Limitations on the Extraterritorial Application of Law

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The power of a state to apply its law to foreign facts is limited by various bodies of law. Some limitations are imposed by public international law, and a transgression of these limitations may lead to diplomatic protest\(^1\) or to an unfavorable judgment by the Court of International Justice.\(^2\) Limitations may also be imposed by the law of a second state. For example, a court may refuse to recognize or enforce a foreign judgment on the ground that in its view the court of rendition had given an improper extraterritorial application to its law.\(^3\) Finally, and of greatest importance, there may be local limitations. The power of a state to apply its law extraterritorially may be limited, as in the United States, by a constitution or by other organic law. Even more frequently, such limitations are imposed upon the power of a state which is a member of a federal union either by the union itself or by the constitution or other organic law of the particular member state involved. It is to limitations upon the power of a member state that this paper will primarily be directed.

Canada, Australia and the United States are federal states, and in all three there are limitations upon the power of the member states or provinces to give their laws extraterritorial application. In Canada, these limitations are found in Section 92 of the British North America Act which lists the matters that may exclusively be regulated by the Provincial Legislatures.\(^4\) Of the matters listed in

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1. See, e.g., *The Cutting Case*, 1887 U.S. Foreign Rel. 757
this Section, those that are of particular importance for our purposes are "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province." In Australia, these limitations are found in the constitution or organic law establishing each member state. For example, Section 5 of the Constitution Act of New South Wales employs a familiar formula by empowering the Legislature "to make laws for the peace, welfare and good government of New South Wales." Section 1 of the Constitution Act of Victoria authorizes its Legislative Assembly "to make laws in and for Victoria." In the United States, the limiting source upon the power of the United States to legislate extraterritorially is the due process clause of the Fifth Amendment of the Constitution. The due process clause of the Fourteenth Amendment plays a similar role in the case of the member states. By way of contrast, the full faith and credit clause of Article IV, Section 1 of the Constitution has been primarily employed in the area of the recognition and enforcement of sister state judgments. On rare occasions, the clause has also been held to require application of the law of a particular state to determine the rights and liabilities of the parties, even though application of the law to one or more other states would have been permissible in the circumstances under due process.

It will have been noted that all of these limiting provisions are vaguely worded. As a result, they must depend almost entirely for their meaning upon the way in which they are interpreted and applied by the courts. For the same reason, the courts in each of these three nation-states enjoy great freedom in determining what limitations, if any, should be imposed upon the extraterritorial application of law. In making such determinations the courts should presumably be guided by considerations of what would be best for their nation as a whole. And since Canada, Australia and the United States are all federal states, it would seem that these guiding considerations should generally be the same. So far as is known, no

5. Limitations on the power of a state of the United States to apply its law extraterritorially have been well discussed in two recent articles. Kirgis, The Roles of Due Process and Full Faith and Credit in Choice of Law (1976), 62 Corn. L. Rev. 94; Martin, Constitutional Limitations on Choice of Law (1976), 61 Corn. L. Rev. 185

6. See, e.g., Order of Commercial Travelers v. Wolfe (1947), 331 U.S. 586 (full faith and credit requires that rights of members against fraternal benefit society should be determined by law of state of society's organization)
court in any of these three nation-states has made a serious attempt to discuss the factors which are relevant in assessing the propriety of an extraterritorial application of law. An attempt to do so will here be made. Particular emphasis will be placed upon United States materials. This is because the writer is most familiar with these materials, and also because the question of the propriety of an extraterritorial application of law appears to have arisen most frequently in the United States.

Should a Distinction be Drawn between Statutes and Common Law Rules?

A preliminary question that deserves discussion would receive a different answer in Australia, and probably also in Canada, than in the United States. The question is whether a distinction should be drawn for the purpose at hand between statutes and common law rules of choice of law. More precisely, can a statute be given a broader sweep of extraterritorial application by means of common law rules of choice of law than by an explicit provision on the point in the statute itself?

The problem is well illustrated by the Australian case of Kolsky v. Mayne Nickless, Ltd. A suit was brought in New South Wales to recover for a death that had occurred in an automobile accident in the Australian state of Victoria. The plaintiffs based their claim on the New South Wales Compensation to Relatives Act. The Act, which provided that recovery in an action for wrongful death should not be reduced by reason of the deceased's contributory negligence, was drafted so as to apply "whether the subject matter of the complaint arises within or outside New South Wales ... ." By way of defence, the defendant alleged as follows: First, the deceased had died domiciled in Victoria. Second, the defendant was incorporated and did business in that state. Third, the automobile involved in the accident was registered in Victoria. Accordingly, the governing law must be that of Victoria under which the contributory negligence of the deceased would reduce recovery for his wrongful death. The plaintiffs demurred to this defence and the court found in their favor. It stated, without further explanation, that the provision in the New South Wales Act providing for its extraterritorial application was beyond the "territorial competence"

7. [1970]92 W.N. (N.S.W.) 855
of the enacting legislature "at least in the absence of any sufficient territorial connection" with New South Wales. The court held nevertheless that the Act was properly applicable by reason of the common law rule of choice of law enunciated in the British case of Philips v. Eyre: 8 in order to succeed in a tort action the plaintiff must show that the defendant's conduct was "actionable" under the law of the forum and "not justifiable" under the law of the state where it took place. 9

Such a conclusion would not likely be reached today in the United States. In the well-known case of Erie R. Co. v. Tompkins, 10 the Supreme Court stated definitively that the common law is not "a transcendental body of law outside of any state but obligatory within it unless and until changed by statute". It is, in the court's view, as local to the state where it is in effect as is a statute. Hence it seems clear that in the United States, a state could not by means of common law rules obtain a wider scope of extraterritorial application for its legislation than it could by statute. The contrary result in the Kolsky case (which probably would also be reached in Canada 11) is explained by the fact that, unlike the Supreme Court of the United States, the Supreme Court of Canada and the High Court of Australia are courts of general appellate jurisdiction that hear appeals from the provincial and state courts on issues of common law. As a result, uniform common law rules of choice of law may be thought to prevail in all Canadian provinces, except Quebec, and in all Australian states.

Although the explanation for the result reached in Kolsky may be clear, the case is nevertheless of considerable interest. Its rationale must rest on the notion that common law rules are not of the same order as statutes: whereas the latter are the creation of the state of their enactment, the former have a universal or, at least, national character. Whatever may be the merits of this view, it does lead to what to an American is a surprising result: namely, that in Australia, and probably also in Canada, a statute may obtain a wider sweep of territorial application by means of common law rule of choice of law than by an explicit provision in the statute itself.

8. [1870] L.R. 6 Q.B. 1
9. To the same general effect as Kolsky, see Koop v. Bebb, [1951] 84 C.L.R. 629 10. (1938), 304 U.S. 64
The Basic Principle

In determining the outermost reaches of state power, it is desirable first to ascertain the basic principle involved. No consensus has as yet developed in Canada, Australia or the United States as to the guiding principle which determines the permissible limits on the extraterritorial application of law. In the well-known case of International Shoe Co. v. State of Washington, the Supreme Court of the United States did, however, state the basic principle for determining the limits under the due process clause of the Fourteenth Amendment of a state's judicial jurisdiction. Defining the power of a state to decide cases in its courts, it was held that the state must have such contacts with the defendant "as make it reasonable, in the context of our federal system of government, to require the [defendant] to defend the particular suit which is brought there." It is suggested that essentially the same principle should be applied with reference to the extraterritorial application of law. Thus in an interprovincial or interstate case in Canada, Australia or the United States, the basic question should be whether it be reasonable, in the context of the federal system involved, to apply the law of the particular state to the given state of foreign facts. In international cases, the test would be modified by the substitution of "international system" for "federal system."

The International Shoe test requires that two conditions be met to give a state judicial jurisdiction. Firstly, the state must be a fair place from the standpoint of the defendant for the trial of the action. Secondly, trial in the state must be consistent with the needs of the federal system. This second requirement has rarely been mentioned in the cases, but is of great importance nevertheless and indeed forms the basis of the majority opinion of the Supreme Court in Hanson v. Denckla. That fairness to the defendant is not the only criterion of judicial jurisdiction can also be made clear by a simple hypothetical.

Suppose that suit is brought in State X on a transaction whose contacts are purely with State Y. In accordance with the X statute, the defendant is served by registered mail in Y. The defendant lives

12. (1945), 326 U.S. 310
13. (1958), 357 U.S. 235 (In his majority opinion, Chief Justice Warren stated that constitutional restrictions on the personal jurisdiction of the state courts are "more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."
near the Y border, and the courthouse where the suit would be tried in X is considerably closer to the defendant's home than is the closest courthouse in Y. Here it could hardly be contended that suit in X would be inconvenient for the defendant; indeed it might be considerably more convenient than would be a suit in Y. Nevertheless, it is entirely clear, in view of the total absence of X contacts, that X would lack judicial jurisdiction to try the case. This would not be primarily because of considerations of fairness for the defendant, but rather because it would be inconsistent both with the needs of the federal system and with the exclusive interests of State Y, for the suit to be brought in State X, which has no interest in the case.14

It is believed that the same considerations should be applied to determine the propriety of an extraterritorial application of law. Such application should not be unfair from the standpoint of those whose interests would be affected. It should also be consistent with the needs of the federal system involved or, in an international case, with the needs of the international system in general. This can be made clearer by an extreme and quite unrealistic hypothetical.

Suppose that a resident of Nova Scotia is struck while crossing a street in London by an automobile being driven by an Englishman on the left hand side of the street. Upon his return to Nova Scotia, he somehow obtains jurisdiction over the Englishman and here brings suit to recover for his injuries. His claim is that the defendant had been negligent in driving on the left side of the street as by English law. Clearly, it would be improper for the Nova Scotia court in these circumstances to apply its law, which requires that one drive on the right, and thereby hold the defendant liable.

With good logic, one could say that such application of Nova Scotia law would violate Section 92 of the British North America Act. The issue at hand did not involve either "Property and Civil Rights" or "Matters of a merely local or private Nature" in Nova Scotia. But, in this writer's opinion, there are two other factors which would make application of Nova Scotia law inconceivable. The first is that it would be entirely unfair to apply this law to hold the defendant liable for injury caused in England by an act required

14. Lower federal courts have explicitly said that the interest of a state in having the case tried in its courts is an important criterion for determining whether the state has judicial jurisdiction. See, e.g., Farrell v. Piedmont Aviation, Inc. (1969), 411 F. 2d 812 (2d. Cir.); Curtis Publishing Co. v. Birdsong (1966), F.2d 344 (5th Cir.)
by English law under which he would not be liable. Clearly, the defendant in this case had moulded his conduct upon English law. To apply the law of Nova Scotia would disappoint his justified expectations. The second and equally important factor is that application of Nova Scotian law would be inconsistent with the needs of the international system. It would result in frustrating the policy of England, the state with by far the greatest interest in the resolution of the particular issue. Without question, the answer to our hypothetical would be the same if, in place of Nova Scotia, we were to substitute an American or an Australian state. In the United States, it would be said that application of the law of the American state would violate due process. Application of the law of the Australian state would be struck down in Australia usually for the stated reason that the “peace, order and good government” of the particular state were not involved. Whatever the formulation relied upon, the two basic factors would be the same: application of the law of the Canadian province, or of the Australian or American state, would be unfair to the defendant and would be inconsistent with the needs of the international system by frustrating the policy of the state with by far the greatest interest in the matter.

The two basic factors discussed above are surely as important in an interprovincial (Canada) or interstate (Australia or the United States) case as they are in the international arena. The question remains, however, whether the considerations involving these areas are necessarily the same. Express authority on the point seems to be lacking. It can be suggested, however, that because of the needs of the interstate system, the power of a member state to apply its law extraterritorially may be more restricted in the interstate than in the international area. In Australia and the United States, this may be in part because of the full faith and credit clauses of their respective constitutions. In the international area, a court may protect the vital interests of its own state by refusing to recognize or enforce the judgment of another state which disregarded those interests. On the other hand, by reason of full faith and credit, a state court in Australia or the United States cannot refuse on such a ground to recognize or enforce the judgment of a sister state. In an interstate

15. For a similar suggestion, see Restatement (Second), Conflict of Laws 9, Comment d.
17. *Fauntleroy v. Lum* (1908), 210 U.S. 230
system, a state should perhaps be required to have greater regard for the interests of a sister state than one nation can be expected to have for those of another.

Not surprisingly, no actual case has been found with such an outrageous extraterritorial application of law as the hypothetical situation discussed above. Nevertheless the hypothetical illustrates in stark fashion the two basic factors involved and demonstrates that these factors are likely to be present, although in different degrees, in every case. We proceed now to a discussion of these two factors.

**Fairness to the Parties**

Fairness to the parties should always be an important criterion. Rarely, if ever, would a state seek to apply its law extraterritorially, as in our hypothetical, to impose a burden upon a person who had acted in another state in the way required by that state’s law and, moreover, without reason to suppose that his act would have effects elsewhere. But there are situations where an extraterritorial application of law has been struck down at least partially because of considerations of fairness to the parties. Such situations arise when a person has acted in another state, perhaps not in actual reliance upon application of that state’s law but, in any event, with no adequate reason to foresee that he would be held subject to the law invoked. Two illustrative cases will be mentioned, one from the United States and the other from Canada.

*John Hancock Mutual Life Ins. Co. v. Yates,* 18 a decision by the Supreme Court of the United States, involved a suit upon a life insurance policy that had been applied for and issued in New York to a New York resident. The insured was suffering from cancer at the time, but his application to the insurance company contained the false statement that he had not recently been under medical care. As a consequence, under New York law, the insurance company had a complete defence on the policy. After the insured’s death, his widow moved to Georgia. There she obtained judgment on the policy by application of the Georgia rule that a false statement in an insurance policy is not material if the agent who solicited the policy was aware of the true facts. There was no suggestion that the insurance company had actually acted in reliance upon the application of New York law, as, for example, by charging lower premiums. Nevertheless, the Supreme Court reversed, stating that

18. (1936), 299 U.S. 178
“there was no occurrence, nothing done” in Georgia, and accordingly that Georgia law could not constitutionally be applied to deprive the insurance company of a defence it enjoyed under New York law. Although the point was not expressly referred to in the opinion, *Yates* appears to be a good example of an unfair extraterritorial application of an unforeseeable law.

The Canadian case is the well-known *Royal Bank of Canada v. The King.* There bonds had been sold in England to provide for the construction of a railroad in the Province of Alberta. After a change of administration, the Alberta Legislature enacted a statute whereby the proceeds of the bonds would be paid to the Province instead of being used for the construction of the railroad, and the Province would assume primary liability to the bondholders. Suit was thereafter brought by the Province in the name of the Crown to recover such proceeds of the bonds as were on deposit in the defendant bank. On appeal to the Privy Council, the statute was declared invalid. The rights of the British lenders against the bank were held to be “outside the province” of Alberta and accordingly not affected under Section 92 of the British North America Act by Alberta legislation. That considerations of fairness had much to do with that decision is made clear in the judgment. The Privy Council emphasized the “well-established principle of the English common law” that one who has paid money to another for a purpose that has failed should be entitled to recover it. This principle of fairness combined with the extraterritorial aspects of the case led to the overturn of the statute.

The *Royal Bank of Canada* case should be compared with *A.G. Ont. v. Scott.* In this latter case the Supreme Court of Canada held that the Ontario Reciprocal Enforcement of Support Act could validly be applied to provide for confirmation hearings in Ontario of a support order obtained in England by a wife against a husband who, at all relevant times, had resided and been physically present in Ontario. One could argue with some plausibility that the right of the wife in England against her husband was neither a “civil right” nor a matter of a “merely local or private Nature” within Ontario. Thus, as a matter of strict language, the statute as applied did not fall within the provincial powers granted by Section 92 of the British North America Act.

19. [1913] A.C. 283
The court, however, distinguished the Royal Bank of Canada case on the ground that there is a significant difference "between vesting a right and extinguishing it." Notwithstanding this point, it is almost certain that considerations of fairness were at the root of these two decisions and possibly played a more influential role than did the literal wording of Section 92 of the British North America Act.

Considerations of fairness are most likely to come to the fore in situations where a person acts with deliberation and forethought. The most obvious case is where the person deliberately acts in the way required by state law, as in the English accident hypothetical discussed above. Such considerations will also be present, although in lesser degree, in cases where a person does not actually mold his conduct upon the specific provisions of a state's law but nevertheless acts as other persons do in that state with the expectation that a contract, or a contractual provision, will be held valid and effective. In such a situation, extraterritorial application of an unforeseeable law that would disappoint these expectations may well be improper. A case in point is John Hancock Mutual Life Ins. Co. v. Yates, which has already been discussed.\textsuperscript{21} Lilienthal v. Kaufman,\textsuperscript{22} an Oregon decision, is also illustrative. In that case, an Oregon spendthrift traveled to California and there obtained a loan from a California resident. Suit to recover on this loan was defeated thereafter in the Oregon courts by application of Oregon's spendthrift statute. California law did not recognize such a defence. This decision is open to serious criticism on ordinary choice-of-law principles.\textsuperscript{23} It may also have been unconstitutional on the ground that it deprived the plaintiff of due process of law under the Fourteenth Amendment of the United States Constitution. To be sure, Oregon had an interest in applying its law to protect its resident. However, the transaction had taken place wholly in California under whose law the defendant had no defence. It may well be that the California plaintiff had made the loan without being aware of the precise provisions of California law. But he had certainly acted in the belief that he was owed a valid obligation and was ignorant both of the defendant's status as a spendthrift and of the provisions of Oregon's spendthrift law. Application of this

\textsuperscript{21} See text at note 18, supra
\textsuperscript{22} (1964), 293 Or. 1; 395 P.2d 543
Oregon law clearly disappointed the plaintiff’s expectations and on the particular facts may have been unconstitutional.

Considerations of fairness are less significant in situations where, as in the ordinary negligence case, a person acts without forethought and on the spur of the moment. Under these circumstances, a person has few relevant expectations to be disappointed by the extraterritorial application of a foreign law. Accordingly, a decision holding such application of law to be improper would be more likely to find its justification in the needs of the interstate or international systems. It is to considerations of this sort that we now turn our attention.

The Needs of the Interstate or International Systems

As has been said above, it is the thesis of this paper that the same basic principle should be applied to determine the propriety of either an exercise of judicial jurisdiction over a non-resident or an extraterritorial application of law. This principle is that in a federal union the action taken should be “reasonable, in the context of [the] federal system of government”. Stated more precisely, it should be fair from the standpoint of the parties and also consistent with the needs of the interstate system. At least in the United States, considerations of fairness to the defendant have been emphasized most frequently in cases of judicial jurisdiction. The needs of the interstate or international systems have played a comparable role in the relatively few cases concerned with the extraterritorial application of law. This is not because the relative importance of these two values differs from one area to the other. Rather it is simply because the element of fairness to the defendant has been particularly obvious in the majority of the cases involving judicial jurisdiction that have arisen to date.

Brief discussion of several decisions of the Supreme Court of the United States may here be instructive. We start with *New York Life Insurance Co. v. Head*24 which involved the question whether Missouri insurance law could constitutionally be applied to modify the terms of a loan made on a life insurance policy. The policy had originally been issued in Missouri to a person who was only temporarily present in the state and who had his home in New Mexico. While still domiciled in New Mexico, the insured had transferred the policy to his daughter. She in turn by letter sent from

24. (1913), 234 U.S. 149
New Mexico, requested a loan from the insurance company in New York. The loan was granted. The agreement stated that the loan and the interest thereon was payable at the insurance company's home office in New York and that the effect of any default in the payment of interest on the loan would be determined by the law of New York. Following such a default, the daughter brought suit on the policy in the Missouri courts. She contended that the applicable law was that of Missouri which would have given her more protection than that of New York. The Missouri courts accepted her contention. The Supreme Court, however reversed, on the ground that such application of Missouri law was unconstitutional, "since it would be impossible to permit the statute of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all States are restricted within the orbits of their lawful authority and upon the preservation of which the government under the Constitution depends." Clearly, the basis of the Court's decision was that the Constitution assigns "orbits of . . . lawful authority" to each state and that any attempt by a state to transcend its orbit must be rejected as inconsistent with the needs of the federal system.

*Home Insurance Co. v. Dick*[^25] is an important case. A fire insurance policy covering a tug in Mexican waters had been issued in Mexico to a Mexican resident by a Mexican insurance company. The policy provided that any loss should be payable in Mexico and that suit on the policy must be brought within one year of the date on which the loss occurred. The policy was assigned in Mexico to Dick prior to the loss of the tug which also occurred in Mexico. At the time of the assignment, Dick resided in Mexico although his domicile was in Texas. Following the loss of the tug, Dick returned to Texas and there brought suit against the defendant insurance company, which had reinsured part of the risk. The defence was that suit had not been brought within one year of the loss as required by the policy. Dick, however, contended that this defence should be rejected by reason of a Texas statute which invalidated any provision limiting the time for bringing suit to a period under two years. The Texas courts upheld this contention, but the Supreme Court reversed on the ground that such application of the Texas statute deprived the defendant of property without due process of

[^25]: (1930), 281 U.S. 397
law. This was because "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas . . . . The fact that Dick's permanent residence was in Texas is without significance. At all times here material he was physically present and acting in Mexico."

Fairness to the defendant insurance company was clearly not the principal basis of this decision. At least, there is nothing in the Court's opinion which suggests either that the defendant would not have reinsured the risk but for the provision in the policy restricting the time for bringing suit, or that the defendant charged a lower amount because of this provision. Rather, as the language quoted from the opinion makes clear, the basic reason for the reversal was that, in the opinion of the Supreme Court, Texas was seeking to apply its statute to a situation in which it had relatively little interest and certainly far less of an interest than Mexico. Dick, it will have been noted, was an international, rather than an interstate, case. Hence it must stand for the proposition that, at least in the opinion of the Supreme Court of the United States, the needs of the international system require that states should apply their law only within the "orbits" of their "lawful authority". Stated negatively, it appears that states should not give their law extraterritorial application in situations where to do so would frustrate the policy of a state having a far greater interest in the determination of the matter at hand.

Another significant decision is Clay v. Sun Insurance Office Ltd. It there appeared that, while domiciled in Illinois, the plaintiff had purchased in that state from the defendant insurance company a policy which insured him against the loss of personal property. A few months later, the plaintiff changed his domicile to Florida and there the loss occurred. The plaintiff brought suit in Florida after the lapse of the twelve month period provided in the policy. The question was whether the Florida statute, which invalidated provisions limiting the time for bringing suit to a period under five years, could constitutionally be applied. The Supreme Court answered this question in the affirmative. In its brief opinion, the Court stressed that the defendant insurance company must have realized that the plaintiff might move to other states, since the policy protected him wherever he might go. Moreover, since the defendant was licensed to do business in Florida, "it must have

been known that it might be sued there.’’ Although the opinion only laid stress upon considerations of fairness to the defendant, it seems clear that Florida had sufficient interest in the case to justify application of its law. The loss had occurred in Florida at a time when the plaintiff was domiciled in that state. Accordingly, Florida had good cause to be concerned with the plaintiff’s welfare and he must have belonged to the class that the statute in question was designed to protect. There was also the further fact that the defendant insurance company was licensed to do business in Florida.

The Clay case should be contrasted with John Hancock Mutual Life Insurance Co. v. Yates, which has already been discussed and in which, it will be recalled, the insured’s widow moved to Georgia following his death. Application of Georgia law to protect the widow was there declared unconstitutional although Georgia had an obvious interest in her welfare. Such application would have been unfair to the insurance company since, in contrast to Clay, the two most significant events — i.e., the issuance of the policy and the insured’s death — had occurred before the widow moved to Florida. Such application would also have been inconsistent with the needs of the interstate system, since it would permit the beneficiary of an insurance policy to obtain a state’s favourable law, following the occurrence of the loss, by the simple expedient of moving his domicile to that state. A rule of this sort would make it difficult, if not impossible, for insurance companies to calculate the extent of their risks and thus might be harmful to the interstate system by imposing an improper burden upon the insurance industry as a whole.

Other Factors

We now turn to a consideration of other factors which bear upon the propriety of an application of law to foreign facts. One factor is the extent to which the contacts are grouped in the state whose law is sought to be applied. It may be that in an ideal world this factor should have at most only secondary significance. It can be argued persuasively that, irrespective of the contacts, a state can have no justification for giving a rule extraterritorial application in situations where no policy underlying the rule would be furthered by doing so. Nevertheless, it seems clear that the massing of contacts in a state

27. See text at note 18, supra
may be of crucial importance in the current stage of choice-of-law thinking. Take the case, for example, where a resident of state X is negligently killed in state Y by another resident of X. Suit is brought in X to recover for the wrongful death, but all of the deceased's next of kin reside in state Z. The X and Z rules differ with respect to the way in which the proceeds of a recovery for wrongful death should be divided. Here it seems clear that Z has by far the greater, if not the exclusive, interest in the application of its rule of division. Nevertheless, it seems unlikely that on these facts an application by X of its own rule would today be held unconstitutional.

A second factor is whether the state whose law is sought to be applied would be the state of the applicable law under a recognized rule of choice of law. Suppose, for example, that in state X a resident of state Y, all of whose next of kin reside in Y, is negligently killed by another Y resident. Suit is brought in X to recover for the wrongful death. In this case, Y is clearly the only state which has any real interest in how the proceeds of the recovery should be divided. Also the great majority of the significant contacts are grouped in Y. Nevertheless, it is believed that application of X law would not be held unconstitutional by the Supreme Court of the United States. This is because X is the state of injury. A classical rule of choice of law, which still has a substantial following, directs that rights and liabilities in tort should be determined by the law of this state. It is surmised that application of X law would in this case also be held proper in Canada and Australia, which adhere to the rule of Philips v. Eyre. In any event, the general principle would still hold true that a state will be privileged to apply its law, even though no interest of its own would be served by doing so, if it is the state of the applicable law under a recognized rule of choice of law.

Another factor is whether the interest of the state would be served by the extraterritorial application of its rule. This is of extreme importance. Any extraterritorial application of a rule is likely to interfere with the interests of other states, and such interference can hardly be justified unless, at the very least, it would result in the furtherance of some substantial interest. Whether a state has an interest in the extraterritorial application of a rule depends upon whether such application would result in the advancement of

28. See, for example, the cases collected in Hagemann, The ‘‘New Learning’’ and Choice of Law in Tort Cases (1977), 22 S.D.L. Rev. 253, at 270-271
29. [1870] L.R. 6 Q.B. 1
purpose or policy of the rule. If not, such application might well be thought improper. Nevertheless, as has been said, it seems unlikely that at the present time an extraterritorial application of law would be held unconstitutional in situations where either a substantial number of the contacts are massed in the state whose law was sought to be applied, or the state is that of the applicable law under a well-established rule of choice of law. In other situations, however, furtherance of the purpose or policy of a rule should be an essential condition to the validity of its extraterritorial application.

Assuming that this condition is met and that basic considerations of fairness to the parties are satisfied, there is still the question whether an extraterritorial application of law would result in an improper sacrifice of the interests of other states or of the interstate or international systems as a whole. As has been seen, these latter interests were afforded protection by the decisions of the Supreme Court in *New York Life Insurance Co. v. Head*, 30 *Home Insurance Co. v. Dick*31 and *John Hancock Mutual Life Ins. Co. v. Yates*.32 It is thought, however, that some recent state33 and lower-federal court decisions in the United States have paid these interests insufficient regard. *Rosenthal v. Warren*,34 a decision by a federal Court of Appeals, will serve as an illustration. In that case, Rosenthal, who was domiciled in New York, went to Boston to be operated on by the defendant Warren, a world-renowned surgeon. Rosenthal died after the operation, and suit to recover for his allegedly wrongful death was brought against Warren in New York. He claimed by way of partial defence that in no event could damages be recovered in excess of $50,000 — the maximum recovery permitted at that time by the Massachusetts wrongful death statute. This defence was struck down on the basis of what the court deemed to be New York's strong policy against damage limitations. The result is highly unfortunate. To be sure, since Rosenthal was a New York resident, a purpose of the New York rule against damage limitations was presumably served by its extraterritorial application in this case. On the other hand, this result was achieved at the sacrifice not only of greater Massachusetts' interests but also of

30. See text at note 24, *supra*
31. See text at note 25, *supra*
32. See text at note 18, *supra*
34. (1973), 475 F.2d 438 (2d Cir.)
those of the interstate system as well. The Massachusetts rule limiting the amount of recovery was surely designed to protect residents, such as Dr. Warren. In addition, all of the relevant contacts, save that of Rosenthal's residence, were grouped in Massachusetts. Accordingly, the case must stand for the proposition that a state can apply its rule to protect its residents wherever they may travel irrespective of the countervailing interests of other states. 35 It means that the obligations of one who remains at home will depend, at least in part, upon the domicile of any person he may injure. It means also that the only way such a person can avoid being subjected to liability under a foreign law is, to refuse to deal with foreign residents. Results such as this are thought to be quite inconsistent with the needs of a federal system. These needs require, as a minimum, that each state refrain from interfering in matters that are of far greater concern to another and that no state apply its rules in a way that would seriously deter persons from dealing with residents of other states. Future cases will presumably determine more precisely the limits of a state's orbit of lawful authority with respect to the extraterritorial application of its laws.

Even if future cases limit materially the power of a state to give extraterritorial application to its law, ample room will still remain for the operation of common law rules of choice of law. Today in the United States, the normal case involving multistate contacts is one where the law of a number of states can lawfully be applied under due process. Accordingly, a court must resort to a choice-of-law rule to determine which law to apply in the decision of the case. This situation will inevitably continue except for those cases where the Supreme Court mandates the application of the law of a particular state. On the basis of past experience, cases of the latter sort will be few in number. 36 Out of considerations of fairness, however, the Supreme Court has recently taken such action in the case of the escheat of intangible obligations owed by a

36. On a few occasions, the Supreme Court has laid down hard-and-fast rules of choice of law. Subsequent experience has usually shown these rules to be unsatisfactory and, with two exceptions, they have been discarded. (Reese, Full Faith and Credit to Statutes: The Defense of Public Policy (1952), 19 U. Chi. L. Rev. 339. One of these exceptions concerns the law governing the rights of a member against a fraternal benefit society. See note 6, supra. The second exception involves escheat and is discussed in the text that follows immediately below.
multistate corporation. Usually, a number of states will have sufficient contact with the intangible — as, for example, the state where the obligation was incurred, or was to be paid or which was the domicile of the creditor etc. — to justify application of their respective laws under normal due process standards. But such an approach would permit a number of states to apply their law of escheat and thereby expose the debtor to the danger of having to pay a debt more than once. Accordingly, the Supreme Court has laid down a hard-and-fast rule of due process that "the right and power to escheat the debt [belongs] to the State of the creditor's last known address as shown by the debtor's books and records."37

In conclusion, comparison can usefully be made between the approach taken by the Supreme Courts of Canada and of the United States in cases involving essentially the same problem. The Canadian case is Interprovincial Co-operatives Ltd. v. The Queen.38 The question was whether Manitoba could apply its statute to hold the defendants liable for damage caused by placing mercury in streams in Ontario and Saskatchewan with the permission of the authorities of those Provinces. By a closely divided vote, a majority of the Court answered this question in the negative. Three members of the Court, in an opinion written by Justice Pigeon, held that Manitoba lacked power to apply its statute under Section 92 of the British North America Act. Since the defendants' acts had not been done "in the Province". In view of the interprovincial nature of the problem only the Canadian Parliament could supply a legislative solution. Speaking only for himself, Justice Ritchie, who was one of the majority of four, held that the case was governed by common law principles of conflict of laws. Under the rule of Philips v. Eyre the defendants could not be held liable for acts that were justifiable under the law of the state where they were done. In a dissenting opinion, Chief Justice Laskin joined by two other judges, held that Manitoba, as the place of injury, had constitutional power to apply its law under "common law choice of law" principles. Furthermore Manitoba had the "predominant interest" in the decision of the question at hand.

The American case is *Watson v. Employers Liability Assurance Corp., Ltd.*.\(^3\) It involved the question whether Louisiana could constitutionally apply its direct action statute to permit a person injured in that state to bring suit against a foreign insurance company without first having established the liability of the insured. The insurance policies in question contained a "no action" clause, which prohibited direct actions of the sort provided for in Louisiana. This clause was valid and effective under the law of the states where the policies had been issued and delivered. As in the *Interprovincial* case, the suit in *Watson* was intended to impose upon the defendant a liability to which it was not subject under the law of the state where its conduct had taken place. But in *Watson* the applicability of the Louisiana statute was upheld by a unanimous court. In his opinion, Justice Black first pointed out that the defendant insurance company did a nationwide business and that the policies provided protection against liability for injuries suffered "anywhere in the United States." Accordingly, although the Justice did not explicitly make this point, application of Louisiana law would not be unfair to the defendant insurance company which could have foreseen that an injury covered by the policy might occur in that state. The opinion incidentally mentions the fact that the defendant was licensed to do business in Louisiana.

Justice Black then addressed himself to the needs of the federal system. He stated in this regard that:

> Louisiana's direct action statute is not intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure payment of such damages.

It will have been noted that Justice Black did not find it necessary to inquire whether Louisiana law could be deemed applicable under ordinary choice-of-law principles or whether Louisiana was the state with the greatest interest in the decision of the case. For him, it was enough that extraterritorial application of the statute would not

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39. (1954), 348 U.S. 66
be unfair to the defendant and that Louisiana had sufficient interest in the case to justify such application. Almost surely, the *Interprovincial* case would have been decided differently if it had arisen in the United States and had involved states of that country.

**Conclusion**

Canada, Australia and the United States are all federal states and, as such, have common needs and interests. In each country, provisions that differ widely in their wording impose limitations upon the powers of the member states to apply their law extraterritorially. Those provisions, however, are all so vaguely worded that they can mean little in the absence of judicial interpretation. In none of these three countries does this task of interpretation appear to be greatly advanced. It has been the thesis of this paper that two basic principles should be considered in determining the propriety of an extraterritorial application of law. These are that such application should be essentially fair to the parties and also consistent with the needs of the interstate, or international, systems. These principles in turn are vague and leave much room for interpretation. Nevertheless, they provide the essential bases for further developments in this important field.