Conflict of Laws—Presumption of Foreign Law—Indiana Cases and the Restatement

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an interference with the government, are *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, which involved the obligations of the federal government sold to raise public funds; *Ambrosini v. United States*, 187 U. S. 1, 23 Sup. Ct. 1, where surety bonds were exacted by the state government in the exercise of its police power; and *Gillespie v. Oklahoma*, 257 U. S. 501, 42 Sup. Ct. 171, a strict case, which decided that when the instrumentality is so intimately connected with the necessary functions of the government as to fall within the exemption, the immunity extends to the income derived from the instrumentality. In *Panhandle Oil Co. v. Miss.*, 277 U. S. 218, 48 Sup. Ct. 451, it was decided that a state tax on gasoline sold by dealers was illegal so far as it applied to gasoline sold by those dealers to the United States coast guard fleet and to the United States Veterans' Hospital. In this opinion the court said: "The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions... While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes." Mr. Justice Holmes, together with three other justices, dissented: "When the government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. The question of interference with government is one of reasonableness and degree and it seems to me that the interference in this case is too remote." Certainly this is a borderline case difficult to reconcile with the principal case, for in each the interference seems equally remote. In the principal case, however, the court did not seem to have much difficulty in perceiving this, for speaking through Mr. Justice McReynolds, who dissented in the Panhandle case, it said: "There was no tax on the contract for such carriage (of the mails); the burden laid upon the property employed affected operations of the federal government only remotely."  

J. W. S.

**Conflict of Laws—Presumption of Foreign Law—Indiana Cases and the Restatement**—There are some fifty or more reported Indiana cases in which presumption of foreign law is considered, yet this point has not been satisfactorily settled. In several of the cases, which have been subsequently cited as precedent and made the basis of a later decision, the remarks of the court upon this question are purely dicta and in no respect necessary to the decision of the case in which they appear. And other cases are found to indicate, by the language employed, that a certain rule is the prevailing one while following a different rule in actual decision. The rule supported by the majority of the cases is the general American rule that in the absence of any showing to the contrary the presumption is that the common law prevails in the foreign state. *Titus v. Scantling*, 4 Blackf. 89 (1835); *Trimble v. Trimble*, 2 Ind. 76 (1850); *Cunningham v. Jacobs*, 120 Ind. 306 (1889); *Gates v. Newman*, 18 Ind. App. 392 (1897); *Penn. Mutual Life Ins. Co. v. Norcross*, 163 Ind. 379 (1904); *Baltimore & Ohio R. Co. v. Freeze*, 169 Ind. 370 (1907); *Southern R. Co. v. Elliott*, 170 Ind. 273 (1907); *Cobe v. Malloy*, 44 Ind. App. 8 (1909); *Wallace v. Thompson*, 49 Ind. App. 211 (1911); *W. McMillen & Son v. Hall*, 59 Ind. App. 545
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(1915); Cleveland, etc. R. Co. v. Wolf, 114 N. E. 236 (App. Ct., 1916); Swain v. Schild, 66 Ind. App. 156 (1917); Chalmers & Williams v. Surprise, 70 Ind. App. 646 (1919); Henning v. Hill, 80 Ind. App. 363 (1923).

This rule has even been applied in many cases where the Indiana law on the subject is statutory. Stout v. Wood, 1 Blackf. 71 (1820); Johnson v. Chambers, 12 Ind. 102 (1859); Engler v. Ellis, 16 Ind. 475 (1861); Men- denhall v. Gately, 18 Ind. 149 (1862); Crake v. Crake, 18 Ind. 156 (1862); Buckinghouse v. Gregg, 19 Ind. 401 (1862); Smith v. The Muncie National Bank, 29 Ind. 158 (1867); Schurman v. Marley, 29 Ind. 458 (1868); Liechtenberger v. Graham, 50 Ind. 288 (1875); Alford v. Baker, 53 Ind. 279 (1876); Smith v. Peterson, 63 Ind. 243 (1878); Robards v. Marley, 80 Ind. 186 (1881); Rogers v. Zook, 86 Ind. 237 (1882); Supreme Council v. Garrigus, 104 Ind. 133 (1885); Jackson v. Pittsburgh, etc. Ry., 140 Ind. 241 (1894); B. & O. R. Co. v. Reed, 158 Ind. 25 (1901); B. & O. R. Co. v. Jones, 188 Ind. 87 (1901); B. & O. R. Co. v. Adams, 159 Ind. 688 (1902); B. & O. R. Co. v. Hollenbeck, 161 Ind. 452 (1903); Midland Steel Co. v. Citizens Nat. Bank, 34 Ind. App. 107 (Dictum, 1904); Wabash R. Co. v. Hassett, 170 Ind. 370 (1907); Crume v. Brightwell, 69 Ind. App. 668 (1918); Culp v. Butler, 69 Ind. 668 (1918); Clark v. Southern Ry. Co., 69 Ind. App. 697 (1918); Gates v. Faubre, 74 Ind. App. 382 (1920).

An exception to this rule is indicated, by way of dictum, in Buchanan v. Hubbard, 119 Ind. 187 (1889) to the effect that in respect to those states or territories in which the common law did not prevail prior to their entrance into the Union it will not be presumed that the common law is in force there now but that the law in such state is the same as that of the forum. And in Krouse v. Krouse, 48 Ind. App. 3 (1911) in which the law of California was involved the rule was laid down that the court having judicial notice of the fact that the civil law once prevailed in California the presumption that the common law prevails there is removed and therefore the case must, as a matter of necessity, be decided in accordance with the laws of Indiana. The court declares that this case falls within the rule laid down in Buchanan v. Hubbard, supra, but, although in practical effect they are the same, there is technically a difference in these two rules. The former presumes the laws of the two states to be the same while the latter recognizes, logically, the absence of any presumption and the application of the law of the forum as a matter of necessity. This latter is a logical result of the general rule above stated.

A second rule, and one which is directly contra to the rule presuming that the common law prevails, is laid down in a number of cases that it will be presumed, in the absence of any showing to the contrary, that the foreign law is the same as the law of the forum. Shaw v. Wood (dictum) 8 Ind. 518 (1856); Draggo v. Graham (dictum), 9 Ind. 212 (1857); Farkhi v. Ramsee (dictum), 19 Ind. 400 (1862); Buchanan v. Hubbard, 119 Ind. 187 (1889); Bierhaus v. Western Union Tel. Co., 8 Ind. App. 246 (1893); Cooley v. Kelley, 52 Ind. App. 687 (1912); Irose v. Batta, 181 Ind. 49 (1913); Spielman v. Herskovitz, 78 Ind. App. 131 (1921). And to the same effect there is the rule that where there is no common law on the subject and the foreign law is not shown the law of Indiana will be applied. Hollman v. Collins, 1 Ind. 24 (1848); Blystone v. Burgett (dictum), 10 Ind. 28 (1857); Crake v. Crake (dictum), 18 Ind. 156 (1862); Patterson v. Carrell, 60 Ind. 128 (1877). Since if there was no common law on the sub-
ject there would have been no cause of action or defense at common law this is in effect the same rule as the second rule stated above.

In Crake v. Crake, supra, it was held that where a contract, governed by foreign law, embraces terms upon a subject not settled by the common law and no statute of the foreign state is shown the courts of this state will presume such contract valid. And Cunningham v. Jacobs, supra, which was an action upon an attachment bond executed in Illinois, held that although a writ of attachment is the creature of statute law and was unknown to the common law yet where a court of a state in which the common law is presumed to prevail has issued such a writ it will be presumed that the proceeding was valid and that the court did not exceed its powers since "it is always to be presumed that everything was rightly done in court unless the contrary expressly appears by the record."

In view of the state of the authority in Indiana it would be a simple matter to adhere to the rules set out in the Tentative Draft No. 5 of the Restatement of the Law of Conflict of Laws which was submitted for discussion at the seventh annual meeting of The American Law Institute, May 9, 1929. They are as follows:

"Section 654. FOREIGN COMMON LAW. In the absence of evidence, the common law of another common law state is presumed to be the same as the common law of the forum.

Section 655. FOREIGN STATUTORY LAW. In the absence of evidence, there is no presumption that a particular statute exists in another state.

Section 656. PRESUMPTION AS TO FOREIGN LAW. In the absence of evidence, the law of a state not governed by the system of the common law will not be presumed to be like that of the forum."

Obviously these rules do not cover the whole problem but they are in accord with the majority of the Indiana cases.

S. J. S.

CRIMINAL LAW—CONVICTIOIN OF LESSER CRIME UNDER INDICTMENT FOR A GREATER—Defendant below was indicted on a charge of rape of a female under the age of sixteen, and was convicted of the crime of encouraging the delinquency of a female under eighteen. The case was appealed on the question of whether the crime charged so included the one of which defendant was convicted as to permit conviction of the lesser under an indictment on the greater. The court held such conviction contrary to law, and reasoned as follows: The crime of which defendant is found guilty must be a degree of the crime as charged, or must be necessarily included in the offense charged; otherwise there can be no conviction of the lesser crime. (1) Since rape was not divided into degrees at the time of defendant's trial, conviction under the first requirement was impossible. (2) As to the alternative requirement, contributing to delinquency is not necessarily included in the offense charged. For it may be accomplished without a touching, whereas rape cannot be; and it may be committed without assault, assault and battery, or intent to commit rape, but merely with the intent to encourage the girl to submit to commission of the act by a third person. This is not rape. Gouchenour v. State, Sup. Ct. of Ind., Oct. 29, 1930; 173 N. E. 191.

The case was obviously decided according to the weight of authority. Watson v. State, 116 Ga. 607, 43 S. E. 32; Reynolds v. People, 83 Ill. 479,