the plaintiff held legal title to shares in the corporation after his appointment as executor by the Illinois probate court, and since some of the wrongs allegedly occurred during the period of his executorship, the court correctly held that he had the right to bring an action for an injury to the corporation during the time he was legal owner, even though the ownership was for the benefit of others.

The principal problems in the case were what law governs the right of a shareholder to maintain a derivative suit and whether the plaintiff executor had fulfilled the essential conditions of that governing law. The usual conflict of laws rule is that the local law of the state of incorporation determines the right of a shareholder to participate in the administration of the affairs of the corporation and to act as its representative in pursuing a claim. The court, consistent with this well-established principle, held that the local law of Massachusetts, the state of incorporation, controlled the right of the plaintiff to maintain his derivative suit.

Under Massachusetts law a minority shareholder cannot bring a derivative suit to enforce a claim that a majority of his fellow shareholders have determined in good faith not to present, even though the alleged wrong is not ratifiable. Because of this rule of Massa-

5 Section 44 of the Investment Company Act of 1940 expressly vests the federal district courts with jurisdiction of "violations of this subchapter or the rules, regulations, or orders thereunder." 15 U.S.C. §§80a-43 (1958).


7 The court found that the complaint had fulfilled the procedural requirements of Rule 23(b) of the Federal Rules of Civil Procedure in that it set out in detail the reasons why the plaintiff did not attempt to obtain action from the shareholders. Fed. R. Civ. P. 23(b) reads in relevant part as follows: "In an action brought to enforce a secondary right on the part of one or more shareholders . . . the complaint shall . . . set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."


10 Solomont & Sons Trust, Inc. v. New England Theatres Operating Corp., 326 Mass. 99, 93 N.E.2d 241 (1950). With respect to the requirement of demand upon fellow stockholders, the so-called Massachusetts rule expressed in the Solomont case
Massachusetts law, the court stated that a shareholder in a Massachusetts corporation must make demand upon the other stockholders before he brings a derivative suit. Only an allegation that the majority are corrupt or are otherwise incapable of acting in good faith excuses the demand. Since the plaintiff failed to plead compliance with the strict Massachusetts rule as to prior demand, the court dismissed the complaint for failure to state a cause of action. 11

The court's determination to apply the conventional conflicts rule respecting the plaintiff's right to bring his derivative action posed another and more difficult choice of law problem for the tribunal. This was not a diversity jurisdiction case in which the federal district court would be required, under the *Erie* rule, to apply Massachusetts law, including its conflicts law. 12 The action was based upon the federal Investment Company Act of 1940, and the court took jurisdiction under Section 44 of that statute. 13 The plaintiff in bringing his derivative suit was prosecuting a federally created right. The question presented itself, therefore, as to whether the court reached the right decision in permitting state law to cut off the enforcement of that federal right.

It is clear that a federal court must apply federal law to a federal issue and state law to a state issue, irrespective of the basis of the jurisdiction. 14 The correct choice of law requires, therefore, that a court determine whether the interest in question is federal or state. The court in the present case determined that the plaintiff's right to bring a derivative action for his corporation was essentially a matter relating to the internal management of the corporation. It was, therefore, a state interest to be governed by the law of Massachusetts, the state of incorporation, even though the claim of wrongdoing was based upon a federal statute. 15

The court was certainly cognizant of the federal interest issue, for it stated that the situation would be different if the federal statute had provided the stockholder with a direct right against those who damaged the corporation in violation of a national regulatory policy is a minority position and has been criticized. See Note, Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit, 73 Harv. L. Rev. 746, 747, 762 (1960).


14 See note 5 supra.


16 222 F. Supp. 805, 808-809 (D. Mass. 1963). In so ruling the court specifically declined to follow the contrary doctrine enunciated in *Rogers v. American Can Co.*, 305 F.2d 297 (3d Cir. 1962), holding that the derivative right of a stockholder to present his corporation's claim of damage for injuries caused by violation of the federal antitrust laws was a right determined by federal law and could not be cut off by an honest vote of a majority of the stockholders.
established by the statute. But the Investment Company Act of 1940 did not provide for such a direct right of action.\textsuperscript{16}

The choice of law problem in this mixed federal-state question area remains a difficult one, but the court's solution in the present case seems proper. Inasmuch as the plaintiff-executor sought to press, derivatively, the Massachusetts corporation's claim and not his own direct right, the district court was correct to hold him to the demand requirement prescribed by Massachusetts law.\textsuperscript{17}

§\textsuperscript{9.3}. Construction of a will of movables: Law of testator's domicile at time of death governs. In *Moore v. Cannon*\textsuperscript{1} the Supreme Judicial Court applied the usual conflict of laws rule that a will 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.\textsuperscript{2}

The testator executed his will in 1925 while domiciled in New York. He thereafter moved to Massachusetts where he died in 1926. When the testator made his will, and at his death, personality constituted the bulk of his estate.

By his will the testator gave the residue of his estate in trust to pay the income to his wife during her life; at the death of his wife there was to be set up a trust for each then-surviving child of the testator. The whole corpus of each trust was to have been paid to the child by the time he had reached age thirty. Paragraph seven of the will, which was directly involved in the principal issue in the case, read as follows:

In the event of the death of any of my . . . children prior to the death of my . . . wife, leaving a wife or husband or issue of him or her surviving, and surviving my said wife, I hereby direct my . . . trustee upon the death of my . . . wife to . . . pay over the part of my estate which would have gone to such child . . . had he or she survived my . . . wife and lived to the age of thirty years, to those who would have been entitled to receive such


\textsuperscript{17} Since this analysis was written, the United States Court of Appeals for the First Circuit has vacated the judgment of the federal district court and remanded the case to that court with directions. Levitt v. Johnson, 334 F.2d 815 (1st Cir. 1964), cert. denied, 85 Sup. Ct. 649 (1965). The court of appeals, holding that the judgment of the district court "negates the intention of the [federal Investment Company Act] and underestimates the role to be played by the federal courts in the implementation of national regulatory legislation," ruled that federal rather than state law controlled the minority stockholder's derivative suit under the federal statute. The writer is not convinced that the federal issue was the principal interest in question. More definite criteria are needed to resolve the choice of law problem in this federal-state interest area.

\textsuperscript{1} 1964 Mass. Adv. Sh. 929, 199 N.E.2d 312, also noted in §4.2 supra.

part of my . . . estate had such child died intestate vested with the title thereto. 8

At the death of the testator's widow in 1961, the trustees under the will sought declaratory relief concerning the distribution of the trust corpus. Specifically, the case was concerned with the distribution of the share which Donald, a son of the testator, would have taken if he had been alive at the death of the testator's widow. Donald died in 1943, leaving his wife and an adopted son, John, both of whom were still living. The primary issue was whether John, adopted in Massachusetts by Donald in 1938, more than twelve years after the testator's death in 1926, could share in the trust corpus by virtue of the provisions of paragraph seven, already quoted. The case was reported to the Supreme Judicial Court by the probate judge without decision.

Since the testator had not designated a law to govern the construction of his will, the Court ruled that the will was to be construed in accordance with the law of Massachusetts where the testator had been domiciled at the time of his death. The Court thus applied the usual choice of law principle pertinent to the interpretation of a will of movable property 4 and the one endorsed by Massachusetts usage. 5

The Court then turned to the interpretation of paragraph seven of the will and held that it referred to the statute governing the intestate distribution of Donald's estate. Since Donald died domiciled in Massachusetts, conflicts law dictated that questions of intestate succession to his personal property were to be determined by the law of Massachusetts. 6 The statutes referred to, therefore, were the Massachusetts statutes relating to intestacy. 7

The Court, having disposed of this conflict of laws problem, resumed the interpretation of paragraph seven under apposite Massachusetts law to determine what rights, if any, the adopted son John had in the trust corpus.

Prior to 1958, an adopted child's rights under a will were severely restricted if the testator were not the adopting parent. 8 Consequently,

4 See note 2 supra.
7 See G.L., c. 190, §3; id., c. 210, §7.
8 G.L., c. 210, §8, formerly read: "The word 'child,' or its equivalent, in a . . . bequest shall include a child adopted by the . . . testator, unless the contrary plainly appears by the terms of the instrument; but if the . . . testator is not himself the adopting parent, the child by adoption shall not have, under such instrument, the rights of a child born in lawful wedlock to the adopting parent, unless it plainly appears to have been the intention of the . . . testator to include an adopted child." Section 8 has been amended by Acts of 1958, c. 121, §1, to read: "The word 'child,' or its equivalent, in a . . . bequest shall include an adopted
if the words "issue" and "heirs," found in other provisions of the testator's will, had occurred in the dispositive part of paragraph seven, it could reasonably have been argued, on the basis of the pre-1958 form of General Laws, Chapter 210, Section 8, that John could not share in the part of the trust corpus which Donald would have taken if he had survived his mother.

The testator, however, used different words to designate the ultimate recipients of that part of the trust corpus, viz., "to those who would have been entitled to receive such part of my . . . estate had such child died intestate vested with the title thereto." This language, the Court stated, indicated the testator's intention that Donald's share of the trust property was to be dealt with essentially as Donald's own property, which the testator should have realized might pass to later adopted children of Donald. The Court held, therefore, as a matter of interpretation of the testamentary language, that the same persons, including the adopted son John, took Donald's share of the corpus who would have taken Donald's own property by intestacy.

The Court stated that no Massachusetts case that had been brought to its attention dealt with precisely this question. Case law abundantly substantiated the construction of the pre-1958 form of General Laws, Chapter 210, Section 8, as excluding an adopted child when a person not the adoptive parent used the words "issue," "heirs," and "children" in the dispositive language of the will. The Court refused, however, to extend those decisions to the present case, in which the testator in effect treated his deceased son Donald's share, for the purposes of distribution, as if legal title had been vested in Donald. The Court thereupon ordered a decree to be entered in the probate court declaring, inter alia, that John should take two thirds of the share of the trust corpus which would have been Donald's had he survived the testator's widow.

It is obviously desirable that so far as possible an estate should be treated as a unit and, to this end, that its different components should be controlled by a single law. For this reason the common law of conflicts refers questions relating to the validity, effect, and construction of a will of movables to the law of the testator's domicile at his death. The application of traditional choice-of-law doctrine by the Court in the present case was justified because the various elements in the case clearly called for Massachusetts law in the interests of uniformity and convenience.

The Court's refusal to extend the disabling rule relating to an adopted child was also warranted. Present trends favor treating child to the same extent as if born to the adopting parent or parents in lawful wedlock unless the contrary plainly appears by the terms of the instrument." The 1958 Act (by §2) made the amendment applicable only to "grants . . . or bequests executed after the effective date of" that act.

adopted children equally with the natural children of parents. The 1958 amendment of General Laws, Chapter 210, Section 8,10 attests to the presence of that trend in Massachusetts. The Court's decision, therefore, was in accord with present Massachusetts public policy.

§9.4. Life insurance contract: Effect of material misrepresentations in application. In Merchants National Bank of Newburyport v. New York Life Insurance Co.,1 the Supreme Judicial Court was presented with the question of what state's law should govern the rights created by a life insurance contract. Specifically, the issue presented was what law controls as to whether a false statement made by the insured in his application to the company bars recovery upon the policy.

The insurance company (New York), through a California office, issued to a domiciliary of California an insurance policy on his life. The policy was assigned to the plaintiff bank in California. The insured died eight months after the issuance of the policy. In his application the insured had stated that he had never used alcoholic beverages to excess or been treated for alcoholism. An investigation by the defendant, New York, disclosed that the insured's representations were anything but true. It consequently notified the plaintiff that because of the misrepresentations the policy was voidable, that it had elected to rescind, and that therefore it denied liability. The bank thereupon brought action to recover the face amount of the policy.

In answer to a demand for the admission of facts under General Laws, Chapter 231, Section 69, the plaintiff admitted the insured's misrepresentations with reference to the use of alcohol. At the close of the evidence the trial judge directed a verdict for New York to which the bank excepted.

The Supreme Judicial Court held that under the law of Massachusetts, as under the law of California, the trial court correctly directed a verdict for New York and overruled the plaintiff's exceptions. Under Massachusetts law the misrepresentations concerning the use of alcohol materially increased the risk, as a matter of law, and entitled New York to avoid the policy.2 The Court, noting that the insured had his domicile in California, and that the insurance contract seemed to have been made in that state, also considered the law of California. An analysis of apposite California law revealed that the same result would have been reached under that law.

Although the events in the present case occurred in California, and the suit was brought in Massachusetts, there was no choice of

10 See note 8 supra.


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law problem. Since the outcome was the same whether Massachusetts or California law was applied, the Court did not have to decide between its own law and the law of California to determine the rights of the parties. The Court's opinion, however, is not without significance with regard to the proper choice of law rule relating to the rights created by life insurance contracts.

The substantial weight of authority is that the validity, interpretation, and effect of a life insurance contract are governed by the law of the place where it is made.8 This position represents a particular application of the traditional lex loci contractus rule. The Court took cognizance of traditional doctrine, therefore, when it decided to consider the law of California "because the contract seems to have been made there."4 But the Court also noted, with a reference to Section 346h of the Restatement of Conflict of Laws Second, that the insured had his domicile in California. The inference seems to be that the Court is not irrevocably committed to the traditional place-of-making rule and would give full consideration to the law of the state which had significant contacts with the contract.

Inasmuch as the chief purpose of insurance legislation is to protect the insured individual against 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 mechanical application of the lex loci contractus does not achieve this objective.6

§9.5. Interspousal immunity: Domiciliary law controls. As this writer had occasion to note at some length in the 1963 SURVEY, the traditional rules for choice of law in tort cases are under attack.1 As a consequence, the traditional place-of-impact rule is gradually giving way to the view that the substantive law of the state which has significant contacts with the transaction determines whether there is a cause of action sounding in tort. The decision of the Supreme Court of New Hampshire in Thompson v. Thompson2 attests to this development.

6 Restatement of Conflict of Laws Second §346h (Tent. Draft No. 6, 1960), reads in part as follows: "(1) Except as stated in Subsection (2), the validity of a life insurance contract and the rights created thereby are determined . . . by the local law of the state where the insured was domiciled at the time the policy was issued. (2) If the contacts which the contract has with another state are sufficient to establish a more significant relationship between the contract and the other state, the local law of the other state will govern."
6 Although the courts usually purport to apply the law of the place of making to determine the rights created by life insurance contracts, it seems that in the great majority of decisions this place has coincided with the insured's domicile at the time of his receipt of the policy. See id. Reporter's Note at 117.

In *Thompson* a wife brought action against her husband in the New Hampshire court to recover for injuries allegedly caused by the gross negligence of her husband while operating, in Massachusetts, a motor vehicle in which she was a passenger. Both wife and husband were domiciled in New Hampshire. The defendant husband moved to dismiss the action on the ground that one spouse cannot maintain a tort action against the other under Massachusetts law. The trial court granted the defendant’s motion, and the plaintiff wife took exception. The Supreme Court of New Hampshire, holding that the question of interspousal immunity is governed by the law of New Hampshire, the domiciliary law, and that under that law such immunity does not exist, sustained the plaintiff’s exception and remanded the case.

Before the *Thompson* decision it was well-settled law in New Hampshire that although a wife could bring a tort action against her husband for acts of negligence committed in New Hampshire, her right to recover against him for such acts done in another state was determined by the law of the second state. Since, under the law of Massachusetts, the place of the allegedly negligent act, no cause of action arises in favor of husband or wife for a tort committed there by the other during coverture, the ruling of the trial court in granting the defendant’s motion to dismiss was, as the Supreme Court pointed out, clearly in accordance with then existing New Hampshire law.

This deference shown to the lex loci delicti by New Hampshire law in the matter of interspousal tort suits was in accord with the traditional vested rights doctrine. Recent decisions from several jurisdictions, however, support the view that interspousal immunity is to be determined more logically according to the law of the domicile of the parties. The New Hampshire Supreme Court, taking note of the recent trend, stated that “the time has come to re-examine the position taken by our cases.”

The reasons generally advanced to explain the existence of the prohibition against interspousal suits are the preservation of marital harmony and the avoidance of collusive suits. Whatever the correct explanation, it is clear that the state of the parties’ domicile has the greatest interest in the matter. The question of immunity from suit must, therefore, be determined by the law of the family domicile.

The court, noting that New Hampshire law permits interspousal suits without fear of collusion or of family discord within its borders,

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12 See Restatement of Conflict of Laws Second §890g, Comment a (Tent. Draft No. 9, 1964); Ehrenzweig, Conflict of Laws 581-589 (1962).
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stated that a suit between New Hampshire spouses could hardly be the concern of Massachusetts. Accordingly, the court held that the question of whether the defendant was immune from liability to his wife was governed by New Hampshire law, the law of the parties' domicile, and it specifically overruled the Gray case and all subsequent decisions that applied the lex loci delicti principle.

The New Hampshire Supreme Court properly rejected the lex loci delicti rule in Thompson. The question of the interspousal suit was clearly an incident of the marital status centered in New Hampshire. It makes no sense to have that incident governed by Massachusetts law merely because the husband and wife happened to be involved in an accident there.

It should be noted that the court, in dictum, chose to apply Massachusetts law with its gross negligence standard\(^8\) to judge the defendant husband's conduct toward his wife-passenger. The court gave no reason for this choice beyond stating that "we have no doubt that the law of the jurisdiction where a tort is committed should continue to determine the applicable standard of care."

One might question whether the standard of care applicable to the conduct of New Hampshire spouses is of less concern to that state and its law than the matter of interspousal immunity. The court held that New Hampshire law governed the latter issue because New Hampshire was the state with the more significant contacts with the transaction. It can reasonably be argued on the same basis that New Hampshire law should control the question of the standard of care.\(^9\)

It seems safe to predict that this dictum of the court in Thompson will not become ruling law in New Hampshire as long as the court has to determine the applicable standard of care in the context of important contracts centered in that state.

