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## CONFLICT OF LAWS: INCHING FORWARD SLOWLY

Richard J. Conviser\*

*The author highlights the continuing uncertainty remaining in choice of law determinations in the Illinois courts. Instead of clarifying matters in the wake of the Ingersoll decision, the author argues that the courts have not yet definitely accepted or rejected the Second Restatement's "most significant relationship" approach for the non-tort substantive areas of law, thereby leaving the practitioner in somewhat of a quandary.*

ONE year ago, it could be said with certainty that very little in the conflict of laws area in Illinois could be viewed by practitioners with certainty.<sup>1</sup> To be sure, in 1970 the Illinois Supreme Court had, in *Ingersoll v. Klein*,<sup>2</sup> decided that cases involving multi-state tort issues were to be governed by the Second Restatement "most significant relationship" approach. The *Ingersoll* decision followed four years of utter confusion during which the Illinois courts had pursued an ever wavering course between the Restatement (First) "vested rights" and Restatement (Second) "most significant relationship" approaches.

Dicta in *Graham v. General U.S. Grant Post No. 2665*, indicated a willingness on the part of the Illinois Supreme Court to adopt the new Restatement approach.<sup>3</sup> Such dicta seemed in keeping with the enlightened Supreme Court decision in *Wartell v. Formusa*,<sup>4</sup> wherein the new Restatement rules governing inter-spousal tort immunity were opted for in lieu of the standard vested rights rule. But a number of appellate decisions at all levels strictly adhered to the traditional rule.<sup>5</sup> Unfortunately, the clarification provided by *In-*

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1. See Conviser, *Conflict of Laws, 1971-72 Survey of Illinois Law*, 22 DEPAUL L. REV. 16 (1972).

2. *Ingersoll v. Klein*, 46 Ill. 2d 42, 262 N.E.2d 593 (1970).

3. 43 Ill. 2d 1, 248 N.E.2d 657 (1969).

4. 34 Ill. 2d 57, 213 N.E.2d 544 (1966).

5. See, e.g., *Marchlik v. Coronet Ins. Co.*, 40 Ill. 2d 327, 239 N.E.2d 799 (1968); *Bridges v. Ford Motor Co.*, 104 Ill. App. 2d 26, 243 N.E.2d 559

*gersoll* was incomplete. It was unclear as to whether its holding should be confined to tort cases or be broadly applied to all substantive law areas.<sup>6</sup> The opinion, in support of its analysis, quoted heavily from *Babcock v. Jackson*<sup>7</sup> and *Griffith v. United Airlines*.<sup>8</sup> The quoted language in the authority cited therein leveled an attack not only on the *lex loci delicti* in specific, but on the vested rights approach in general.

Resolution of this problem has for several years now been, without doubt, the main task confronting the Illinois Courts. Although the task still remains, one court in the last year has at least "inched" forward in a direction of progress.

The "clarifying" decision, *P.S. & E. Inc. v. Selastomer Detroit Inc.*<sup>9</sup> was a federal court decision decided by the Seventh Circuit Court of Appeals.<sup>10</sup> The essential facts were fairly simple: plaintiff allegedly entered into an oral contract to act as the exclusive sales agent for defendant. The place of contracting was arguably in either Michigan or Illinois. Plaintiff's principle place of business was in Illinois, defendant's in Michigan. Negotiations had taken place in both states, and the correspondence relied on as evidence of the contractual terms was mailed between both states.<sup>11</sup>

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(1968); *Kabek v. Thor Power Tool Co.*, 106 Ill. App. 2d 190, 245 N.E.2d 596 (1969). See also Waxman, *Conflict in Illinois Courts on Choice of Law Theory in Torts—Is It Lex Loci Delictus or Substantive Interest?*, 59 ILL. B.J. 212 (1970); Note, *Conflict of Laws, Illinois Tort Choice-of-Law Problems Moved Toward Further Confusion*, 64 NW. U.L. REV. 841 (1970).

6. Although the court's main focus was clearly the quest for a meaningful resolution of conflicts tort issues, the opinion could, nonetheless, support a much broader interpretation. It should, perhaps, be noted that subsequent tort decisions have uniformly applied the *Ingersoll* reasoning in that setting. See *Wilhoite v. Fastenware, Inc.*, 354 F. Supp. 856 (N.D. Ill. 1973); *Gates Rubber Co. v. USM Corp.*, 351 F. Supp. 329 (S.D. Ill. 1972); *Blazer v. Barrett*, 10 Ill. App. 3d 837, 295 N.E.2d 89 (1973); *Johnson v. Ward*, 6 Ill. App. 3d 1015, 286 N.E.2d 637 (1972).

7. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

8. 416 Pa. 1, 203 A.2d 796 (1964).

9. 470 F.2d 125 (7th Cir. 1972). See also Benett, *Contracts—Sales, 1972-73 Survey of Illinois Law*, 23 DEPAUL L. REV. —, — *infra*.

10. It has long been well settled that a federal district court in diversity of jurisdiction cases must apply the substantive law of the state in which it sits, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), including that state's conflict of law rules. *Klaxon Co. v. Stentor Elec. Mfg. Co. Inc.*, 313 U.S. 487 (1941). See generally R. LEFLAR, *AMERICAN CONFLICTS LAW* § 66, 150-54 (Rev. ed. 1968). The Seventh Circuit in *Selastomer* was bound by this rule as the lower court proceedings had been based on diversity jurisdiction.

11. 470 F.2d at 127.

Performance was to be rendered in several states.<sup>12</sup> Defendant allegedly terminated the contract without cause and invaded plaintiff's exclusive market area. In issue was the law to govern the dispute arising out of this contract.

Judge Sprecher, writing for the court, relied upon *Oakes v. Chicago Firebrick Co.*<sup>13</sup> for the relevant governing rule.<sup>14</sup> Under its principles, the law of the place of performance governs the construction and obligations of the contract when the place of making and place of performance differ, if the agreement is to be wholly performed in one jurisdiction. If more than one place of performance is involved, the place of making of the contract governs its construction and obligations.<sup>15</sup>

Having stated the rule, the court then discovered it to be unworkable in this fact pattern. The law of the place of performance would, of course, not govern as the contract was to be performed in more than one state.<sup>16</sup> The rule's "fall back" position, viz., the law of the place of making should then govern, could not be resorted to as it was unclear where the contract was made.<sup>17</sup> In short, the court found itself with a unique fact pattern for which there was no Illinois precedent.<sup>18</sup>

Undaunted, the court found its solution by engaging in a presumption as to what an Illinois court would do if faced with this problem—their conclusion: an Illinois court would look to "analogous modern tort cases relying upon the 'most significant contacts'

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12. Although performance of the contract was contemplated on a rational scale, it was realistically limited to those states where plaintiff had "active" salesmen, namely, Illinois, Wisconsin, Minnesota, Iowa, Indiana and Michigan. 470 F.2d at 127. In any event, more than one state was involved.

13. 388 Ill. 474, 58 N.E.2d 460 (1945).

14. Candidly, there is still some legitimate dispute as to whether the Illinois position can be so readily reduced into a clearly operative rule. At least one commentator has recently stated his belief that a number of rules might be applicable. Earle, *Conflict of Laws and the Second Restatement—Illinois Accepts the Tort Provisions: What About Contracts?*, 61 ILL. B.J. 292, 296 (1973). See also Larson, *Choice of Law: Illinois Contract Cases*, 31 CHI.-KENT L. REV. 291 (1953). This confusion notwithstanding, the *Oakes* rule probably is still the favored one in Illinois. See Bernhard, *A Rationalization of the Illinois Conflict of Laws Rules Applicable to Contracts*, 40 ILL. L. REV. 165, 183-84 (1945).

15. 470 F.2d at 127.

16. See note 2 and accompanying text, *supra*.

17. See note 3 and accompanying text, *supra*.

18. 470 F.2d at 127.

rule."<sup>19</sup> The court then went on to find that Illinois law should control as that state had the most significant relationship to the parties and transaction.

What does *Selastomer* do for the Illinois practitioner? It does this: it offers some current, positively stated precedent on the present state of conflicts law in the contracts area. The rule enunciated in the *Oakes* case is again embraced as the law of the land. To this extent it is a welcome clarification which provides a somewhat firmer footing. That having been said, a caveat should be added, for in the process of "clarifying," the decision raises the specter of potential further uncertainty. It would be a practitioner of limited vision who would casually overlook the potential consequences of the court's ultimate reliance on the Second Restatement, irrespective of any distinguishing aspects of the unusual factual setting.

The discussion above leaves unanswered the question as to which approach would be preferable, the *Oakes* rule or that of the new Restatement. This clearly was not a question that could be tackled head-on by the federal courts as they are, of course, bound by the existing local law conflicts rules.<sup>20</sup>

Arguments in favor of sustaining the *Oakes* rule necessarily revolve around a projected intention of the parties as to their obligations under the contract. If it is to take place essentially in one jurisdiction then, so the reasoning goes, they can visualize and prepare for the contingencies surrounding their ultimate obligations under the contract and would do so according to that place. Conversely, the place which is casually or fortuitously selected, as is so often the case, for the execution of the contract, in no way enters into such thoughts of the parties. Furthermore, its proponents would argue that such a rule would, as do all of the vested rights rules, give the parties a certain measure of certainty in their dealings, a necessary pre-requisite when one is dealing with a contract situation which is a planned transaction. This they argue, should distinguish it from tort cases which "just happen" and which might require an entirely different kind of analysis.

Proponents of the "most significant relationship" approach appear, however, to have the best of the argument. Surely, it is a desirable goal to give to the court sufficient flexibility so that it might

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19. *Id.*

20. See note 10, *supra*.

adapt itself to any given set of facts presented in the instant litigation before it. The Second Restatement "most significant relationship" test would more readily appear to do this.

The test is two pronged: both the connecting facts in a given case as well as certain specified policy-oriented principles are to be considered.<sup>21</sup> The Second Restatement aids in this task by assigning a qualitative value to specific factual contacts in each substantive area. In a contracts case, the factual contacts generally regarded as the most important are: the place of negotiation; the place of contracting; the place of performance; the place where the subject matter of the contract is located; and the domicile residence, nationality, place of incorporation and place of business of the parties. Finally, the Restatement goes a step further in making qualitative fact assessments in the contracts area; it lays down more detailed rules in the form of presumptions of which locality will likely have the most significant relationship to certain kinds of contracts, for example, the law of the situs in land sale contracts.<sup>22</sup>

One should note further that one of the Restatement's enumerated policy statements could be utilized to meet the desires for certainty in a planned transaction. Section 6(2) does provide for the protection of justified expectations. This principle could obviously be wielded to bring about any such desired effect, without being upgraded to such a degree of certainty so as to rob the court of the ability to decide that some other factor is more important in the given case and should be weighted more heavily.<sup>23</sup>

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21. The basic controlling Restatement Section is § 188. The factual contacts are spelled out here in subsection 2 and the policy principles of § 6(2) are incorporated by reference. These policy principles are applicable to all substantive areas of law. They are: (1) the needs of the interstate and international systems, (2) the relevant policies of the forms, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying that particular field of law, (6) certainty, predictability and uniformity of result, and (7) ease in the determination and application of the law to be applied. These principles seem to reflect a compromise reached during the drafting of the Second Restatement calculated to satisfy at least some desires of the interest analysis proponents. Candidly, however, one wonders whether such generally stated principles would be of any practical value in the resolution of conflict cases. The doubt is heightened by those decisions handed down to date which have utilized the approach taken in the Second Restatement. These invariably rely almost in their entirety on a factual contact analysis in reaching a decision.

22. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 189-197 (1968).

23. The author, however, does not wish to imply that the best approach is neces-

## OTHER MATTERS OF NOTE: DOMICILE

In *Davis v. Davis*<sup>24</sup> an Illinois appellate court was faced with a domicile fact issue that would be any conflicts professor's dream hypothetical.

In *Davis*, the plaintiff, Shelley Davis, was seeking an Illinois divorce. Domicile came into issue when his defendant wife, Laura, alleged that he had not been a resident of Illinois for one year prior to institution of the divorce action, as required by statute.<sup>25</sup> The court, thus, found itself in a position of evaluating the facts in order to determine whether sufficient contacts with Illinois existed so that statutory requirements could be satisfied. The facts presented to them were as follows:

Shelley Davis was born and raised in Chicago, where he lived with his parents. In 1954, when he was in his last year of high school, he attended an out-of-state boarding school. Thereafter, he commenced on a career as a perennial academic. He was engaged as a student and/or instructor in various universities, all outside the state of Illinois, from 1954 until the commencement of the litigation. At the time of litigation, he was pursuing a full time teaching career at the University of Maryland.

Throughout this period of time his parents set aside one bedroom in their apartment for Shelley's use. He kept some of his possessions there. Indeed, when his parents had moved about four years prior to this suit, he changed his voting address and draft board residence

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sarily that formulated in the Second Restatement. It is to be hoped that Illinois courts, in formulating their own "final" choice of law approaches will at least consider other alternatives.

24. 9 Ill. App. 3d 922, 293 N.E.2d 399 (1973).

25. ILL. REV. STAT. ch. 40, § 3 (1971). This Illinois statutory provision, as is true with so very many statutory provisions predicated upon domicile, contains the term "residence." The question then arises as to whether the statutory term is synonymous with domicile as the term is usually interpreted or is intended to convey a different meaning. Although there is a spectrum of possible meaning, domicile as it is generally utilized in divorce statutes, including Illinois, refers to a technical domicile plus actual residence. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 17 (1971). Given this interpretation, the courts are in a position to more readily find that domicile exists in a given instance than would be the case if they were dealing with traditional domicile concepts. Obviously, however, this would depend upon the statutory construction to be given to any given individual statute. See also Reesé & Green, *That Elusive Word, "Residence"*, 6 VAND. L. REV. 561 (1953).

address to the new location.<sup>26</sup> Shelley opened and maintained a savings account at a Chicago bank since 1960. He had also filed his federal income tax returns in Chicago and had continued to receive some correspondence at his Chicago address.

The most obvious out-of-state factual contacts, of course, revolved around the simple fact that for almost twenty years Shelley had, in fact, lived outside of Illinois. The marriage, the dissolution of which was in issue, had been celebrated in New York and the couple had lived in New York. At the time of the law suit, Shelley was living in Maryland where he held his full time teaching job and his wife and child were living in West Virginia.

Shelley maintained a bank account in Maryland. He had acquired a Maryland driver's license and purchased a car which was registered in Maryland. He had filed both New York and Maryland income tax returns.<sup>27</sup> He had also applied for a country club membership in West Virginia on behalf of his wife.

The trial court found that Shelley's factual contacts with the state of Illinois were sufficient to fall within the statutory requirements and granted the requested divorce. On appeal, the appellate court affirmed. It noted that although there was "considerable evidence of Shelley's ties with other states over his life time . . . there [was] also sufficient evidence of his intent to remain an Illinois citizen to support the finding of continued Illinois residence."<sup>28</sup> It further stated that temporary absence, even though admittedly lengthy in the instant case, was not sufficient to equate with abandonment.<sup>29</sup> The court went on further to express what probably is the rule to be derived from this case, mainly, that questions as to intent to abandon a residence specifically (and probably domicile fact questions generally) are for the trier of fact to answer and once having been answered not to be overruled unless against the manifest weight of the

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26. In February, 1971, after the suit was filed, a voters canvas resulted in his name being stricken from the voting list. He, however, had been reinstated as a registered voter prior to trial.

27. There was some conflict in the testimony of the plaintiff as to whether he had ever filed an Illinois State Income Tax return. 9 Ill. App. 3d at 926, 293 N.E. 2d at 402.

28. *Id.*

29. *Id.* at 926, 293 N.E.2d at 403. The court here relied on *Cohn v. Cohn*, 327 Ill. App. 22, 63 N.E.2d 618 (1945).



evidence.<sup>30</sup>

There are two quarrels with the *Davis* court's reasoning. The first is rather technical. The court stated that what would be necessary to prove that one has given up a domicile is to show affirmative acts of abandonment. This is incomplete statement. It has long been well settled that it is not only necessary to prove that a domicile has been abandoned, but it is also necessary to prove that a new domicile has been acquired. In short, *both* steps are required to effect a change of domicile. Until the second step is completed, however, one will retain one's former domicile even though the record shows a clear intent to abandon.<sup>31</sup> The result could have been, obviously, the same had the court followed this approach as well. This is so because the rule generally followed would also require that the party asserting that a change of domicile has taken place would also have to bear the burden of proof.<sup>32</sup>

The second quarrel with the *Davis* decision is somewhat more serious. In reaching domicile fact determinations a court should always bear in mind that domicile issues are never "resolved in a vacuum." Put another way, one is always making a domicile fact determination because something else depends on it. In this case, the matter that depends upon a finding of domicile is that of whether subject matter jurisdiction is present for purposes of granting a divorce. As such, the court should have taken into account the interest that Illinois might have in granting a divorce for this particular marriage. Shelley and Laura Davis had met and married in New York. They had lived marital existence together in New York and in other states, not however, in Illinois. Throughout the course of litigation, neither party was physically living in Illinois, nor was it likely that they would. Given this fact situation one can only pose the question as

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30. *Id.*

31. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19 (1969). The classic case on this point is *In re Estate of Jones*, 192 Iowa 78, 182 N.W. 227 (1921). In that case, Evan Jones, a domiciliary of Iowa, decided to return to his native Wales to live out the rest of his days. He sold his property in Iowa and left for England. Unfortunately, the ship on which he was sailing, the ill-fated *Lusitania*, was sunk by a German submarine—and he never made it. Even though he had very clearly manifested his intent to abandon his Iowa domicile, the court found that he would retain it until he had acquired a new one elsewhere, *i.e.*, Wales. Since he had never arrived in Wales, he, of course, never satisfied that second requirement, and thus, retained his Iowa domicile.

32. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 19, comment C (1969).

to what interest Illinois had in dissolving this marriage. The answer is probably none and at best a very slight one. That being the case, a contrary result would probably have been the better one.

The result suggested immediately is of course, academic. The court found domicile to exist, and did so in a fashion that leads one to offer this bit of advice to Illinois practitioners: Domicile issues in Illinois courts will be liberally resolved in favor of a finding that domicile exists on the facts and, whatever the result, the ultimate one will invariably be that reached by the trial court for a reversal on appeal is highly unlikely.