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Moffatt Hancock* The Effect of a Post-Occurrence Change of Domicile upon a Choice of Law Determining the Validity of Other-Insurance Clauses in an Accident Policy**

The state has a legitimate interest in applying a rule of decision to... litigation only if the facts to which the rule will be applied have created effects within the state for which the state's public policy is directed. To assess the sufficiency of asserted contacts between the forum and the litigation, the court must determine if the contacts form a reasonable link between the litigation and a state policy.

Mr. Justice Powell1

1. Facts of the Hague Case

Like many hundreds of his fellow countrymen, Ralph Hague (with his wife Lavinia) made his home in one state, Wisconsin, and commuted every day to his place of employment in another, Red Wing, Minnesota. He had been so employed and had so commuted for fifteen years when, on July 1, 1974, he was riding, as a passenger, on his son's motorcycle in Wisconsin, near the Minnesota border. They had stopped at a crossroad and signalled their intention to make a left turn onto the crossroad. While waiting for a car on the crossroad to go by, they were struck from behind by a car owned and driven by Richard Borst, a noninsured driver. Ralph Hague was so severely injured that he died en route to a hospital in Daluth, Minnesota.

Prior to his fatal accident Ralph Hague had purchased a policy of liability insurance covering injury or death that he might inflict upon others while operating any one of three automobiles owned by him. He paid a separate premium for each vehicle. A separate part of the policy also insured him against bodily injury or death suffered by him and caused by a noninsured negligent driver of another car (hereinafter called an "NIN driver"). This insurance was not

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limited to situations where Hague was driving or riding in one of his own three cars. Rather, it covered the loss resulting from his bodily injury or death caused by a NIN driver even if Hague was driving or riding in a car not owned by him or was using the highway as a cyclist or a pedestrian.\(^2\)

II. \textit{Historical Background of NIN Driver Insurance}

Insurance against the harm caused by NIN drivers was originally conceived of and sold by insurance companies to palliate and defuse the popular clamor for compulsory liability insurance of all motor vehicles on the highways.\(^3\) State legislators strongly favored the new NIN driver protection. They hesitated to impose compulsory liability insurance because it necessarily would result in higher premiums for which they would be blamed. During the 1960s, state after state passed statutes requiring all companies selling liability insurance to residents of their state to offer NIN driver insurance to all purchasers of liability insurance. Some state statutes purported to compel the purchasers of liability policies to protect themselves by buying the NIN driver insurance. This insurance was generally required by the state statutes to promise a minimum of compensation equal to the lowest amount of liability insurance that an insured driver could buy under the law of the enacting state.

Had Ralph Hague owned only one car, he could have purchased all of the coverage described above, plus the same protection for members of his family and household, to the amount of $15,000 for any one person's damages. Since only about ten per cent of the drivers of American highways are noninsured, this broad protection could have been bought for a relatively modest premium. However, because he had three automobiles, Hague was required to pay three times the premium that he would have paid had he had only one; this would appear to be excessive. Since a large part of the risk assumed by the insuring company, Allstate, was totally unrelated to the use of any of Hague's automobiles (because it covered Hague while he was a passenger or driver in a vehicle not owned by him), the fact

\(^2\) "The policy issued to Mr. Hague provided that Allstate would pay to the insured or his legal representative damages 'sustained by the insured, caused by accident, and arising out of the ownership, maintenance or use of an uninsured automobile...'" Opinion of Brennan J. in \textit{Allstate v. Hague}, supra, n. 1 at p. 641, n. 18.

that he owned three automobiles, instead of only one, did not multiply threefold the risk that would have been incurred in the case of his owning only one. True, the possibility that all three automobiles might simultaneously be on the highways increased that part of the risk related to the use of one or more of his three automobiles. But the risk to him or to a member of his family in circumstances not involving the use of any of his automobiles would have remained the same whether he owned one or twenty.4

The foregoing statements are based, of course, on the assumption that Allstate was in no case to be liable for more than $15,000 to defray the loss caused by the injury or death of one person. Such an interpretation of the policy would make the amount of the premium charged appear to be excessive and unfair. Thus, a more just and rational interpretation of the policy would have required a judicial decision that, since Hague had paid a triple premium, he was entitled to a triple recovery, to wit, $45,000 to compensate his widow for the wrongful killing of her husband by Richard Borst.5

Since the purchase of insurance against NIN drivers was required by Wisconsin law, unfair and oppressive overcharging of persons owning more than one automobile deserved careful judicial scrutiny. Two clauses contained in Hague's policy are pertinent here, the first of which read as follows:

7. Other Insurance

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under this coverage shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of the liability for

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4. The foregoing discussion of various aspects of NIN driver insurance has been based on the following works of reference: A. Widiss, A Guide to Uninsured Motorist Coverage §§ 1-3 (1981 Supp.); Netherton, id; M. Franklin, Cases and Materials on Tort Law and Alternatives, 733-35.

5. As the Minnesota Supreme Court stated in Van Tassel v. Horace Mann Mutual Insurance Co. (1973), 296 Minn. 181; 207 N. W. 2d. 348 at 186 (permitting the insured to recover $33,000 when she owned four separate policies on four separate vehicles, each providing $10,000 in NIN driver protection): "...the fact that the legislature required an uninsured-motorist provision in all policies, added to the fact that a premium has been collected on each of the policies involved, should result in the policyholder's receiving what he paid for in each policy, up to the full amount of his damages. ...[I]t seems more just that the insured who has paid a premium should get all he paid for rather than that the insurer should escape liability for that which it collected a premium."
this coverage exceeds the limit of liability for such other insurance (emphasis added).\textsuperscript{6}

This clause clearly does not apply to the death of Ralph Hague. Doubtless the policy contained a clause defining "bodily injury" so as to include "death", and "automobile" so as to include "motorcycle". Hague, therefore, was "occupying an automobile" (as defined) "not owned by the name insured", that is, himself. But, there was no "other similar insurance" available to him and "applicable to" such automobile, as defined. His son, Ronald, had no NIN driver insurance "applicable to" his motorcycle. "Other similar insurance" must surely mean similar insurance under a policy other than the policy in which the word "other" appears.

Neither did the second clause of section 7 apply to the death of Ralph Hague. It read as follows:

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance and Allstate shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance (emphasis added).\textsuperscript{7}

Again, we note that "other similar insurance" cannot rationally refer to insurance under the policy in which these words occur. Moreover, the words "Allstate shall not be liable", et cetera, make it absolutely clear that no part of Allstate's liability can be regarded as other similar insurance.

III. Other Insurance Clauses in Hague's Policy Clearly Void for Irrelevance and Ambiguity

These clauses were obviously meant to deal with the situation in which two or more persons held policies of NIN driver insurance, each of which covered the accident in question. If, for example, Ralph Hague's son had held a policy of NIN driver insurance relating to his motorcycle, that policy would probably have covered his father as a guest passenger on the motorcycle. That case would have been covered by the first clause of section 7. Or, if Ronald, the

\textsuperscript{6} Weintraub, \textit{Who's Afraid of Constitutional Limitations on Choice of Law?}, 10 Hofstra L. Rev. 17, 18.

\textsuperscript{7} Ibid.
son, had been hit by a NIN driver while crossing a road as a pedestrian, he would have been covered by his own motorcycle policy and by his father's policy as a family member. In this case, the second clause of section 7 would have been applicable.

One would suppose that anyone familiar with the English language would realize that the other-similar-insurance clauses in Ralph Hague's policy could not possibly be read as referring to insurance provided by the same policy in which they appeared, which was also the only policy providing NIN driver insurance held by the insured. Moreover, Professor Weintraub has found several cases in which, although the other-similar-insurance clauses were identical with those in the Hague case, the insurer's counsel argued that the clauses applied to a situation where the insured plaintiff had purchased two or more separate policies issued by the same insurance company respecting each of two or more cars. In each case the court held that the clauses were too ambiguous to cover the facts presented and allowed the insured to recover the total sum of all policies issued to him by the same company.

Clauses such as these have been a prolific source of litigation since NIN driver insurance first won the enthusiastic support of insurance companies and legislators alike. To win popular support also, the NIN driver coverage was, as we have seen, extended to the named insured and the members of his family under all circumstances in which a NIN driver could hurt or kill them. Guests and paying passengers legally occupying one of the named insured's vehicles were also covered. Thus, it frequently happened that the victim of a NIN driver found himself covered by his own policy and that of his host-driver or his father or both.

The insurance companies took it on themselves to ascribe to the statutes encouraging and requiring this new insurance an unwritten limitation, namely, that no victim of a NIN driver should receive greater compensation than he would have received had he been injured by an insured driver carrying the minimum legal limit of liability insurance. Most victims of NIN drivers were able to recover under only one policy. The legislature, it was argued, never intended that the victim of a NIN driver should receive higher compensation than the victim of a properly insured driver. If an

8. Weintraub, supra, note 4, at 21-23. The writer is particularly indebted to Professor Weintraub for the assistance he has derived from Professor Weintraub's analysis of this particular problem.
injured person happened to be covered by two or more NIN driver policies purchased by different persons, he should not obtain an undeserved windfall.

IV. Other Insurance Clauses Held Contrary to Legislative Intent and Policy of Overwhelming Majority of States

A large majority of state courts told the insurance companies emphatically that their state's legislation did not imply any such unstated limitation; that is, persons covered by two or more NIN driver policies purchased by several persons must be entitled to collect (to the amount of his damages) the full sum provided by all such policies without any reduction whatever. All other-similar-insurance clauses to the contrary were declared invalid, as being contrary to the compensatory policies of the statute. A relatively small minority of state courts agreed with the insurer's counsel, holding that no legislative purpose of their statutes prevented an insurance company from contracting in its policies for the reduction or extinguishment of its liability to the victim of a NIN driver who was covered by two or more policies purchased by different persons. Such contracts must, however, be stated in the policy in clear and unambiguous words.

V. Wisconsin Follows Minority Rule Holding Other Insurance Clauses Valid if Clear and Certain

In the case of Nelson v. Employers Mutual Casualty Co.,10 which was decided in 1974, the Supreme Court of Wisconsin had reaffirmed its position, as of 1968 (the date when the facts had occurred) in agreement with the minority of state courts on the specific problem stated in the preceding paragraph. On September 29, 1968, Lois Nelson sustained serious personal injuries in a collision between a car driven by her and one owned and driven by Richard Severson, a negligent noninsured driver who died in the collision. Miss Nelson had, apparently, no NIN driver insurance of her own. But she was driving, with permission, a car owned by her employer, Denmark Farm Equipment Incorporated. Insurance purchased by them from Employers Mutual Casualty Co. covered

9. As of 1981, only eight states will enforce the limitation on recovery advocated by the insurers: Arkansas, California, Colorado, Illinois, Louisiana, New York, South Carolina, and Utah. Widiss, supra, n. 4, at §2.59-2.61.
10. 63 Wis. 2d 558 (1974).
her injury by a NIN driver to the amount of $10,000. She was also covered, to the same amount, by similar insurance purchased by her father from Mutual Service Casualty Insurance Co. Her damages amounted to more than $20,000. Employers Mutual settled its liability by paying $10,000.

Her father's policy with Mutual Service contained the following clause relating to other similar insurance:

> With respect to bodily injuries to an insured, while occupying an automobile not owned by the named insured, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant and this insurance shall then apply only in the amount by which the applicable limit of liability of this part exceeds the sum of the applicable limits of liability of all such other insurance (emphasis added).\(^\text{11}\)

This clause of the policy obviously covered the facts of the *Nelson* case like a tent. Indeed, its application to those facts was not questioned. The sole argument advanced against the clause was that it contravened the compensatory policy of Wisconsin's 1967 statute requiring insurers to offer NIN driver coverage to all purchasers of liability insurance. Following two earlier decisions of 1971 and 1972,\(^\text{12}\) the Wisconsin Supreme Court sustained the validity of the other-similar-insurance clause.

Thus, it seems obvious that if Lavinia Hague had brought suit in a Wisconsin court, claiming $45,000 under her husband's NIN driver coverage, the *Nelson* case would have presented no obstacle to her recovery under Wisconsin law, the law of her and her husband's domicile at the time of his death. Unlike the facts of the *Nelson* case, the facts of the *Hague* case did not fall within the scope of the other-similar-insurance clause of Hague's policy. Moreover, none of the earlier Wisconsin cases had involved a claim for NIN driver insurance, based on a single policy purchased by the named insured, to recover the amount of damages for his wrongful death sustained by his beneficiaries. However, Lavinia Hague was not destined to remain domiciled in Wisconsin or to file her famous suit in that state.

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\(^{11}\) *Id.*, at 561.

VI. Lavinia Hague Moves to Minnesota, Whose Domestic Law Would Support Her Claim, and Sues Allstate

Shortly after her husband's death, Lavinia Hague moved from the village of Hager City, Wisconsin (population 100) to Red Wing, Minnesota (population 13,700), only a mile and a half from her former abode. Less than two years after the fatal accident, on June 19, 1976, she married a Minnesota resident who owned a service station in Bloomington, Minnesota, and went to live with him in Savage, Minnesota. On May 28, the Registrar of Probate for Goodhue County, Minnesota, appointed Lavinia Hague Personal Representative of the estate of her deceased husband. In this capacity, she filed suit on the same date in a Minnesota court against Allstate. She petitioned the court for a declaration that she was entitled to recover (on proof of sufficient damages) the full sum of $45,000 under her husband's policy.

Lavinia Hague's counsel did not rely upon the arguments previously advanced, namely, (1) that the other-insurance clauses in Hague's policy could not be sensibly read as applicable to any of the coverage provided by that very policy, (2) that the Wisconsin case, *Nelson v. Employers' Mutual Casualty Co.*, which enforced an other-similar-insurance clause, had only involved other insurance not purchased by the injured plaintiff. The different line of argument actually chosen by Lavinia's counsel must have appeared on first impression very attractive and convincing. In *Van Tassel v. Horace Mann Mutual Insurance Co.*, 13 decided in 1973, the Supreme Court of Minnesota had held that all clauses which reduced or eliminated the coverage of a NIN driver insurance policy because other similar insurance was available to the insured were void and unenforceable. The judges held, in a unanimous opinion, that when the Minnesota legislature required insurers to offer to every buyer of liability insurance NIN driver coverage up to the level of at least $10,000 for each person so injured, the legislature deprived the insurers of power under any circumstances to make contracts reducing that coverage below the fixed sum. This case, supported by the great majority14 of other states, must have appeared to provide Lavinia Hague's counsel with a powerful argument, provided they could persuade the court that the policy of

13. See note 5, *supra*.
14. See note 9, *supra*. 
Minnesota law ought to cover her case because of its significant factual contacts with that state, that is, her husband's fifteen years of employment in Minnesota and her domicile there acquired after his death.

VII. The Wisconsin Contacts: Did They Really Relate to Wisconsin Policy?

Before examining these unusual contacts, let us briefly consider the significance of the various Wisconsin contacts. Some judges and commentators continue to believe that every fact occurring within the boundaries of a state supports some vague, unstated argument for applying that state's domestic law to the case at hand, regardless of the policy or policies of that domestic law. For such judges and commentators, the arguments for applying Wisconsin law will seem to have been overwhelming: for example, Hague's NIN driver insurance contract was purchased by him in Wisconsin, a state whose domestic law would have upheld the validity of its other-insurance reduction clauses. But was the rule validating such clauses supposed to apply to all such contracts made in Wisconsin? Suppose the insured and his family had been domiciled in a state that invalidated such clauses. Was the policy in the Nelson case supposed to apply to such a case? Suppose Hague had made his insurance contract in Minnesota where he was employed. Would it have made sense to hold that, in such a case, the other-insurance clause would be invalid, but that in the present case it must be held binding? The single fact of two persons making a contract in a state whose law would sustain its validity cannot, in and of itself, give that state a legitimate claim to have the contract enforced against the contrary claim of another state more significantly connected to either of the parties.

There was another Wisconsin contact that did not support the application of Wisconsin law: the tortious act that caused Hague's death had occurred in Wisconsin. Because the state in which a person has been killed might have a concern that potential medical and funeral expenses owing to its citizens should be paid, it might be argued that Wisconsin would have an interest in the application of its insurance law to any available insurance, payable to Hague's

15. Since plaintiff's counsel assumed these clauses were valid in Wisconsin, we do so for purposes of argument.
estate. That the state of injury has such an interest in available insurance is supported by the Watson and Clay cases. But Wisconsin could have no such interest in Hague's case because the effect of applying its law would have been to diminish the sum recoverable under Hague's policy. The only policy of Wisconsin law that would appear to command serious attention could be described as follows. The Wisconsin court, having considered its statutes requiring that NIN driver insurance be provided for all purchasers of liability insurance, had held that the legislature did not intend to abandon a general policy of freedom of contract, beneficial though that policy might be to the insurance companies. Assuming, then, that the Wisconsin legislature did favor a policy of freedom of contract as one beneficial to all members of the community, the case of Ralph Hague, who had made his home in Wisconsin and who had purchased a NIN driver policy from an insurance company doing business in Wisconsin, would appear to fall within the ambit of that Wisconsin policy. If we are to be totally fair to the potential policies of Wisconsin law, we should recognize that Wisconsin law may well have reflected a policy favoring reduction clauses appropriately applicable to the case of Lavinia Hague.

VIII. Analysis of the Opinions of the Minnesota Supreme Court

Speaking for the majority of the Supreme Court of Minnesota with reference to the Nelson case, Justice Yetka wrote:

The Wisconsin Supreme Court has articulated its state policy of

17. That Ralph Hague's car was at all times garaged in Wisconsin is a contact absolutely devoid of any policy significance for choice-of-law purposes. In the first place, the accident in question had absolutely nothing to do with any of Hague's automobiles. Furthermore, the insurance company had undertaken responsibility for injuries inflicted by a NIN driver anywhere in the United States or Canada. This mysterious allusion to the place where the plaintiff's or defendant's car was usually garaged has become a kind of standard form in judicial opinions. It is, of course, true that insurance premiums are in part based upon previous loss experience involving cars garaged in the rating territory where the insured's car is garaged. But it has been conclusively demonstrated that when cars from a particular state are involved in accidents outside that state, the occurrence of that loss will have virtually no effect on the general level of premiums in that state. See Morris, Enterprise Liability and the Actuarial Process — The Insignificance of Foresight, 70 Yale L.J. 554 (1961); Currie, Review of Ehrenzweig, Conflict of Laws, (1964) Duke L.J. 424 at 432.
insuring minimum recovery on the part of victims of uninsured motorists. This policy may be based, in part, on a desire to keep insurance premiums low while providing some protection against uninsured motorists.\textsuperscript{18}

Justice Yetka was probably correct in suggesting that the decision in the Nelson case, which enforced an unambiguous clause restricting each victim of a NIN driver to recovery under one policy only, would depress the premiums paid for such insurance by all residents of Wisconsin.\textsuperscript{19} He wisely refrained from suggesting that the application of the contrary Minnesota rule in the Hague case (and in other identical cases occurring in the same year) would, in the future, have the effect of increasing those premiums. Concerning the fixing of liability insurance premiums, it has been conclusively demonstrated that the complex techniques used for forecasting future liabilities to be generated by cars garaged in a particular rating territory operate in such a way that shifts in choice-of-law methodology have little or no effect upon such forecasts. Choice-of-law cases, allocated to a single-rating territory, are so few in proportion to the number of nonconflict cases used in making the forecast that their effect is usually of little or no significance.\textsuperscript{20} The same is doubtless true of the methods used to forecast damages to be inflicted by NIN drivers for which the insurer will be liable.

Unfortunately, Justice Otis (dissenting) introduced a totally fallacious and discredited theory into the case to support the application of Wisconsin law. Justice Otis wrote that:

The rights of this defendant [Allstate] which are, in my opinion, constitutionally protected, were vested at the time it entered into its contract for insurance with the decedent in Wisconsin [June 8, 1974] prior to July 1, 1974 [date of the collision]. At that time stacking had been held unavailable by the Wisconsin court in its Nelson decision, filed May 20, 1974. Defendant had a right to

\textsuperscript{18} Hague v. Allstate Ins. Co., 289 N.W. 2d 43 at 47.
\textsuperscript{19} Morris, supra, n. 17.
\textsuperscript{20} Morris, supra, n. 17. See also discussions of the actuarial methods by which insurance premiums are fixed in Hancock, Some Choice-of-Law Problems Posed by Antiguest Statutes: Realism in Wisconsin and Rule-Fetishism in New York, 27 Stan. L. Rev. 775 at 780; Hancock, Anti-Guest Statutes and Marital Immunity for Torts in Conflict of Laws: Techniques for Resolving Ostensible True Conflict Cases and Constitutional Limitations, 1 Dalhousie L.J. 105 at 139; Hancock, Policy Controlled State Interest Analysis in Choice of Law, Measure of Damages, Torts Cases, October 1977 Int'l & Comp. L.Q. 799 at 805.
rely on that decision in fixing its rates and in actuarially assessing its exposure (emphasis added). 21

The italicized words above embody a tiresome old fallacy first suggested by Ehrenzweig in 1960. 22 Some judges still insist on rehearsing the fallacy, although it was completely discredited by Morris in 1961. Insurance actuaries, in fixing premiums, do not, and could not, rely upon the potential application of particular rules of domestic laws, such as that of the Nelson case or choice-of-law methodology. Since 1961, Ehrenzweig’s error has been analyzed and exposed by commentators and judges alike. 23

How shall we explain Justice Otis’ strange misconceptions of the actuarial process? One cannot help wondering why he and his colleague, Justice Petersen, should have been so concerned about the possibility that an insurance corporation might have failed to foresee the possible application of Minnesota law. Forecasting risks of loss is the principal business of insurers, an activity in which they have the assistance of experienced actuaries and attorneys. Why should a judge, who knows relatively little about the problems they face, feel it necessary to come to their assistance? One suspects that Justice Otis and his colleague in dissent held a strong opinion that Wisconsin law, which validated the reduction clauses, ought to be applied for reasons not connected with the insurer’s calculations. This suspicion gains support from the fallacious choice of law technique, popular with some judges and even a few commentators, known as ‘‘grouping of contacts’’ or ‘‘finding the center of gravity’’. This technique permits and encourages the judge to apply the law of that state with which the parties and the facts have the most numerous contacts, even though some or all of those contacts are quite unrelated to any policy embodied in the domestic law of that state. This technique is much easier to use than that of choosing a rule of domestic law because the facts fall within the legitimate range of its underlying policy. The latter technique may involve some hard thinking about the purposes of a given rule and the rules’ relative importance. One must also consider the actual effect of that rule on human behavior and whether it has had unexpected consequences. Many judges will also want to inquire as to whether its policies have become anachronistic in a modern context.

22. Ehrenzweig, Conflict of Laws, 582-583.
23. For citations to commentators, see, supra, notes 17 and 20. See also, for example, Miller v. Miller (1968) 22 N.Y. 2d 12, 237 N.E. 2d 877.
Justice Otis made no secret of his preference for the "centre of gravity" technique. He discussed at great length the earlier Minnesota case of *Bolgren v. Stich*, decided in 1972. Its fact-law pattern had presented a false conflict problem, analogous to that in *Babcock v. Jackson*.25 However, Justice Kelly, writing for the Supreme Court of Minnesota in the *Bolgren* case, decided to employ the "center of gravity" technique. He carefully counted the contacts with the three states involved — Minnesota, South Dakota, and North Dakota. He then announced that Minnesota was the winner of the title "the center of gravity"; hence, its law should be applied. Mr. Justice Kelly also stated that "[i]n addition to the fact that Minnesota is the center of gravity of the contacts, this state has the greater interest in applying its law."26

In applying the center of gravity technique to the *Hague* case, Justice Otis concluded that Wisconsin had the largest number of factual contacts and, thus, its law, as embodied in the *Nelson* case, should be applied. However, as our review of those Wisconsin contacts clearly showed, they were contacts without legal policy consequences. With one possible exception, none of them was so related to a Wisconsin policy as to show that the range of that policy reached the present case.

In the *Bolgren* case, Justice Kelly's resort to the fallacious technique of counting insignificant contacts in order to find a "center of gravity" did not result in an indefensible decision; a policy-determined analysis would have reached the same result. He merely overloaded his opinion with some unconvincing arguments. But Justice Otis' use of the same technique in the *Hague* case could have led to a most unfortunate result if only one more of his colleagues had joined him. However, the three-judge minority of the Supreme Court of Minnesota held that the contacts with Minnesota justified the application of its law, thereby invalidating the reduction clauses. Employing the analytical framework of five choice-of-law influencing considerations, developed by Leflar,27 they relied particularly upon Leflar's fifth consideration, "application of the better rule of law". Because of the Minnesota rule, invalidating reduction clauses would require the costs of accidents

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24. (1972) 293 Minn. 8, 196 N.W. 2d 442.
caused by NIN drivers to be spread more broadly across insurance premiums. In view of this, the majority concluded that Minnesota had the better law, and so entered judgment for Hague’s estate. Allstate’s counsel then scored a signal success: they persuaded the United States Supreme Court to review the case on constitutional grounds.28

IX. The Narrower Issue Presented by Supreme Court Review

Having shifted our focus on the Hague case to its consideration in the United States Supreme Court, we have, at least temporarily, narrowed the crucial issue. Speaking for the four-judge plurality that prevailed in the federal Supreme Court, Justice Brennan stated that issue as follows:

It is not for this court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court’s choice of its own substantive law, in this case, exceeded federal constitutional limitations. Implicit in this inquiry is the recognition, long accepted by this court, that a set of facts, giving rise to a lawsuit or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction . . . As a result, the forum state may have to select one law from among the laws of several jurisdictions having some contact with the controversy.

In deciding constitutional choice of law questions, whether under the due process clause or the full faith and credit clause, this court has traditionally examined the contacts of the state whose law was applied with the parties and with the occurrence or transaction giving rise to the litigation . . . In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair . . . the court has invalidated the choice of law of a state which has had no significant contact, or no significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction (emphasis added).29

28. (1980) 444 U.S. 1070, 100 S. Ct. This was the first time that the Supreme Court had granted certiorari on a question involving nothing more than the propriety of a state’s choice of law since the granting of certiorari in the case of Clay v. Sun Insurance Office Ltd., supra, n. 16.
X. Comparison of Domicile Status and Employment Status

In order to realize fully the high degree of similarity between the case of Ralph and Lavinia Hague and that of a husband and wife domiciled at all times in Minnesota, consideration of such a hypothetical case may be instructive. Suppose that both Ralph and Lavinia Hague had been domiciled at the time of their marriage in Minnesota, where Ralph was then employed. Assume also that they rented a modest home in Red Wing. Two years later, Ralph purchases in Wisconsin, from a friend selling Allstate policies there, an insurance policy exactly like that in the actual case. Soon thereafter, he is killed in Wisconsin by a NIN driver while a passenger on his son’s motorcycle, as in the actual case. (In this hypothetical example, a post mortem change of domicile by Lavinia Hague to Minnesota would have been impossible. That feature of the real case will be discussed later.)

Assuming that Lavinia Hague then brought suit in a Minnesota court for a declaration of her rights against Allstate, a judgment in her favor surely would have ensued. The making of the contract in Wisconsin and the death of Hague in that state would not have provided any ground for resort to Wisconsin’s rule validating reduction clauses. But Minnesota, as Lavinia’s domicile, would have had a strong interest in applying its invalidating rule to give her a larger recovery under the policy. For the future, the nullification of the reduction clauses would assure husbands in Minnesota who purchased NIN driver insurance for their wives’ protection that their state would not permit reduction clauses to reduce that protection, regardless of where the policy contract had been made or the death had occurred.

XI. Home Insurance Co. v. Dick: An Illustration of the Rejection of Domicile as a Contact of Any Significance in Choice-of-Law Cases

Time was when the importance for choice-of-law purposes of a man’s domicile received scant consideration in torts and contract cases. The traditional territorial system of Story, Dicey, Minor, and Beale stressed so strongly the situs of acts and events that the law of a person’s domicile had come to have little significance when he acted outside its territory. In the Supreme Court’s oft cited, but much misunderstood, decision of 1930 in Home Insurance Co. v.

30. See text, section VII.
Dick, C. J. Dick, an American citizen, was at all relevant times domiciled in Texas. In that state, the legislature had enacted, in 1909, a statute of a common type, designed to prevent insurance companies and other wealthy and powerful debtors from inserting clauses in their contracts limiting the time within which they might be sued by their less experienced creditors. Those creditors, the legislators believed, should be allowed sufficient time to decide whether to consult an attorney and to give such an attorney, once consulted, time to investigate his client’s claim. Such clauses were also considered objectionable because they deprived a citizen of access to the courts of his state at a time when the limitation and prescription statutes of that state had given him access. To obtain the benefits of what was frequently a nonnegotiable adhesion contract, the citizen was being forced to renounce, in part, one of his basic civil rights. At the date of the Dick case, twenty-five states had enacted such statutes nullifying time-of-suit clauses. The Texas statute read as follows: “No persons, firm, corporate association or combination of whatsoever kind shall enter into any stipulation, contract or agreement, by reason whereof, the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract or agreement for any said shorter period in which to sue shall ever be valid in this state (emphasis added).”

On October 27, 1923, C. J. Dick filed suit in a Texas District Court against Compania General Anglo-Mexican de Seguros, a Mexican insurance company, for $35,000 allegedly owing to Dick (and others) under a policy insuring the tugboat Waverly against loss or damage by fire in Mexican waters. The policy was approved and accepted by the Mexican company, in Mexico, on March 18, 1921, to be in effect for one year thereafter. On July 27, 1921, the tugboat caught fire and sank in the harbor of Tampico, Mexico.

32. See Home Insurance Co. v. Dick, 8 S.W. 2d 354 at 357 (Ct. of Civil Appeals decision); Home Insurance Co. v. Dick, 15 S.W. 2d 1028 at 1030 (Commission of Appeals decision).
33. For a list of states nullifying time-of-suit clauses as of 1960, see the opinion of Black J. (dissenting) in Clay v. Sun Life Ins. Office Ltd., supra, n. 16 at 215, n. 1.
35. Texas and Gulf Steamship Co. was an original party to the insurance policy. At a subsequent date, Suderman and Young was allowed to intervene, but its interest was held to be identical with Dick’s.
Since the Mexican company carried on no business whatsoever in Texas, it was immune to suit in Texas courts. But the Franklin Fire Insurance Company and the Home Insurance Company had each entered into a contract of reinsurance with the Mexican company for $15,000.36 Both of these companies carried on business37 in Texas and had appointed agents for service there, as was required by Texas law. Notices of garnishment were served upon them in Dick's suit against the Mexican company, alleging that their debts to the Mexican company were pending the court's decision on Dick's claim.

The trial judge found that, when the policy was issued, Dick was "temporarily sojourning"38 in Mexico. That judge further found "that the plaintiff, C. J. Dick, had a beneficial and insurable interest in said vessel, and that said policy hereinabove described, as originally issued, was for the benefit of the Plaintiff, C. J. Dick and the Texas and Gulf Steamship Company, according to the respective interests of said parties in said vessel (emphasis added)."39 In the light of these findings of fact by the Texas trial judge, the following statement of Justice Brandeis must be regarded as somewhat misleading: "It (the policy) was issued by the Mexican company in Mexico to one Bonner of Tampico, Mexico, and was there duly assigned to Dick, prior to the loss."40 This "statement" of the facts implied that after Bonner, a Mexican domiciliary, had made a contract with the Mexican corporation to be performed in Mexico, Dick had taken an assignment of Bonner's rights, and that he then claimed his rights to be greater than Bonner's because he was permanently domiciled in Texas. But Dick was, in fact, an original party to the insurance contract holding an insurable interest in the tug, Waverly. Only after he had become a party to the original contract did Dick receive an assignment of Bonner's original interest in the policy.

In the Texas courts, the garnishees (Home Insurance Co. and Franklin Fire Insurance Company) relied upon the following clause in the policy as a defense: "It is understood and agreed that no judicial suit or demand shall be entered before any tribunal for the

37. *Ibid.* This finding was reiterated in the Commission of Appeals decision at 1029-30, and in the U.S. Supreme Court opinion at 404.
collection of any claim under this policy, unless such suits or demands are filed within one year, counted as from the date on which such damage occurs."\(^\text{41}\) They also relied upon articles 1038, 1039, and 1043 of the Mexican Commercial Code, prescribing one year as the time limited for suit to enforce a contract of insurance, and a second clause in the policy incorporating by reference the time limit of the Mexican Commercial Code.

It is high time to recall that we began this rather extended analysis of the Dick case to demonstrate that, as recently as fifty years ago, the laws and policies of a party's domicile had almost no effect upon the solution of choice-of-law problems involving contracts. Though all three of the Texas courts gave judgment in favor of Dick against the garnishees, the judges' opinions were almost entirely devoted to the endless conundrums of classification,\(^\text{42}\) far removed from any issue of social policy. They actually concluded that the time-of-suit clauses in the policy had no effect on substantive rights of the parties.\(^\text{43}\) While holding that the contract clauses were contrary to Texas' public policy, they did not explain how that policy had been involved, that is, that the Texas legislature had, in 1909, indicated its opinion that such clauses were unfair to creditors and that, in this case, their enforcement would deprive a citizen of Texas of access to the courts of his state, contrary to its laws.

Speaking through Mr. Justice Brandeis, the Supreme Court unanimously overruled the Texas courts' decision. Though his opinion "containeth many points of good learning", its major argument is briefly and pithily stated, as follows: "The Texas statute, as here construed and applied, deprives the garnishees of property without due process of law . . . . In the case at bar 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. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas."\(^\text{44}\) Thus, in the game of blindfold contact-counting, Mexico is a shut-out winner.

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42. See Hancock, *Policy Controlled State Interest Analysis in Choice of Law, Measure of Damages, Torts Cases*, *supra*, n. 20 at 819-824.
But were not the Texas courts bound to give some serious consideration to a strongly worded Texas statute in cases where the rights of a Texas citizen are at stake? Justice Brandeis’ response was short and unequivocal: “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. Texas was, therefore, without power to affect the terms of contracts so made.”

Today, these sentences are of historical interest only. In three subsequent cases involving claims against insurance companies, the Supreme Court has stressed the significance for choice purposes of beneficial law enacted in the state where the claimant suffering damage to person or property has been domiciled.  

XII. Evaluation of Ralph Hague’s Employment Status as a Significant Minnesota Contact

Returning to our hypothetical case wherein Ralph and Lavinia Hague are assumed to have always been domiciled in Minnesota, let us focus on the basic question: why should the courts of that state apply that state’s laws for the Hagues’ benefit? It is common practice to say of persons so situated that they are voting, taxpaying members of the Minnesota community. But Ralph and Lavinia had contributed much more to the state than taxes. For several years, Ralph had given his knowledge, his skills, and his productive energy to the Minnesota economy. The same would have been true of Lavinia if she had been gainfully employed. In any event, we should assume that she aided and supported Ralph by performing some or all of the homemaking tasks a wife usually assumes and, by her tender companionship, gave him a sense of joie de vivre and self-fulfillment that only a true wife can bring to her mate. Thus, she made him a happier and more creative person in relation to his employment.

How do these contributions of Ralph and Lavinia to the Minnesota economy relate to their insurance policy? The answer is very simple: when a husband buys insurance covering his death, his principal motive is to protect his wife against poverty and

45. Id. at 408.
46. Pacific Employers Ins. Co. v. Industrial Accident Comm’n (1939) 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940; Watson v. Employers Liability Assurance Corp., supra, n. 16; Clay v. Sun Ins. Office Ltd., supra, n. 16. It would be impractical to attempt to cite all the cases in which state courts have given great weight to the domicile of one or both of the parties.
destitution. The state of his and her common domicile has necessarily a very powerful concern to carry out his objective. That concern should suffice to bring all insurance benefits payable on his death within the potential scope of the state’s insurance laws.

We may now return to the original, actual case by supposing that, after Ralph and Lavinia had lived as man and wife in Minnesota for a few years (and before any other facts had occurred), they had moved into a handsome old house in Hager City, Wisconsin, that Lavinia’s great-aunt had devised to her. From that time forward, they received police protection as property owners, making their home in Wisconsin and paying taxes on the newly-acquired house in Hager City. Ralph, with Lavinia’s wifely support, continued to earn his living in Minnesota and to pay income tax to that state. To complete the picture of the actual case, we must further assume that the NIN driver insurance was purchased and the fatal accident occurred in Wisconsin. (Lavinia’s post-mortem change of domicile we shall reserve for further discussion.) Thus, we reach the crucial question: if, when Ralph and Lavinia were both domiciled in Minnesota, that state had a strong concern for the application of its rule, invalidating the reduction clauses of their policy, why should that strong concern not have continued as long as Ralph, with Lavinia’s wifely support, continued to contribute his skills, knowledge, and productive energy to the Minnesota economy and to pay taxes to Minnesota as well? The question surely appears to answer itself, for whether Ralph chose to make his home (that is, to dine, sleep, and eat breakfast) in Minnesota, Wisconsin, or Canada, his contribution of work and taxes to Minnesota would remain sufficient to give that state a strong and legitimate concern to help him provide for his wife after his death.

Speaking for the plurality of four judges who (with Justice Stevens concurring in a separate opinion) affirmed the Minnesota Supreme Court’s decision, Justice Brennan articulated most of the argument hitherto set forth. He clearly recognized that Hague’s Minnesota employment conferred on him a status such that that state’s concern for his welfare and safety was affected by his injury or death outside its borders. Thus he wrote: “That Mr. Hague was not killed while commuting to work or while in Minnesota does not dictate a different result [that is, exclusion of Hague from Minnesota’s interest and concern]. To hold that the Supreme Court of Minnesota’s choice of Minnesota law violated the Constitution for that reason would require too narrow a view of Minnesota’s
relationship with the parties and the occurrence giving rise to the litigation. An automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected to the occurrence. Similarly, the occurrence of a crash, fatal to a Minnesota employee, in another state is a Minnesota contact."

In stressing the importance of Ralph Hague's contribution to the general economy of Minnesota, Justice Brennan unfortunately failed to mention Lavinia's wifely support and the taxes they paid to Minnesota. But even without referring to these significant factors, he succeeded in showing Minnesota's concern, not only for its employees during their lives, but for the "vindication of the rights of the estate of a Minnesota employee." Thus he wrote:

First, and for our purposes, a very important contact, Mr. Hague was a member of Minnesota's workforce . . . . While employment status may implicate a state interest less substantial than does residence status, that interest is nevertheless important. The state of employment has police power responsibilities toward the non-resident employee that are analogous, if somewhat less profound, than toward residents . . . . The state's interest in its commuting, non-resident employees reflects a state concern for the safety and well-being of its workforce and the concomitant effect on Minnesota employers . . . . If Mr. Hague had only been injured and missed work for a few weeks, the effect on the Minnesota employer would have been palpable and Minnesota's interest in having its employee made whole would be evident. Mr. Hague's death affects Minnesota's interests still more acutely even though Mr. Hague will not return to the Minnesota workforce. Minnesota's workforce is surely affected by the level of protection the state extends to it, either directly or indirectly. Vindication of the rights of the estate of a Minnesota employee, therefore, is an important state concern (emphasis added)."  

As Professor Weintraub has suggested, Minnesota might very properly have required Hague's employer to contribute to insurance on Hague's life payable to his estate. Since Hague had already purchased NIN driver insurance payable to his estate, the Minnesota court had merely claimed for that state the power to invalidate clauses that were unfair and oppressive under Minnesota law. As a corporate member of the Minnesota economic community, Allstate was clearly bound to submit to all reasonable regulations of its transactions with Minnesota citizens or persons entitled to the

47. Allstate v. Hague, supra, n. 1 at 641.
48. Id. at 640-641.
49. Weintraub, supra, n. 6 at 29.
protection of Minnesota laws, such as a long-time member of the Minnesota workforce.

XIII. Justice Powell’s Narrow Interpretation of Hague’s Employment Status

It is not easy to understand how, in his well-informed and perceptive opinion, Justice Powell came to disagree with Justice Brennan about the very existence of Minnesota’s concern for the widow of a long-time member of that state’s workforce and his desires to provide for her on his death. Concerning the general principles established by prior Supreme Court decisions, the two judges seem to have been generally in agreement. Thus, Justice Powell wrote: “The Court should invalidate a forum state’s decision to apply its own law only when there are no significant contacts between the state and the litigation (emphasis added).”50 Further on in his opinion, he wrote: “Nonetheless, for a forum state to further its legitimate public policy by applying its own state law to a controversy there must be some connection between the facts giving rise to the litigation and the scope of the state’s lawmaking jurisdiction.”51 He concluded his summary of general doctrine as follows: “the state has a legitimate interest in applying a rule of decision to the litigation only if the facts, to which the rule will be applied, have created effects within the state toward which the state’s public policy is directed. To assess the sufficiency of asserted contacts between the forum and the litigation the court must determine if the contacts form a reasonable link between the litigation and a state policy. In short, examination of contacts addresses whether the state has an interest in the application of its policy in this instance. If it does, the Constitution is satisfied.”52

As has already been explained, the Minnesota court’s invalidation of the reduction clauses in Ralph Hague’s policy (by applying Minnesota law) effectuated that state’s concern for the welfare of an employee’s wife after his death, as well as its concern that his plan to protect her by accident insurance on his life should produce the maximum recovery. But Justice Powell emphatically refused to recognize any such Minnesota concerns, saying that “[t]he insured’s place of employment is not, however, significant in this

51. Id. at 651.
52. Id. at 651-652.
case. Neither the nature of the insurance policy, the events related to the accident, nor the immediate question of stacking coverages, are in any way affected or implicated by the insured’s employment status. . . . Minnesota does not wish its workers to die in automobile accidents. But permitting stacking will not further this interest.” 53

But why should Minnesota’s concerns be so narrowly circumscribed by the Supreme Court? As Justice Brennan noted, the death of Hague in Wisconsin had drastic effects in Minnesota. It prevented him from ever returning to his work in that state and stopped the flow of income from that state to Lavinia Hague. 54 These unfortunate results cannot be prevented, but they can be alleviated. Minnesota can, and should, declare its concern for the fairness and legality of clauses in accident insurance policies issued to its nonresident employers, and so apply its law invalidating reduction clauses.

XIV. The Significance of Allstate’s Extensive Business Activities in Minnesota

What significance should Minnesota have attached to the extensive business carried on in its territory by Allstate? If the persons and events of a given case had no other connection with Minnesota except that the cause of action was based upon a policy issued by Allstate, its judges would have had in personam jurisdiction over Allstate, but no rational ground for applying its substantive law. But if Hague had been at all times domiciled in Minnesota, that state would surely have had very just grounds for, in effect, saying to Allstate, “Since you are a member of this economic community, licensed to carry on profitable trade here, you must submit to the rules of our law in your transactions with our citizens.”

Now, although Hague had not made his home in Minnesota, he had, as we have noted, made a substantial contribution to its economy by his services and had paid the same income tax as a domiciled citizen. Moreover, his death in Wisconsin had had drastic consequences in Minnesota. His wife’s right to have Minnesota law applied to her claim against Allstate was surely as strong as that of the wife of a domiciled Minnesotan would have been. In other words, we have here a situation in which the choice of law

53. Id. at 654.
54. Id. at 640-642.
consequences of a particular contact (Allstate’s membership in the Minnesota economic community) depended almost entirely upon the presence of another contact, namely, Hague’s contribution to the Minnesota community of his services and income tax.

XV. Post-Occurrence Change of Domicile to a State Hitherto Unconnected with the Facts: Unfairness to the Nonchanging Party

The notion that a man, who, having established his home in one state, works all day in another, makes a greater economic contribution to the state of service, rather than to the former state, has come to modern choice-of-law doctrine as a startling novelty. Traditionally, the community within the boundaries of which a man ate, drank, and slept regularly has always been considered to be the community of which he was a member for all legal purposes affected by such membership. That community lawyers have called his “domicile” or “permanent residence”. Choice-of-law significance was attributed to the law of a state wherein a person was employed only in situations where the employee was injured or killed in the course of his work, or while travelling to or from his place of work.

Had the choice-of-law importance of the state of service been more generally recognized, the Supreme Court might have found it unnecessary to consider whether, and to what extent, Lavinia Hague’s post mortem change of domicile supported Minnesota’s claim to apply its law. It is fortunate, however, that Justice Brennan decided to consider that issue, for few problems of modern choice-of-law doctrine have generated as much controversy as that of post-occurrence change of domicile. Justice Brennan’s analysis, though not wholly flawless, points the way to a sensible and realistic solution of the problem.

55. Older statutes and constitutions generally use the term “residence” with the same meaning as that of “domicile”. Judges frequently use it with this meaning also. Modern commentators do not use the word “residence” without some qualifying adjective: when they mean domicile, they use the expression “permanent residence”. When they mean a presence in the territory that does not amount to domicile, they use the expression “temporary residence”. See Reese and Green, That Elusive Word Residence, 6 Vand. L. Rev. 561 (1953).


To illustrate the problem in its simplest form, let us consider a hypothetical variation of the Hague case. Suppose that Laura and Rudy Hugg make their home after marriage in Hager City, Wisconsin, where Rudy raises poultry and pigs on fifty acres of Wisconsin land. From Allstate, he purchases a policy of NIN driver insurance covering three cars owned by him, to the amount of $15,000 each, a policy exactly like that held by Ralph Hague, but containing the following reduction clause not in Hague's policy: "Allstate shall not be liable in any event for more than $15,000 to compensate for the wrongful injury or death of any one person." Assume that Rudy Hugg is killed in Wisconsin on the same day as Ralph Hague, under identical circumstances, by a NIN driver. He had not, at any material time, worked or carried on business in Minnesota. Soon after his death, Laura Hugg moves to Red Wing, Minnesota, where she makes her home. Ten months after Rudy's death, she marries a Minnesota domiciliary and lives with him in that state. Less than two years after Rudy Hugg's death, Laura Hugg brings suit in a Minnesota court against Allstate for a declaration that she was entitled to recover $45,000 under Huggs' NIN driver policy (which was identical to Hague's, except for the reduction clause quoted above). Under the Wisconsin cases, this clearly expressed clause would have been valid, and Wisconsin's declared policy of freedom of contract obviously applied to a contract between a Wisconsin domiciliary and an insurance company licensed to do business there.

When Laura decided to make her home in Minnesota, the American Constitution compelled that state to accept her as a newly domiciled citizen. The government of Minnesota thereby became obliged to protect her from poverty and destitution. Likewise, that state had the power to enforce in its courts any obligation legally owing to Laura Hugg as a consequence of her husband's death, subject, of course, to all legal defences of the obligor. Thus, the Minnesota court would be faced with a true conflict case: a conflict

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58. Edwards v. California (1941) 314 U.S. 160, held that "the right to move freely from state to state is an incident of national citizenship protected by the privileges or immunities clause of the fourteenth amendment against state interference." See also Shapiro v. Thompson (1969) 394 U.S. 618 (held unconstitutional statute which denies welfare assistance to residents of a state who have not resided in the state for at least one year immediately preceding their application for such assistance); Memorial Hospital v. Maricopa County, (1974) 415 U.S. 250 (held unconstitutional statute requiring residence in a county as a condition for indigent's receiving nonemergency assistance at county's expense).
between Wisconsin’s freedom-of-contract-for-insurers policy and Minnesota’s policy protecting its citizen, Laura Hugg, against the reduction clause in her first husband’s insurance contract. The resolution of such conflicts between the divergent and overlapping rules (and policies) of two states constitutes the central problem confronting courts in some choice-of-law cases today. Indeed, it has always been the central problem in some choice cases, but its presence was concealed by the devoted adherence of judges and commentators to a set of territorial slogans that refused all recognition to the laws of the parties’ domiciles in tort and contract cases. With the adoption of a new judicial approach to choice problems that begins with an analysis of local domestic laws and their policies, the important distinction between true conflicts and false conflicts has come to light. Moreover, commentators and judges have devised certain techniques by which the selection of one of two conflicting rules may be explained and justified in a rational manner, calculated to prevent, or at least alleviate, interstate friction and hostility that might lead to interstate retaliation.

But consideration of all the relevant policies involved in Laura Hugg’s case brings to our attention a policy issue that is not directly related to either Minnesota’s or Wisconsin’s domestic law; it is an issue solely derived from the existence of different communities, each occupying a defined territory and making its own laws for its own people. In the specific terms of Laura Hugg’s case, the issue may be stated as follows. After Rudy Hugg’s death had, under Wisconsin law, created a cause of action for only $15,000 against Allstate, would it not have been, in some degree, unfair to Allstate to permit Laura, by her unilateral, self-determined act of changing her domicile, to establish a law-selecting contact with Minnesota solely for her own advantage? Needless to say, Allstate had done nothing to cause or encourage Laura to change her domicile. Before Laura, by her change of domicile, gave Minnesota a concern for her future welfare, the only law applicable (namely, Wisconsin’s) limited Allstate’s liability to $15,000. If the law of Laura’s newly chosen domicile, Minnesota, were to be applied, Allstate would be deprived of its protective limitation, which is valid under Wisconsin

59. See Hancock, supra, n. 57 at 218; Hancock, Anti-Guest Statutes and Marital Immunity for Torts in Conflict of Laws: Techniques for Resolving Ostensible True Conflict Cases and Constitutional Limitations (1973) supra, n. 20 at 126-128, and 131-140.
law, and subject to a judgment for $45,000. In other words, prior to Laura's one-sided change of domicile, all the operative facts, on which her claim depended, had occurred in Wisconsin. Nothing happened thereafter to justify resort to the law of Minnesota, except Laura's one-sided act of changing her domicile. Moreover, by her one-sided act, Wisconsin's policy of freedom of contract for its licensed insurers who sell NIN driver insurance to Wisconsin citizens would have been subverted in this and all similar cases. Incidentally, by declining to permit Laura, of her own volition, to bring Minnesota law and policy into the case after her loss had been suffered, the court would avoid the difficulty of resolving a true conflict problem.

Even for this particular case, however, the resolution arrived at cannot be considered wholly satisfactory. Minnesota has been forced to accept Laura Hugg as a new citizen, with a corresponding liability for her welfare. Under Minnesota's domestic law, the reduction clauses in her policy would be treated as oppressive and void. But Minnesota's domestic policy, which was designed to protect Laura and other citizens, conflicts with judicial notions of fairness to Allstate. Thus, Minnesota's policy will be subverted because Laura alone created her Minnesota contact after her cause of action had accrued. The resulting decision is still a compromise of the type that courts must often reach, \textit{faut de mieux}, in true conflict cases.\textsuperscript{60} Though we may agree that Laura Hugg should not be permitted to add $30,000 to her claim against Allstate by making her home in Minnesota after her cause of action for $15,000 had accrued, the rule adopted in this case should not be elevated to the status of a fundamental constitutional principle.

XVI. \textit{Post-Occurrence Change of Domicile to a State Previously Connected with the Facts: A Situation Where the Moving Party is Already Entitled to the Protection of the Law of his New Domicile}

While Lavinia Hague's post-accredual change of domicile differed no whit from that of Laura Hugg, it was combined with an additional important fact, \textit{not} present in Laura Hugg's case, namely, Ralph Hague's fifteen years of commuting to Minnesota and his daily

\textsuperscript{60} Had the court attempted to give consideration to Minnesota's undoubted concern for Laura Hugg's welfare as a new citizen, the case would have presented a true conflict. By its determination that such consideration would be unfair to Allstate, the court did not have to grapple with the true conflict problem.
employment there. The various Minnesota concerns for Lavinia’s welfare and Ralph’s plans for it after his death, stemming from his status as a nonresident employee, have already been discussed.

That status and the Minnesota concerns engendered by it called for a very different result in the Hague case. A careful distinction should be drawn between it and the Hugg case. Prior to Laura Hugg’s removal to Minnesota, her claim against Allstate had been solely governed by Wisconsin law, under which the policy of freedom of contract for insurers would have unquestionably required a judgment for no more than $15,000. At that point, the case did not raise any choice-of-law problem at all. It was a purely domestic Wisconsin case in which Allstate had an ironclad defense. Totally different was the situation in the Hague case. Upon his death, it presented a difficult true conflict problem; Allstate had no ironclad defense to Lavinia’s claim, insofar as it rested on Minnesota’s concerns for Ralph as a longtime employee and for her as his wife. Disregarding Lavinia’s change of domicile would not resolve the true conflict. On the other hand, as has been noted, Minnesota’s concern for Lavinia has actually been increased by her removal there, even though consideration of this fact may be in some degree unfair to Allstate. Assuming Minnesota’s total concern for Lavinia’s welfare has been increased, how are the judges supposed to separate from the remainder that portion that resulted from her change of domicile?

The suggestion has elsewhere been ventured by the present writer that when one party’s change of domicile has not been the sole source and cause of a state’s concern in a true conflict problem, the judges need not and should not attempt to separate that state’s concern into two parts in the course of considering their decision. They should, rather, give such effect to that state’s total concern as they believe it to deserve in light of the policies involved. This was, in effect, the course taken by Justice Brennan; for the plurality, he wrote that:

Respondent became a Minnesota resident prior to the institution of this litigation. The stipulated facts reveal that she first settled in Red Wing, Minnesota, the town where her late husband had worked . . . . While John Hancock Mutual Life Insurance Co. v. Yates held that a post-occurrence change of residence to the forum state was insufficient, in and of itself, to confer power on the forum state to choose its law, that case did not hold that such

61. See Hancock, supra, note 57 at 228-234.
a change of residence was irrelevant. Here, of course, respondent's *bona fide* residence in Minnesota was not the sole contact Minnesota had with this litigation. . . . Respondent's residence . . . constitute[s] a Minnesota contact which gives Minnesota an interest in respondent's recovery, an interest which the court below identified as full compensation for "resident accident victims" to keep them "off welfare rolls" and "able to meet financial obligations." In sum, Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair. Accordingly, the choice of Minnesota law by the Minnesota Supreme Court did not violate the Due Process Clause or the Full Faith and Credit Clause. 62

XVII. Analysis of the Yates Case of 1936: Justice Brandeis' Decision as Affected by the Dick Case of 1930

The famous old case of *John Hancock Mutual Life Insurance Co. v. Yates* 63 received far more attention in the instant litigation than it deserved. It was decided by the Supreme Court almost fifty years ago, in 1936, a time when the overlapping, elastic slogans, known as choice-of-law principles, accorded no influence to the law of the state of a party's domicile in torts and contract cases. This exclusion was so generally accepted that counsel, in attempting to suggest that a citizen of the forum deserved the benefit of rules of the forum's domestic law, usually argued that the pertinent rules should be classified as remedial or procedural. We have already considered this problem of counsel (and of judges, as well) and their strategy to circumvent it in our discussion of *Home Insurance Co. v. Dick*. 64 There, Justice Brandeis refused to classify the Texas statute banning time-of-suit clauses as a rule of Texas procedure to be followed in all litigation in Texas courts. Though Dick had purchased insurance from a Mexican insurer in Mexico, covering the loss of his tugboat only in Mexican waters where it had burned and sunk, Dick had at all times been a domiciled citizen of Texas (and, therefore, the United States). But Justice Brandeis rejected any suggestion that Dick could, in a Texas court, be entitled to the protection of the Texas statute banning time-of-suit clauses. "The fact that Dick's

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63. (1936) 229 U.S. 178, 57 S. Ct. 129, 81 L.Ed. 106.
64. See text, section XI.
permanent residence was in Texas," he wrote, "is without significance."  

It is only against this background of general professional consensus (and Justice Brandeis' views in particular) that his opinion in the Yates case can be properly interpreted and understood. In May 1932, Harmon Yates and his wife were both domiciled in New York, where he purchased a policy of life insurance from the John Hancock Insurance Company for $2,000. During the ensuing month, he died of cancer. The company refused payment on the ground that Yate's applications, signed by him, contained material false answers to two questions: "Have you ever been treated for cancer of indigestion? Have you had medical advice from any other disease or disorder during the five years preceding this application?" The company claimed to have proof that Yates had had medical treatment five times within the month preceding the application. Under New York law, Yates was responsible for the truth of the answers, even though the company's agent had written them in the form. Under New York cases, these false answers were material to the risk assumed by the company. Consequently, the company's apparent promise was void. 

Yate's widow, the beneficiary of the policy, removed to Georgia and brought suit in that state's courts. The company's proof of the falsity of answers in the application was not disputed. Neither was its proof of New York law. But the trial court refused to enforce the New York law. Instead, it left the issue of the policy's validity to the jury with instructions to find for the plaintiff if they believed that the deceased Yates had given truthful oral answers to the agent or if they believed that the answers of the deceased, though false, were not material to the risk. The trail court's rejection of New York law and resort to Georgia law were sustained by the higher Georgia courts on the grounds that the New York law had been properly classified as remedial or procedural.  

Justice Brandeis easily demolished this fictitious classification of the New York law. Indeed, two of the five judges in the Georgia Supreme Court had expressed their strong dissent against it. There

66. See *Hancock*, *supra*, n. 57 at 223-225. The Supreme Court does not say that Yates signed the application; this fact appears in the Georgia report (1936) 182 Ga. 213, 221, 185 S.E. at 273 (dissenting opinion of Justice Gilbert).  
remained, however, the question whether Georgia law might be considered as expressing a policy concern for the widow Yates, who had become domiciled there. On this point, Justice Brandeis was exceedingly terse: "In respect to the accrual of the right asserted under the contract or liability denied, there was no occurrence, nothing done to which the law of Georgia could apply. Compare *Home Insurance Co. v. Dick*."68

A law student of today, unacquainted with the *Dick* case, might well wonder why Justice Brandeis did not mention the unfairness to the company of allowing the widow, by changing her domicile, to bring Georgia law into the case for her benefit. Justice Brandeis was certainly not the man to leave an argument half stated. The reason for his terseness lay in his citation of the *Dick* case, in which Dick had been domiciled in Texas throughout the entire transaction. His domicile had, nevertheless, been held to be "without significance". In the *Yates* case, Justice Brandeis was not particularly concerned with the timing of Mrs. Yates' removal to Georgia. Her domicile there was, in any case, without significance.

We have already noted that, today, judges employing state interest analysis regard the domicile of one party as a strong ground, in most cases, for applying the law of that party's state.69 This view finds support in several U.S. Supreme Court decisions. Justice Brandeis' decision upon the fact-law pattern of the *Yates* case remains sound. But his sweeping negative statement, excluding Mrs. Yates' Georgia domicile from all consideration, would today require some further explanation, showing the unfairness of allowing her to introduce Georgia law into the case at such a late date.

XVIII. *Justice Powell’s Misconception of the Dick and Yates Cases*

To Justice Brennan’s contention that the *Yates* case was distinguishable from the *Hague* case because Mrs. Hague’s post-occurrence domicile was not the sole contact with Minnesota, Justice Powell (dissenting) somewhat rashly replied that "[t]he post-accident residence of the plaintiff beneficiary is constitutionally irrelevant to the choice-of-law question . . . . What the *Yates* case..." 68 299 U.S. at 182.

court held, however, was that there was no occurrence, nothing done, to which the law of Georgia could apply." 70

Why Justice Brandeis believed, in 1936, that this sweeping statement was permissible has already been explained. In any event, Justice Brandeis and the *Yates* court had no power to make a rule covering a state of facts other than those before them. 71 Continuing his argument, Justice Powell wrote: "Any possible ambiguity in the court's view of the significance of a post-occurrence change of residence is dispelled by *Home Insurance Co. v. Dick* above, cited by the *Yates* court, where it was held squarely that Dick's post-accident move to the forum state was without significance." 72

This last sentence clearly indicates a total misconception of the facts of the *Dick* case. As the quotation above from the *Dick* case tells us, 73 what was held to be "without significance" was "the fact that Dick's permanent residence was in Texas." 74 Dick was never at any time domiciled in Mexico. 75 The case is totally irrelevant to the change of domicile issue. 76

XIX. Justice Powell's Criticism of the Plurality Opinion for its Reliance on Purely Physical Contacts Having No Relation to Minnesota Policies

As has been noted earlier, a not uncommon fallacy of judicial reasoning is the attempt to bolster the choice of a rule of domestic law by referring to contacts totally unrelated to the policy of the

73. See text at note 65.
75. See, supra, note 32 and accompanying text.
76. Justice Brennan, writing for the plurality, was equally confused about the facts of the *Dick* case. In the text of his opinion, this puzzling statement appears: "The policy was subsequently assigned to Mr. Dick who was domiciled in Mexico and 'physically present and acting in Mexico' although he remained a nominal resident of Texas (emphasis added)". *Allstate v. Hague*, supra, n. 1 at 638. But doesn't "permanent residence" mean the same thing as "domicile"? In any event, the Texas courts' opinions make it perfectly clear that Dick was at all times domiciled in Texas, and never domiciled in Mexico. Nothing in Justice Brandeis' opinion is inconsistent with their view which is based on the trial judgment. See *Home Ins. Co. v. Dick*, Ct. of Civil Appeals decision, supra, n. 32 at 357; Commission of Appeals decision, *supra*, n. 32 at 1029-1030.

A few lines later, Justice Brennan wrote: "Dick brought suit in Texas against the New York reinsurer. Neither the Mexican insurer nor the New York reinsurer had
rule. The practice is a carry-over from the time when a contact was believed to support resort to any domestic rule of the territory in which it had occurred, on the ground that the legal effect of every act or event occurring in a given territory must be determined by the laws prescribed by the government of that territory. State policy (or interest) analysis requires something more: the act or event that has occurred must bring the case within the scope of the policy of the rule invoked.

Justice Powell, with some justification, charged the plurality opinion of Justice Brennan with this fallacious reasoning. "The Court," he wrote, "focuses only on physical contacts vel non and in doing so, pays scant attention the the more fundamental reasons why our precedents require reasonable, policy-related contacts in choice-of-law cases." 77

The most singular of these purely physical contacts focused upon by Justice Brennan was Lavinia Hague's appointment as personal representative of her husband's estate by a Minnesota Registrar of Probate. This fact is mentioned at several points in the opinion as an important relation between her and the state, increasing its concern for her welfare. 78 Apparently, her husband's NIN driver accident insurance policy had been made payable not to her, but to her husband's personal representative or estate. Had it been made payable to her by name or as his wife, her formal appointment as personal representative of his estate would have been unnecessary; she could have sued Allstate in her own name. Granting that Minnesota had a concern for her maximum recovery because she

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77. Allstate v. Hague, supra, n. 1 at 654.
78. "Respondent's residence and subsequent appointment in Minnesota as
was a domiciled member of that community, are we to believe that that concern had been significantly increased by her taking a purely formal step in order to bring her lawsuit in Minnesota? Of course not.

Another purely physical contact (perhaps we should call it \textit{a part of a contact}) focused on by Justice Brennan may, on first thought, seem to be less than totally irrelevant. Referring to Mrs. Hague's change of domicile, he wrote that: "There is no suggestion that Mrs. Hague moved to Minnesota in anticipation of this litigation or for the purpose of finding a legal climate especially hospitable to her claim. The stipulated facts, sparse as they are, negate any such inference." \textsuperscript{79} In a footnote, Justice Brennan refers to "the fact that her change of residence was \textit{bona fide} and not motivated by litigation considerations." \textsuperscript{80} These quotations naturally suggest a most critical question. It has already been demonstrated that where one party's unilateral, post-accrual change of domicile constitutes the sole contact with a particular state, it would be quite unfair to the opposite party to give effect to that state's newly acquired concern for the moving party. Such unfairness supports a persuasive argument that no consideration should be given to the law of one party's post-accrual domicile unless contacts with that state, favorable to the moving party, already existed. \textsuperscript{81} Since the law of the post-accrual domicile is to be excluded from consideration to prevent unfairness to the nonmoving party, what possible relevance can be attached to the bona fides of the moving party? Whether his change of domicile was "motivated by litigation considerations" or not, application of the law of his new domicile would be equally unfair to the other party. Why should judges waste time investigating the knowledge of law and possible motivations of a party who has seen fit to change his domicile? They are irrelevant to the issue before the court.

XX. \textit{Conclusion}

What can the inquiring student of judicial behavior learn from the \textit{Hague} case? As is well known, the Supreme Court's tests for the

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\textsuperscript{79} \textit{Allstate v. Hague, supra}, n. 1 at 643-644.
\textsuperscript{80} \textit{Ibid,} Justice Brennan's footnote 28.
\textsuperscript{81} See text at 54-55.
constitutional correctness of a state court’s choice of law are so permissive that the court has not found it necessary to review a pure choice-of-law decision since the Clay case of 1959. Could Mrs. Hague have succeeded in avoiding the expense of Supreme Court review?

In the game of football, there are three techniques for scoring a point-after-touchdown, of which one is by far the easiest and is, therefore, usually chosen. Likewise, to avoid Supreme Court review of a choice-of-law decision, there are two, or possibly three, techniques, of which one is the most obvious and easy, namely, obtaining from the state court an opinion which shows convincingly that the factual contacts of the case (with the state whose domestic rule has been chosen) fall within the policy reach of that rule. But in the Hague case, this technique failed because the Minnesota court’s opinion had stressed chiefly Lavinia Hague’s post-occurrence change of domicile, a dangerously unreliable contact, often resulting in injustice to the nonchanging party. The more reliable contact of Mr. Hague’s long employment in Minnesota received scant recognition in the Minnesota opinion.

The second technique by which Supreme Court review could have been avoided has already been discussed at some length in section III of this paper. It was there concluded that had Mrs. Hague brought suit in Wisconsin, a court of that state would have held that, although Wisconsin law did not prohibit all “other insurance” clauses, those in Hague’s policy could not be applied to the facts of his case. They would have been held to be either totally irrelevant or, at best, hopelessly ambiguous and, so, properly construed against the insurer under the contra proferentes rule. Had the Minnesota court, after stating that it was taking judicial notice of the Wisconsin law, set forth a clear argument that the other insurance clauses would be void under Wisconsin law, the Supreme Court would not have been easily persuaded to review the Minnesota court’s determination of Wisconsin’s law. But the Minnesota court found Wisconsin law to be contrary to that of Minnesota.

The third technique for avoiding Supreme Court review would have involved a plausible argument, not yet supported by clear

82. See n. 27, supra.
83. This is true for both Canadian and American football.
precedents. The death of Mr. Hague had occurred on July 1, 1974. In 1975, the Wisconsin's legislature enacted the following statute:


When two or more policies promise to indemnify an insured against the same loss, no "other insurance" provisions of the policy may reduce the aggregate protection of the insured below the lesser of, the actual insured loss suffered by the insured, or the total indemnification promised by the policies, if there were no "other insurance provision." 84

At the time that Mrs. Hague's action was begun, on May 28, 1976, 85 the law of Wisconsin, as set forth above, appears to have been identical with that of Minnesota concerning "other insurance" reduction clauses. 86 If this state of affairs had been clearly put before the Supreme Court of the United States, would they have granted certiorari on February 19, 1980 to review the Minnesota court's decision?

The purpose and scope of the Full Faith and Credit clause was stated by Justice Powell as follows: "The Full Faith and Credit clause addresses the accommodation of sovereign power among the various states. Under limited circumstances it requires one state to give effect to the statutory law of another state . . . . Both the Due Process and the Full Faith and Credit clauses ensure that the states do not "reach out beyond the limits imposed upon them by their status as co-equal sovereigns in a federal system." 87 When the Supreme Court decided to review the Minnesota decision in the Hague case, some of its members must have thought that circumstances probably existed under which the clause would require Minnesota to give effect to the statutory law of Wisconsin. Assuming such circumstances had existed, at what time would the clause compel Minnesota to give effect to the Wisconsin law? Presumably, it would be compelled to do so at the time that the Minnesota court rendered its final judgment. But, if the Minnesota judgment, rendered on August 31, 1979, had clearly shown (quoting the Wisconsin statutes set out above) that the law of the two states invalidating "reduction clauses" was the same on that

85. Allstate v. Hague, supra, n. 1 at 643, n. 27.
86. In the Hague case, the insurance company argued that the "other insurance" clause referred to other insurance provided by the same policy. A fortiori, the statute would have applied to the Hague case.
87. Allstate v. Hague, supra, n. 1 at 651.
date, would the Supreme Court have thought it necessary to review the Minnesota decision? Surely not.

What effect will the Hague case have on the legal rights and liberties of persons who make their home in one state, but have been employed daily (or working independently) in another on a more than temporary basis. Such employment was recognized in the Hague case as creating a status in the state of service, namely, a membership in the economic community, somewhat resembling that created by domicile. This status was held to confer rights upon Hague that did not arise in the course of his work or his daily commute to his work. They arose from the state’s concern that he should be assisted in providing for his wife after his death. This concern found expression in the application of a Minnesota law invalidating “other insurance” reduction clauses in his NIN driver insurance policy. This concern might, in future cases, be extended to other kinds of accident or life insurance held by a nonresident worker or to such a worker’s cause of action for personal injuries suffered outside the state of his service. It might also be extended to his dependent’s cause of action for his wrongful death outside that state. A single example will suffice to suggest the possibilities for future development of the rule of the Hague case.

John Dak and his wife Linda had made their home in North Dakota for many years. They sent their two young children to school, voted, and paid taxes in that state. But John had been employed for ten years for a corporation that did business in Minnesota, packing and selling seed and fertilizer to farmers. It had its offices and warehouses in East Grand Forks, Minnesota, near the North Dakota boundary. John and his friend Joe North, who was also domiciled in North Dakota, decided to go on a hunting trip in that state. While Joe North was driving his car, with John Dak riding as a guest passenger, he unexpectedly encountered a broad stretch of ice on the road. His car went out of control, skidded off the road, and dropped ten feet over a steep embankment. John Dak was killed instantly.

Under North Dakota law, a host driver was not liable for the death of a guest passenger unless it had been caused by his gross negligence. Hence, Linda Dak brought action against Allstate in Minnesota (which had no anti-guest statute) for a declaration that the liability of Joe North for the death of John Dak should be determined by the laws of Minnesota. Her counsel contended that the state of Minnesota had a concern for John Dak and his family,
similar to its concern for Ralph and Lavinia Hague, based on John's status as a long-time nonresident employee of a Minnesota enterprise; hence, North's legal responsibilities for Dak's death should be governed by the Minnesota standard of ordinary care for the safety of guest passengers. Minnesota's concern for John Dak's wife in the event of his death, counsel contended, was similar to its concern for the wife of one of its domiciled citizens. In Schneider v. Nichols, a Minnesota domiciliary had been injured by the ordinary negligence of a North Dakota host driver in North Dakota. The Minnesota Supreme Court claimed for that state a governmental interest in the outcome and applied the Minnesota domestic rule of ordinary negligence.

Counsel for Allstate would argue, inter alia, that the decision in the Hague case rested upon three contacts with Minnesota: (1) Hague's fifteen years of employment there, (2) Allstate's extensive business there, and (3) Lavinia Hague's change of domicile to Minnesota before bringing suit in that state. In the Linda Dak case, the last of these contacts was not present; Linda Dak had remained domiciled in North Dakota. But, her counsel will doubtless reply, the judges in the Hague case were bound to consider all facts favorable to his cause, including her change of domicile. They expressed no opinion upon what the proper result would have been had one of the three contacts been lacking. Indeed, footnote 29 of Justice Brennan's opinion for the plurality in the Supreme Court stated that "[w]e express no view whether the first two contacts, either together or separately, would have sufficed to sustain the choice of Minnesota law made by the Supreme Court of Minnesota. In short, the newly recognized status based on long employment in a state seems destined to provoke considerable discussion affecting ultimate results in future cases."

The various pointed criticisms of judicial choice methodology suggested in this article should not be allowed to create a misleading impression concerning the judges’ disposal of a cluster of difficult problems. It will be recalled that satisfaction was expressed concerning the three major grounds of the plurality opinion. Our

88. (1968) 280 Minn. 139, 158 N.W. 2d 254. The opinion in this case is unfortunately marred by reference to insignificant contacts totally unrelated to the policy of Minnesota law. See also Foster v. Leggett (Ky. 1972) 484 S.W. 2d 827; dissenting opinion of Mr. Justice Roberts in Cipolla v. Shaposka (1970) 439 Pa. 563, 267 A. 2d 854.
89. Allstate v. Hague, supra, n. 1 at 644.
bases for criticism of some of the reasoning in that opinion were supported, at least in part, by the dissenting opinion. That opinion stands firmly in the tradition of valuable dissents, for it challenges and tests the plurality opinion at every point. Moreover, in attacking the absurd practice of choosing a state’s law in reliance upon factual contacts quite unrelated to that law or its policies, Justice Powell\(^9\) strikes at the roots of that rank and deadly noxious weed that threatens the healthy growth of sound state policy and interest analysis in the choice-of-law garden.\(^9\)

\(^{90}\) See epigraph of this paper and text, section XIX.

\(^{91}\) This metaphor is borrowed with respect and admiration from that formidable weed killer, Walter Wheeler Cook. See Cook, *Logical and Legal Bases of the Conflict of Laws*, Preface, at ix.