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CHOICE OF LAW WHEN THE FORUM IS PRESENTED WITH A CONFLICT

By GLEN E. KELLER, JR.*

I. INTRODUCTION

The early development of choice of law doctrines was slow, since the common law courts refused to entertain cases arising outside England and, when they did begin to recognize these actions, only English law applied. Slowly, however, the increase of international trade and travel gave rise to the necessity of legal redress to cover private transactions occurring outside the jurisdiction of the forum. Thus, with this background, "Private International Law" became an important part of the common law legal fibre. There were few settled concepts, except that recognition of the laws of another nation was based upon comity,[1] in the absence of contrary public policy or the "law of nature."[2]

The constitutional bond between the states of the United States created many different problems from those that existed between nations. The comity theory was entrenched, however, and the pronouncements of Mr. Justice Story helped keep this theory alive.[3] Not until the early 1900's did the attention of Professor Beale and Mr. Justice Holmes cause a change in the accepted theories of Story.[4] With the foundation of Story's arguments shaken, two new theories were advanced: the local law theory and the vested rights theory. The first to arise and be accepted was the vested rights theory, announced by Mr. Justice Holmes:

> The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found.[5]

Less than twenty years later, Judge Learned Hand announced the local law theory:

> [N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.[6]

These two theories, "vested rights" and "local law" have pro-

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1 One of the earliest decisions respecting this problem was The Antelope, 10 Wheat. 66 (1825), Chief Justice Marshall speaking for the Supreme Court.

2 *Id.* at 74.

3 Lorenzen, *Story's Commentaries on the Conflict of Laws — One Hundred Years After*, 48 Harv. L. Rev. 15 (1934).

4 Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 Harv. L. Rev. 361 (1945).

5 Slater v. Mexican Nat'l. R.R., 194 U.S. 120, 126 (1904).

6 Guinness v. Miller, 291 Fed. 769, 770 (S.D.N.Y. 1923). Perhaps the foremost proponent of this theory has been Professor Cook, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) and Cook, *An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws*, 37 Ill. L. Rev. 418 (1943).

vided the bases for most of the modern conflict of laws decisions in the United States. Until recently, the vested rights theory seemed to be general in its application and, although it has not been free from difficulties, it has been a consistent guide to most courts when called upon to determine the rights of injured persons. Recent developments in several jurisdictions have shown a trend away from the vested rights theory and toward an application of the local law theory. Mr. Justice Roger J. Traynor of the Supreme Court of California has explained the evolution, citing the rigidity of the vested rights rules as the basic cause of the trend.[7]

7 Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657 (1959).

II. THE WRONGFUL DEATH PROBLEM

The crash of a Northeast Airlines airplane near Nantucket, Massachusetts on August 15, 1958, and the litigation which followed has resulted in several significant discussions of conflict of laws theory.[8] A hypothetical situation based upon this crash may serve to illustrate the application of the vested rights and local law theories as well as show the problems involved in their application.

Assume an airplane, flying a transcontinental route, originating in New York, landing in Chicago and Denver and crashing shortly after the Denver takeoff. Assume further that Passenger A was domiciled in New York where he boarded the plane; that Passenger B boarded in Chicago where he was domiciled; and Passenger C, a resident of Colorado, boarded in Denver. The airline is an Illinois corporation with principal offices in Chicago. Finally assume that the crash was directly attributable to the negligence of the crew, which occurred in Colorado.

A. VESTED RIGHTS THEORY

This theory provides that regardless of the domicile of the parties or the location of the forum, the law of the place where the tort occurred will govern all substantive matters pertaining to the recovery. Since Colorado is the place of the tort and the Colorado statute provides that the maximum recovery for wrongful death from a common carrier is $10,000,[9] and since damages have usually been considered to be substantive in wrongful death cases,[10] the recovery by the plaintiffs would be limited to $10,000.

The theorists supporting this theory have argued that legal rights are created only by the operation of sovereign made law upon acts occurring within the jurisdiction of the sovereign. The final argument is that but one law can be applied to any one act. The strongest feature of the vested rights theory, as expressed by several writers, is the ease of application and relative certainty of result from its use.[11] Analytically, however, several flaws of a serious nature appear in the practical usage of the theory.

One important inconsistency is that this theory runs afoul of the premise that law is territorial and a foreign sovereign cannot govern the actions of the forum court. The language of Mr. Justice Holmes is strongly indicative of this understanding:

> No one would doubt that the law of Minnesota was necessary to call the obligation into existence. . . . The continued operation of that law keeps the debt alive. . . . When such obligations are enforced by suit in another State it is on the footing of recognition, not of creation. . . .[12]

8 Pearson v. Northeast Airlines, 307 F.2d 131 (2d Cir. 1962), dissenting opinion adopted and amplified 309 F.2d 553 (2d Cir. 1962); cert. denied 372 U.S. 912 (1963); Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

9 Colo. Rev. Stat. § 41-1-1 (1953). *Damages for death.*—(1) Whenever any person shall die from any injury resulting from or occasioned by the negligence, . . . of any . . . employee, while running, conducting or managing any . . . conveyance operated for the purpose of carrying either freight or passengers for hire . . . the corporation, or individuals in whose employ any such . . . employee . . . shall be at the time such injury is committed . . . shall forfeit and pay for every person and passenger so injured the sum of not exceeding ten thousand dollars, and not less than three thousand dollars . . . .

10 Northern Pac. R.R. v. Babcock, 154 U.S. 190 (1894); c.f. Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918).

11 Cheatham, *supra* note 4 at 379; Stumberg, CONFLICT OF LAWS (3d ed. 1963).

12 Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 217 (1930), dissent.

Analysis such as this causes a breakdown in vested rights, since the theory is the enforcement of a foreign created right and the application is the enforcement extraterritorially of sovereign law.

Another very strong criticism of vested rights is that there is no room for flexibility when the court seeks to do "substantial justice." The basis for this argument is that except in cases of penal laws or strong opposing public policy, the forum court must either accept or reject the remedy; there is no middle ground. Actually, this criticism did not become important until *Erie R.R. v. Tompkins*[13] was decided. Under the *Swift v. Tyson*[14] rule, which preceded *Erie*, a suit brought in the Federal District Court would not have been plagued by this rigidity. Rather, in a case where the decision under the law of the place of the tort would have been unduly harsh or unjust, the court would follow a rule designed to do substantial justice between the parties.

Aside from these arguments, the criticism which must be directed to the vested rights theory is that it forces a forum to ignore its interest in the suit for the sake of uniformity. No allowance is made for a situation in which the forum is the only state with any interest in the suit other than the state where the tort occurred.

Applying this theory to the hypothetical example set forth above, it would appear that if the personal representative of Passenger A (domiciled in New York) sued the airline in New York, where there is a strong constitutional mandate against a limitation on wrongful death damages,[15] the plaintiff would still be limited to $10,000 maximum damages regardless of the actual loss involved. As long as there are states which prefer to limit the recoverable damages in wrongful death cases, this type of difficult situation will continue to arise. New York has every conceivable interest in the total transaction, except that the accident and the domicile of the corporation are elsewhere. The fact that the accident occurred in Colorado may well be considered fortuitous since it could have happened in a state where there was no limitation on damages. Vested rights theorists, however, ignore this incongruity and argue that the end, uniformity of result, justifies the means, harshness.

B. Local Law Theory

The reason for development of the local law theory of conflicts was opposition to preceding theories.[16] The fundamental policy of this theory is that since law is *not* extraterritorial in effect, the forum can only apply its own law. Therefore, if the forum recognizes the legal injury which has occurred to the plaintiff, it will provide a reocvery, under its own law, which would be similar to that allowed where the injury occurred. Transferring this to wrongful death cases, a forum could elect to apply its own limitation on the damages, or apply no limitation where the place of the injury had a limitation. In the hypothetical example, the New York resident might sue in New York and obtain a recovery for all of the damages which he could prove.

This theory is said to overcome the major defects of the vested

13 304 U.S. 64 (1938).
14 41 U.S. (16 Pet.) 1 (1842).
15 N.Y. Const. art. I, § 16.
16 Cheatham, *supra* note 4 at 385.

rights theory. First, it allows the forum to enforce the law with which it is familiar. Second, this theory is very flexible, in that it permits the forum to use as a guide only that much of the foreign law as it sees fit. There is, however, one important limitation which must be noted. This is that the forum must have sufficient contacts with the transaction in order to apply its own law. The *Pearson* case[17] has indicated that without these contacts, a decision not following the law of the place where the injury occurred would be in violation of due process and unconstitutional. The number and quality of these contacts is an important problem for the courts to determine at the outset of every case. The *Pearson* and *Kilberg* cases had domicile by the plaintiff, "doing business" by the defendant, a course of business advertising and solicitation by the defendant, purchase of the ticket and boarding of the plane by the plaintiff. Which of these might be considered essential to allow use of the local law is not spelled out in the decisions and, therefore, must be determined by analysis and subsequent decisions.

The local law theory is, however, not necessarily a complete answer to the problems involved in this area of conflict of laws. Cheatham argues that it would be extremely unfortunate if the freedom allowed by the local law theory were to be widely used.[18] It is his argument that only in complex situations should there be a deviation from the foreign law as a guide to the decision. This follows the theoretical outline presented earlier. The problem arises where the parties and counsel attempt to determine when the court will use the law of the forum and what part it may use. In face of this difficulty, one must wonder if perhaps more problems might be created by using the foreign law as a guide rather than applying the foreign law *in toto*. Certainly the many varied interpretations of the effect of contributory negligence in wrongful death cases would lead to confusion by attorneys and judges alike. In effect, Cheatham says that we should fall back upon the basic concepts of vested rights except in "hard cases" when we may find an "out" in the application of the local law theory.

The number of jurisdictions which might find sufficient contacts with an occurrence, to bring the local law theory into play, is readily apparent. In the hypothetical example, three states would

17 Pearson v. Northeast Airlines, 307 F.2d 136 (2d Cir. 1962), dissenting opinion adopted and amplified 309 F.2d 553 (2d Cir. 1962), cert. denied 372 U.S. 912 (1963).
18 Cheatham, *supra* note 4 at 386.

have these contacts and, of course, additional possibilities are unlimited. This in effect means that totally different results would be possible for each passenger in the plane. In turn, this will cause the plaintiff's counsel to begin an analysis of the possible jurisdictions and the occurrence to determine (1) those possible forums which might find sufficient contacts with the occurrence and (2) from among those which would have the most liberal recovery. This raises the question of forum shopping, discussed by Goodrich as follows:

> The outcome of litigation . . . should not be changed by the fact that for one reason or another legal action is instituted somewhere else than at the place where the operative facts were located. Fairness to the parties requires that the fortuitous choice of a geographical place of suit should, as far as is possible, not vary the way in which the suit will be decided.[19]

As vested rights prevented any forum shopping, local law theory appears to encourage it.[20]

Probably the greatest difficulty with the local law theory is the burden which it places upon the parties to the suit. They must actually prepare for two lawsuits upon one set of facts. This is because there is no way to tell in advance what portion of the foreign law will be used to guide the court and what part of the actual local law may be used. In other words, where the vested right theory may have been too rigid and certain, the local law theory may be flexible and uncertain.

III. Intrafamily Tort Liability

Development and change in the field of wrongful death has been fairly limited to date. In the area of intrafamily tort liability, a substantial and fairly widespread development is appearing. The cases usually have arisen where an accident, due to the husband's or father's negligence, injures one or more members of a family in a jurisdiction away from the domicile of the family. Subsequent suit is brought in the family domicile. Where one of the jurisdictions allows intrafamily suits and the other does not, important questions are raised as to the propriety of the suit.

Courts applying the traditional vested rights theory in cases where the foreign law did not permit an intrafamily suit, have held that no suit could be allowed, even in face of the hardships which appeared to be created and even though the forum would have permitted the action had the injury occurred within its jurisdiction.[21] Where the forum (and domicile) does not permit suits of this type and the law of the place of the wrong allows the action, the vested rights effect has been avoided on grounds of public policy, or by a procedural characterization of the right to bring suit.[22]

The same theoretical faults with this method apply as they did in the wrongful death situation. In addition, the hardships imposed

19 Goodrich, CONFLICT OF LAWS 7 (3d ed. 1949).

20 One very recent case has indicated that the courts will be alert to attempts at forum shopping. Thompson v. Capital Airlines, 220 F.Supp. 140 (1963).

21 Gray v. Gray, 87 N.H. 82, 174 Atl. 508 (1934); Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

22 Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936).

by the application of vested rights in intrafamily suits can be easily seen.

The recent trend in cases of intrafamily suits has been to look to the law of the domicile as that which will govern the action.[23] The reason stated by the New Hampshire Supreme Court states the basis for these decisions: "We consider that the incidents of the status of marriage of parties domiciled here should not be determined by the law of another jurisdiction merely because they chance to be involved in an accident there."[24]

It is important to note that the courts here are not following the strict local law theory.[25] Rather, they are seeking justification for using the local law to allow a recovery. In fact, the New Hampshire court specifically stated that the foreign law as to the standard of care would be applied. Thus, this has become but an exception to the rigidity of the vested rights theory where the court feels it cannot do substantial justice as between the parties. The courts, however, have not faced the problem which confronts them, that is what law may they apply and why.

IV. A PROPOSAL

Professor Brainerd Currie of the University of Chicago has proposed a different approach which courts might take when presented with a conflict of laws situation.[26] This proposal approaches a solution to many of the problems presented by the local law theory and the vested rights theory. Currie sets forth five suggestions which should be helpful here in analyzing the problems presented:

1. Normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision.

2. When it is suggested that the law of a foreign state, rather than the law of the forum, should furnish the rule of decision, the court should first of all determine the governmental policy—perhaps it is helpful to say the social, economic, or administrative policy—which is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance.

3. If necessary, the court should similarly determine the policy expressed in the proffered foreign law, and whether the foreign state has a legitimate interest in the application of that policy to the case at bar.

4. If the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law.

23 Thompson v. Thompson, 193 A.2d 439 (N.H. 1963); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955). See Ehrenzweig, CONFLICT OF LAWS 581-583 (1962).

24 Thompson v. Thompson, 193 A.2d 439, 441 (N.H. 1963).

25 Cook, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (1942).

26 Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9 (1958).

5. If the court finds that the forum state has an interest in the application of its law and policy, it should apply the law of the forum even though the foreign state also has such an interest, and, *a fortiori,* it should apply the law of the forum if the foreign state has no such interest.[27]

The first suggestion seems to apply the strongest argument of the local law theorists; no court can enforce any law other than that of its sovereign creator. This argument follows logically from the consideration of the American tradition; the power of a court to adjudicate is derived from the people, and surely the people would prefer to be governed by the law which they, through their representatives, have created.

The second suggestion provides the guide which courts inevitably must find. Professor Currie suggests that the only legitimate reason for applying the forum law to any suit is the interest which the forum has in the case. This surely is the underlying, though unexpressed, reason for the *Kilberg* and *Pearson* decisions in the field of wrongful death, and of the many decisions now appearing in the area of intrafamily suits. It has long been settled that the state in which property is located is the only state which can affect that property in any direct fashion.[28] This, too, is based upon a concept of governmental interest and territorial sovereignty. Is not the situs of property necessarily akin to the domicile of persons? Another important area where the courts have looked to the forum's interest in the suit and the parties is the child custody situation. The problem arises where the domicile of the parents is not the same and the court is called upon to determine the proper custody for the child. Many, if not most, courts have held that the domicile of the child should provide the law to govern custody because, it is said, that jurisdiction is the one with a direct interest in the welfare of the child.[29]

Governmental interest could take several forms in wrongful death and other tort cases. The forum might be the domicile of one of the parties to the suit, either plaintiff or defendant. It would be indeed tenuous to argue that a state did not have an interest in one of its citizens, be he a natural person or corporation. Further, the state might be the place of the tort. No reason is readily apparent why a state is not interested in injuries which occur within its borders, aside from questions of Due Process under the Fourteenth Amendment. The true basis for applying any law to any injury is the interest which the forum has in the suit before it.

This method of choice of law does present several jurisdictions in which there can be a governmental interest in the transaction. Some may even argue that this runs afoul of the "forum shopping" argument which is made to the local law theory. A certain amount of truth is apparent in the argument, but the number of forums available is, in fact, substantially limited and the objection would seem to be minor.

Professor Currie's suggestions three and four provide the only breakdown in the theoretical perfection sought in this area of conflict of laws. Primarily, the question is whether the forum should

27 *Id.* at 9-10.
28 Durfee v. Duke, 84 S.Ct. 242 (1963), which involves an unusual set of facts.
29 McMillin v. McMillin, 114 Colo. 247, 158 P.2d 444 (1945). Annot. 160 A.L.R. 400 (1946).

apply the law of a foreign state, which, as pointed out above, the court rightfully should not do. Rather, sound theory and practice dictate that the forum court should call upon the *forum non conveniens* concept to relieve the courts from hearing controversies in which the state can find no proper governmental interest. Should not the forum court dismiss the action if it cannot find a legitimate interest in the suit? Perhaps the question would be better stated by asking if it would be proper for one jurisdiction to enter a judgment in a case where the court had not been able to apply law with which it was familiar, and at the same time force the state whose law was applied to recognize the judgment under the Full Faith and Credit clause of the Constitution. By the application of the doctrine of *forum non conveniens,* where the forum court has no governmental interest in the transaction, the parties, the subject matter, or the litigation itself, the court is merely guaranteeing that injustice will not occur.

Professor Currie's fifth suggestion provides the solution to many of the problems which have faced the courts for years. The simple statement that the court should apply its own law if it finds an interest in the suit, even if a foreign court also may have an interest, seems so obvious that one wonders why the courts have failed to give official sanction to the idea in wrongful death and intrafamily suits. The proposal does not seem to be fraught with problems of justification, as are the vested rights theory and the "sufficiency of contacts" local law theory. As Professor Currie points out, the Supreme Court has on eighteen separate occasions either specifically supported the governmental interest theory or determined cases consistent with it.[30]

The use of governmental interest in analyzing the hypothetical example above shows the effective limitations on forum choice. Both Colorado and Illinois have an interest in the possible suits, as Colorado is the place of the injury and Illinois is the domicile of the airline. The only interest which New York would have is as the domicile of Passenger A. Therefore, Passenger A's personal representative could sue in New York using the New York wrongful death laws. If Passenger C's representative wished to evade the Colorado limitation on damages by suing in New York, the New York court would dismiss the suit under *forum non conveniens,* because the forum had no governmental interest in the suit.

The suggestion has been made that this thesis will be met by controversy.[31] Indeed it may, as are most suggestions for change. The advantages of pursuing the governmental interest, however, seem to overshadow other theories which have been advanced. The proposal allows a forseeable rule of decision while avoiding a rigid and inflexible application. Forum shopping is pared to a distinct minimum, but convenience of the patries is served. The major advantage of the governmental interest idea is the simple, practical basis which it provides for choice of law. The suggestion must be made that appellate courts re-examine their purposes in conflict of laws cases, and follow the dictates of their jurisdiction's interest in the suit.

30 Currie, *supra* note 26 at 75.
31 *Id.* at 77.