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Cyrus F. Lee

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NOTES AND COMMENTS

Conflict of Laws—Constitutional Law—Federal Courts—Effect of State Court's Refusal to Assume Jurisdiction

Plaintiff, a citizen of Virginia, sought to recover of the defendant, a citizen of North Carolina, the deficiency remaining upon purchase money notes given for a conveyance of real estate located in Virginia. The contract of sale was for Virginia land, was made in Virginia, and was to be performed there. Upon default on one of the notes and foreclosure under an acceleration provision contained in the deed of trust, the trustee sold the land and applied the proceeds to the payment of the notes. There remained a deficiency and the plaintiff sought judgment for the balance in the state courts of North Carolina. Recovery was denied.[1] The court held that a North Carolina statute[2] had de-

[1] Bullington v. Angel, 220 N. C. 18, 16 S. E. (2d) 411, 136 A. L. R. 1054 (1941).

[2] N. C. GEN. STAT. (1943) §45-36. "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed

prived the courts here of jurisdiction to give deficiency judgment. The necessary jurisdictional amount and diversity of citizenship being present, the plaintiff brought his action in the federal district court and obtained judgment for the deficiency. Upon appeal to the Circuit Court of Appeals it was *Held:*[3] The interpretation given the statute by the North Carolina court[4] to the effect that it applies only to the procedural law of the state was binding upon the federal courts, and since the federal courts are bound to follow the state law only in substantive matters, while applying their own procedure, the statute would not bar recovery.

Here we have a situation where the result reached depended upon the forum one chose, which is opposed to the policy behind *Erie Railroad Co.* v. *Tompkins*[5] and the cases furthering it.[6] Paradoxically the variance in this instance is the result of the federal court following the "judge made law" of the state.

State courts have used at least three reasons for not applying the conflict of laws rule that would call for an application of foreign law: (1) A lack of jurisdiction in the forum court. (2) No form of action to grant the relief.[7] (3) Public policy forbids.[8]

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of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same."

[3] Angel v. Bullington, 150 Fed. (2d) 679 (C. C. A. 4th, 1945) *certiorari* granted, Dec. 8, 1945, 66 S. Ct. 231.

[4] Bullington v. Angel, 220 N. C. 18, 20, 16 S. E. (2d) 411, 412, 136 A. L. R. 1054, 1056 (1941) ("It will be noted that the limitation created by the statute is upon the jurisdiction of the courts. . . . This closes the courts of this state to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law of the state which pertains to the practice and procedure or legal machinery by which the substantive law is made effective and not upon the substantive law itself. It is a limitation upon the jurisdiction of the courts of this state.").

[5] 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188, 114 A. L. R. 1487 (1938).

[6] *Cf.* Guaranty Trust Co. v. York, 326 U. S. 99, 109, 65 S. Ct. 1464, 1470, 89 L. ed. 2079, 2086 (1945) ("The nub of the policy that underlies Erie Railroad Co. v. Tompkins is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a state court a block away, should not lead to a substantially different result.").

[7] Slater v. Mexican National Railway Co., 194 U. S. 120, 24 S. Ct. 581, 48 L. ed. 900 (1904); 3 BEALE, CONFLICT OF LAWS (1935) §608.1; GOODRICH, CONFLICT OF LAWS (1938) p. 21; Howard Undertaking Co. v. Fidelity Life Ass'n, 59 S. W. (2d) 746 (Mo. App. 1933).

[8] The following cases illustrate the variety of policies that have been invoked to prevent the courts of the forum from recognizing foreign "rights." Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 825 (1898); Maxey v. Railey and Bro. Banking Co., 57 S. W. (2d) 1091 (Mo. App. K. C. 1933) (gambling debt); Security Co. v. Hendry, 189 N. C. 549, 127 S. E. 629 (1925); Young v. Nave, 135 Kan. 23, 10 P. (2d) 23 (1932) (payment of attorney fees for the collection of a note); Poling v. Poling, 116 W. Va. 187, 179 S. E. 604 (1935) (personal injury action by husband against wife); Commercial Credit Co. v. Higbee,

In deciding that the statute was a limitation upon the jurisdiction of the state courts the Supreme Court is within the rationale of the rule that since jurisdiction is conferred on courts by the sovereign that created them, the local law determines whether or not its courts have power to entertain a given case.[9] This method of not adjudicating foreign "rights" was used where a statute[10] after defining a gambling contract provides that the courts of this state have no jurisdiction to entertain a suit upon a judgment based upon such a contract,[11] the contract being valid where made notwithstanding. A striking example of a state withdrawing the jurisdiction of its courts to adjudicate a foreign right is an Illinois statute[12] providing that no action shall be brought in courts of that state for wrongful death occurring elsewhere.[13] A court's declaration that it is without jurisdiction to enforce a foreign "right" is not often unexplained. More frequently the method is explained as a means of effectuating public policy.[14] The state court in the principal case did not mention public policy, but rested its decision solely on what it found to be a statutory withdrawal of jurisdiction, without explaining why the legislature had so limited its power. But the bare fact that the court construed the statute as closing the doors of the state courts to this type of action is evidence of what the court thought the public policy of the state to be, if not an actual declaration of it. However, it

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92 Colo. 346, 20 P. (2d) 543 (1933) (conditional sales contract registered in foreign state but not in forum); Hudson v. Vonhamm, 85 Cal. A. 323, 259 P. 374 (1927) (action against father for tort of minor child); Ulman, Magil and Jordan Woolen Co. v. Magill, 155 Ga. 555, 117 S. E. 657 (1923) (wife as surety for husband).

There is a strong policy in every state toward recognizing validly created foreign "rights."

[9] 3 BEALE, CONFLICT OF LAWS (1935) §586.1.

[10] N. C. GEN. STAT. (1943) §16-3.

[11] Burus v. Whitcover, 158 N. C. 384, 74 S. E. 11, 39 L. R. A. (n. s.) 1005 (1912). More difficulty was encountered when the illegal contract was the basis of a foreign judgment, and the judgment was sued on here. *Cf.* Mottu v. Davis, 151 N. C. 237, 65 S. E. 972 (1909). *Held:* If the gaming question were raised and decided in the Virginia decision it would be binding here See also, Cody v. Harvey, 219 N. C. 369, 14 S. E. (2d) 30 (1941). *Held:* The trial court should find the facts as to whether the plaintiff's claim was based on a gaming transaction, and if so whether the question were raised by appropriate plea in the trial of the case in the foreign court. Pleading the statute is in the nature of a plea to the jurisdiction which cannot be conferred by a failure of the defendant to plead properly. Note 18 N. C. L. REV. 224 (1940).

[12] ILL. ANN. STAT. (Smith-Hurd 1934) c. 70 §2.

[13] Daugherty v. American McKenna Process Co., 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F 955, Ann. Cas. 1913D 568 (1912).

The effect of the statute was limited by *Kenny v. Supreme Lodge of the World Loyal Order of Moose,* 252 U. S. 411, 40 S. Ct. 371, 64 L. ed. 638, 10 A. L. R. 716 (1920) holding that the statute could not constitutionally withhold jurisdiction when the suit was on a foreign judgment.

[14] Gooch v. Faucett, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835 (1898); Blumenthal v. Blumenthal, 303 Mass. 275, 21 N. E. (2d) 244 (1939); Herzog v. Stern, 264 N. Y. 379, 191 N. E. 23 (1934); Weidman v. Weidman, 274 Mass. 118, 174 N. E. 206, 76 A. L. R. 1359 (1931); Reynolds v. Geary, 26 Conn. 179 (1857).

is submitted that the statute could with equal logic have been construed as fixing the substantive rights of the parties in purchase money mortgage transactions by limiting the creditor to the property conveyed, and only applicable to transactions affecting North Carolina real estate.[15] This was the position taken by the Oregon court in a like situation.[16] That court adopted the view that its statute was meant only to affect real estate in Oregon, and did not establish a local policy against deficiency judgments except for purchase money mortgages on land located there.

Now that we have the state court decision characterizing the statute as not affecting the substantive rights of the parties, but only the jurisdiction of the state courts, how does this construction affect the federal courts sitting here? Since 1938, when the tables were turned and the federal courts were required to follow the substantive law—including the judge made law—of the state in which they are sitting, and their own procedure, characterization of a matter as *procedural* or *substantive* has become increasingly important.[17] To deny a litigant recovery in a state court because to give relief would contravene some settled public policy is a rule of conflict of laws which is a matter of substance to be followed in the federal courts.[18] Whether the state court's refusal to take jurisdiction, when not based on public policy, results in a rule of substance to be followed in the federal courts is doubtful. Thus it was held that the federal court sitting in Illinois was not deprived of jurisdiction by the Illinois wrongful death statute prohibiting such actions in the state courts where the cause of action arose outside the state.[19] But whether the federal court has jurisdiction, and a determination of the law it shall follow once it assumes jurisdiction, are separate questions. Obviously the state can neither by statute nor decision deprive the federal courts of jurisdiction, that being the sole function of their creator.[20]

[15] Suppose a purchase money mortgage on North Carolina real estate and the mortgagor has since moved to Virginia. It would seem odd that the statute should not prevent a Virginia court giving a deficiency judgment if there remained a balance after foreclosure here.

[16] McGirl v. Brewer, 32 Ore. 422, 285 P. 208 (1930); *but see*, Federal Depositors Insurance Corp. v. Stensland, —— S. D. ——, 15 N. W. (2d) 8 (1944).

[17] *See*, Cook, *The Federal Courts and the Conflict of Laws* (1942) 36 ILL. L. REV. 493.

[18] Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. ed. 1481, 134 A. L. R. 1462 (1941); Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. ed. 1487 (1941). See also, Order of the United States Commercial Travelers of America v. Meinson, 131 Fed. (2d) 176 (C. C. A. 8th, 1942); Sampson v. Channell, 118 Fed. (2d) 754 (C. C. A. 1st), 128 A. L. R. 394 (1940).

[19] Stephenson v. Grand Trunk Western Railway, 110 Fed. (2d) 401 (C. C. A. 7th), 132 A. L. R. 455 (1940) (cert. dismissed under rule 35, 311 U. S. 720).

Since Illinois allows an action for wrongful death occurring within the state, it is clear that the statute did not spring from public policy against such actions as such, but was a court calendar relieving device.

[20] 1 MOORE'S FEDERAL PRACTICE (1938) §2.07.

The question in the principal case is not one of jurisdiction but rather what is the law for the federal court sitting in North Carolina, after assuming jurisdiction. Does the public policy of a state which is so strong that by statute it has deprived its courts of jurisdiction to entertain suits of a particular nature bind the federal courts sitting in that state to follow the public policy of the state and refuse relief, although the state court of last resort has interpreted such statute as not affecting substantive rights but merely the adjective or procedural law? It was decided in the *Griffin*[21] case that it was for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of public welfare as to require its courts to close their doors to its enforcement. Once this is done the federal courts sitting in that state are bound to follow such a conflict of laws rule. Should the fact that the state court failed to mention, in construing a statute as closing its doors, the reason for such a statute, or the courts characterization of the statute as *procedural* and not *substantive,* change the rule of law that is to be followed in the federal courts? Obviously the fact that the state court declared its courts without jurisdiction should not mean that the public policy of the state is favorable to such actions. Neither is the state court's characterization controlling in the federal courts.[22] It has been held by a federal district court that the Massachusetts statute abolishing "heart balm" actions was such evidence of the public policy of Massachusetts as to be binding on the federal courts, although the cause of action arose outside Massachusetts and the state court had not decided that an action of such nature could not be maintained in the state court, where it arose in a state that allowed the action.[23] It has likewise been held that the federal district court sitting in New York was bound to follow the New York state rule of *forum non conveniens* and not assume jurisdiction over matters involving the internal affairs of a corporation when in the view of the state court considerations of efficiency, convenience or justice point to the courts of the domicile of the corporation as the appropriate tribunals.[24]

It is submitted that if the statute as construed by the state court is

[21] 313 U. S. 498, 61 S. Ct. 1023, 85 L. ed. 1481, 134 A. L. R. 1462 (1941) cited *supra* note 18.

[22] Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. ed. 1418 (1945); Sampson v. Channell, 110 Fed. (2d) 754 (C. C. A. 1st), 128 A. L. R. 394 (1940). In both these cases the state court had called *procedural* what the federal court was required to follow as substantive.

[23] Fahy v. Lloyd, 57 Fed. Supp. 156 (D. Mass. 1944); *contra:* Wawrzin v. Rosenberg, 12 Fed. Supp. 548 (E. D. N. Y. 1935); noted 14 N. C. L. REV. 286 (decided before Erie Railroad v. Tompkins and the cases cited *supra* note 18).

[24] Weiss v. Routh, 149 Fed. (2d) 193 (C. C. A. 2d, 1945). *But cf.* Williams v. Green Bay & W. R. Co., 326 U. S. ——, 66 S. Ct. 284, 90 L. ed. 247 (1945) (The court left open the question of whether the federal court was bound to follow the state's *forum non conveniens* rule.).

constitutional it evidences a conflict of laws rule that is binding upon the federal court sitting in this state. The constitutionality of the statute, as construed by the state court remains to be discussed[25] for obviously, if the statute is unconstitutional as construed, the federal court should not be required to follow it as evidencing a public policy or for any other reason.[26]

Generally speaking, the forum will apply the law of a sister state which is the situs of a contract or other cause of action, but the question here raised is to what extent the forum is *compelled,* by the federal constitution, to apply the law of a sister state. The clauses most urged as requiring the forum to adjudicate "foreign created rights" are the "full faith and credit" and the "due process" clauses.[27] Just how far these clauses require a sister state to adjudicate or recognize "foreign rights" is not certain, and can only be determined by a process of inclusion and exclusion. That the full faith and credit clause applies to judgments though the original cause of action could not be maintained in the forum is settled;[28] and notwithstanding the inference in *Anglo American Provision Co.* v. *Davis,*[29] this rule cannot be flouted by the simple device of withdrawing jurisdiction from the state courts.[30]

A statute of a sister state must be given full faith and credit when the forum does not have sufficient interest in the litigation to justify overriding it for reasons of public policy;[31] and a state may not under the guise of merely affecting the remedy deny the enforcement of claims that are within this protection of the full faith and credit clause.[32] The dividing line between conflicting interest which determines how far a state must go in recognizing a statute of a sister state has never been clearly drawn, but has varied with the facts of each case. A share-

[25] The court found this to be an interesting question that it was not called upon to decide. Angel v. Bullington, 150 Fed. (2d) 679, 681 (C. C. A. 4th, 1945).

[26] It could hardly be argued that the state court's decision was *res adjudicata* in the federal court, no decision on the merits having been given.

[27] The "privileges and immunities clause" has no application where the state applies the same rule of law to its own citizens as to citizens from other states. Chambers v. Baltimore and O. R. Co., 207 U. S. 142, 28 S. Ct. 34, 52 L. ed. 143 (1917). Neither would the impairment of contract clause be applicable here, since that clause applies only where the statute has been enacted since the contract involved was made. New Orleans Co. v. Louisiana Co., 125 U. S. 18, 8 S. Ct. 741, 31 L. ed. 607 (1888), and here the statute was made specifically applicable only to transactions subsequent to its enactment.

[28] Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. ed. 1039 (1908); *cf.* Roche v. McDonald, 275 U. S. 449, 48 S. Ct. 142, 72 L. ed. 365 (1928). Note (1928) 6 N. C. L. Rev. 479.

[29] 191 U. S. 373, 24 S. Ct. 92, 48 L. ed. 225 (1903).

[30] Kenny v. Supreme Lodge of the World Loyal Order of Moose, 252 U. S. 411, 40 S. Ct. 371, 64 L. ed. 638, 10 A. L. R. 716 (1920).

[31] Bradford Electric Light and Power Co. v. Clapper, 286 U. S. 157, 52 S. Ct. 571, 76 L. ed. 1033, 82 A. L. R. 696 (1932); *see* Alaska Packers Asso. v. Industrial Accident Comm., 294 U. S. 532, 55 S. Ct. 518, 79 L. ed. 1044 (1935).

[32] Broderick v. Rosner, 294 U. S. 629, 55 S. Ct. 589, 79 L. ed. 1100, 100 A. L. R. 1113 (1935).

holder's liability to pay an assessment levied in accordance with the statutory law of the corporation's domicile must not be denied by a sister state,[33] while statutory liability of a married woman on a guaranty for her husband need not be enforced by a sister state when to do so contravenes its public policy.[34] A state may refuse enforcement of an insurance contract on the life of one of its citizens, because of local policy against insurance without an insurable interest according to its law, even though, by the statutory law of a sister state where the contract was made the beneficiary had such an interest.[35] A statutory right to interest on a judgment from the time an action is begun does not override a sister state's policy against such interest calculation, when the judgment is against one of the forum's corporate citizens.[36] These last two cases would indicate that the present trend is toward the conclusion that if the forum state has sufficient interest connection with the persons, property, and events in the litigation to have a public policy against the enforcement of rights under a sister state's statute the full faith and credit clause does not require the enforcement of such rights.[37] No case has been found to the effect that a state must give full faith and credit to the common law of a sister state and it is probably under such law that the plaintiff in the principal case depends for his right to a deficiency judgment.[38]

In the principal case, if the cause of action became a "vested right" only within Virginia it is not a deprivation of property without due process of law for North Carolina not to recognize that right. Even if we accept the view that Virginia could create a right operative by its own power beyond her borders it could hardly be argued that North Carolina's failure to do anything about that right had deprived the plaintiff of property without due process of law. It is when a state has taken foreign rights and with that basis has created a substantially different right, by the elimination of a valid defense, that the due process clause has been invoked to deny the forum the right to make over this obligation of the parties.[39] No case has been found where this clause has been

[33] *Ibid.*

[34] Union Trust Co. v. Grossman, 245 U. S. 412, 62 L. ed. 368, 38 S. Ct. 147 (1918).

[35] Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. ed. 1481, 134 A. L. R. 1462 (1941), cited *supra* note 18.

[36] Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U. S. 487, 61 S. Ct. 1020, 85 L. ed. 1487 (1941), cited *supra* note 18.

[37] Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L. ed. 1481, 1487, 134 A. L. R. 1462 (1941), cited *supra* note 35.

[38] See Dodd, *The Power of the Supreme Court to Review State Decision in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 533, at 545. "Refusal by the courts of another state to give effect to such inchoate law could hardly be described as a failure to give full faith and credit to a public act, record or judicial proceeding."

[39] John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S. 178, 57 S. Ct. 129,

held to compel a state to adjudicate a "foreign right."

Before *Erie Railroad* v. *Tompkins,* a limited uniformity of law within the federal courts was brought about by the application of the "general law" doctrine. However, since that decision the emphasis has been on uniformity between the state and federal courts within a given state and the differences existing between the states, due to conflicting laws or policies, charged to our political system.[40] It would seem that by the court's present interpretations of the full faith and credit or the due process clauses the statute as construed by the North Carolina Supreme Court is constitutional. It remains to be seen whether the United States Supreme Court in the consideration of this case, now before it, will see fit to extend the interpretation of these clauses so as to preclude a state from assuming the position which North Carolina has taken.

CYRUS F. LEE.

Evidence—Negative Testimony—Silence as Hearsay

In an action to recover land sold in a tax foreclosure proceeding, plaintiff sought to establish that the commissioner purchased at his own sale through the wife of one L. L testified that his wife, now dead, did not in his presence pay any consideration for the commissioner's deed to her or receive any consideration for her deed to the commissioner, executed a month later. L joined in the second deed and was present when it was signed. L also stated that his wife did nothing but housework, that he knew she never inherited any money, that he never gave her any large sum, and that he saw her every day. L's testimony (A) that he knew all about his wife's business, (B) that he knew she neither paid nor received anything for the deeds, and (C) that he never heard her say she paid or received any money was excluded by the trial court. The Supreme Court affirmed a nonsuit granted at the close of plaintiff's evidence, and held the testimony above properly excluded by the ban against hearsay.[1] After referring to L's testimony about events occurring in his presence, the court said: "Any other knowledge he had is necessarily predicated upon hearsay, and is incompetent."[2]

(A)

A fundamental rule of admissibility is that a witness to a fact must

81 L. ed. 106 (1936); Hartford Acc. and Indemnity Co. v. Delta and Pine Land Co., 292 U. S. 143, 54 S. Ct. 634, 78 L. ed. 1178, 92 A. L. R. 928 (1934); Note (1935) 13 N. C. L. REV. 213; Home Insurance Co. v. Dick, 281 U. S. 397, 50 S. Ct. 338, 74 L. ed. 926, 74 A. L. R. 701 (1930).

[40] Klaxon v. Stentor Electric Manufacturing Co., 313 U. S. 487, 61 S. Ct. 1020, 1022, 85 L. ed. 1487 (1941), cited *supra* note 36.

[1] Hinson v. Morgan, 225 N. C. 740, 36 S. E. (2d) 266 (1945); Hinson v. Baumrind, 225 N. C. 740, 36 S. E. (2d) 266 (1945) (companion case).

[2] *Id.* at 744, 36 S. E. (2d) at 269.