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Whenever an action—whether based on contract or tort—has substantial elements in two or more states having different local laws, it becomes necessary to determine which of these laws shall govern the rights and obligations of the parties. The ensuing problems incident to deciding which law shall govern comprise a great portion of that branch of the law known as conflict of laws or private international law.[1]

Prior to the nineteenth century this area of the law was quite unimportant in both England and the United States;[2] therefore precedent is relatively sparse. Furthermore, the precedent that does exist is confused not only by the number of divergent choice of law theories employed in different jurisdictions, but by decisions handed down by the same court advancing inconsistent theories. Confusion is especially prevalent in cases involving a choice as to what law determines the validity of a contract.[3] Although there exists some divergence of rules relative to determining what law governs a tort action,[4] the choice of law rules of tort liability are relatively uniform when compared with those of contracts.

The purpose of this article is twofold—first, to enunciate the diverse choice of law theories concerning both contracts and torts which are presently employed, and second, to review analytically the Colorado decisions in relation to these various theories.

CONTRACT CHOICE OF LAW THEORIES

When a court is confronted with a contract connected with two or

[1] Both designations have been criticized. The term "conflict of laws" is criticized because it suggests a struggle between two laws for mastery and because it is too narrow in scope. It has been suggested that "concord of laws" or "choice of laws" would be more appropriate. The term "private international law" has been criticized because the rules are not a private species of the body of rules which prevails between one nation and another as they should be if the term international is taken in its accepted legal meaning. See Goodrich, Conflict of Laws § 5 (3d ed. 1949).

[2] Stumberg, Conflict of Laws 2-6 (2d ed. 1951). Professor Stumberg states that the first complete work in English dealing with Conflict of Laws was by Story whose treatise was published in 1834. Having before him but few cases and consequently no common-law tradition, he turned to the works of continental jurists basing his conclusions largely upon the theories of the Dutch jurists.

[3] Goodrich, Conflict of Laws 321 (3d ed. 1949).

[4] Morris, The Proper Law of a Tort, 64 Harv. L. Rev. 881 (1951).

more jurisdictions, and it determines that some question relating to the contract is one of substance, the court must decide upon the course it will pursue in choosing the substantive law to be applied.[5] The question which has arisen most often and has proved the most troublesome is what law shall govern the validity of a contract. At least the following five diverse choice of law theories concerning validity of contracts have been employed by Anglo-American courts:

1) *The Law of the Place of Contracting (lex loci contractus).* The rule that the place of making or executing governs the validity of a contract has been adopted by the Restatement[6] and has the support of a number of writers.[7] Critics of this rule stress the difficulties inherent in determining the place of making and point out that this place may have no substantial relation to the agreement.[8] For example, a contract to be performed in Wyoming by Wyoming parties might happen to be prepared and executed in Denver, Colorado, perhaps in the office of a Denver law firm. Although the contract, after it has been executed, has no connection with Colorado, according to this choice of law theory Colorado law would govern its validity. Professor Stumberg states that only a minority of the American states have professed to follow the place of making rule.[9]

2) *The Law of the Place of Performance (lex loci solutionis).*[10] This theory has been advanced on the ground that the place of performance usually is of greater significance to the contract than the place of making and that the parties can thus be presumed to have intended the place of performance to govern the validity. However, difficulty arises when several places of performance are named or when no place of performance is named.[11]

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[5] As a general rule matters of procedure are governed by the law of the forum. See Restatement, Conflict of Laws § 585; see also Stumberg, Conflict of Laws 134 (2d ed. 1951).

[6] Restatement, Conflict of Laws § 332 (1934). Id. § 311 comment d provides that a contract is deemed to have been made where the "principal event" necessary to make it a binding obligation took place. See also Goodrich, Conflict of Laws § 107 (3d ed. 1949). The "principal event" mentioned in the Restatement seems to be synonymous with Goodrich's "last act."

[7] Beale, What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 1, 79, 194, 260 (1910); see also 2 Beale, Conflict of Laws § 332.4 (1935) and Goodrich, Conflict of Laws 323 (3d ed. 1949).

[8] Nussbaum, Principles of Private International Law 164-66 (1943).

[9] Stumberg, Conflict of Laws 226 (2d ed. 1951).

[10] In a general summary written in 1910, Professor Beale gave a plurality of states as applying the place of performance rule. Beale, What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 1, 79, 194, 260 (1910).

[11] Stumberg, Conflict of Laws 232-34 (2d ed. 1951).

3) *The Law Intended by the Parties.*[12] The English courts have sought to apply the law or laws by which the parties intended, or may fairly be presumed to have intended, the contract to be governed. Often where the contract expressly states the parties' intention that it shall be governed by the law of a particular jurisdiction, their intention will be effectuated by the courts if the chosen law has some meaningful connection with the contract.[13]

4) *The Law Which Upholds the Contract.*[14] Under this theory courts look to either the place of contracting or of performance and sometimes to some other place having a substantial connection with the contract and apply whichever law will validate the agreement. This rule is often used in commercial contracts requiring interest payments which are usurious and invalid under the laws of one or several of the jurisdictions connected with the loan. The rationale, of course, is that the parties intended to make a valid contract and that this intent should be effectuated.

5) *The "Center of Gravity" Theory.* This rule has also been termed the "grouping of contacts," "most vital connection," "accumulation of contact points" and also the "proper law" of the contract. The latter term, however, has been used to designate the English rule that the law presumably intended by the parties governs a contract.[15] Textwriters are agreed that this method as employed by the English courts to find the "proper law" in order to give effect to the intention of the parties is actually an attempt to find the place most vitally connected with the contract.[16]

This theory is the most recent to be utilized by the American courts. It does not appear as one of the choice of law theories in earlier legal treatises; in fact, it is not mentioned in Professor Strumberg's 1951 treatise.[17]

Under this theory the courts, instead of regarding as conclusive the parties' intention or the place of contracting or performance or the law which upholds the contract, lay emphasis upon the law of the place which has the most significant contacts with the matter in dispute. The theory has been criticized as being merely a device for reconciling cases

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[12] In numerical strength, according to Professor Beale's summary in 1910, the states following this rule rank second. This rule was probably most frequently followed by the United States Supreme Court prior to the decision of Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938) when federal courts were free to apply their own notions of conflict of laws in cases of diversity of citizenship. See Stumberg, Conflict of Laws 234 (2d ed. 1951).

[13] For a general analysis of this theory of law see Note, Conflict of Laws; "Party Autonomy" in Contracts, 57 Colum. L. Rev. 553 (1957). The note concludes by stating: "Theoretically there appear to be no sound objections to permitting contracting parties to select the law governing the validity of their contract if (1) the chosen law has some meaningful connection with the contract, (2) the choice of law is freely arrived at on a basis of equal bargaining power, and (3) compelling public policy considerations, particularly as embodied in local protective statutes, do not dictate applicaton of the law of the forum." Id. at 576.

[14] Goodrich, Conflict of Laws § 111 (3d ed. 1949). See also Stumberg, Conflict of Laws 237-40 (2d ed. 1951).

[15] See Morris and Cheshire, The Proper Law of a Contract in Conflict of Laws, 56 L.Q. Rev. 320 (1940).

[16] See Cheshire, Private International Law 199-204 (4th ed. 1952).

[17] Although Stumberg does not mention this theory as a separate theory he in effect discusses it under the theory of "Intention of the parties." See Stumberg, Conflict of Laws 234-36 (2d ed. 1951).

actually decided according to more traditional choice of law rules and as a means of granting judges an excessively broad discretion in weighing various contacts.[18] On the other hand, this theory has been praised because it gives to the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction most intimately concerned with the outcome of the particular litigation.[19]

The case of *Auten v. Auten,*[20] a recent New York decision employing this theory, merits attention, principally because it has received so much comment,[21] but also because it might well pave the way for other courts, including those of Colorado, to utilize this comparatively new approach. The "center of gravity" theory was applied in the *Auten* case under the following circumstances: The parties, husband and wife, were married in England and lived there with their two children for fourteen years, when the husband allegedly deserted his wife and come to the United States. The wife came to New York for the purpose of making a separation agreement. The agreement entered into by the two parties obligated the husband to pay to a trustee for his wife, who was to return to England, fifty pounds per month for the support of herself and the children, and obligated the wife not to sue in any action relating to their separation. The wife returned to England and subsequently

[18] Note, 40 Cornell L.Q. 772 (1955).
[19] Note, 3 Utah L. Rev. 490 (1953).
[20] 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R. 2d 246 (1954).
[21] The Auten case has been commented on in various notes, e.g., 24 Fordham L. Rev. 268 (1955); 40 Cornell L.Q. 772 (1955); 6 Syracuse L. Rev. 381 (1955).

brought an action in an English court for separation, charging the husband with adultery. The present action was brought in New York to recover installments due for support and maintenance under the agreement. The issue was whether the wife's commencement of the English action constituted a repudiation of the separation agreement and effected a forfeiture of her right to any payments under it. The lower court concluded that New York law was to be applied and dismissed the complaint. The Court of Appeals reversed, holding that the English law rather than New York law applied. The latter court, concluding that England had all the truly significant contacts, stated:

> "By stressing the significant contacts, it enables the court, not only to reflect the relative interests of the several jurisdictions involved but also to give effect to the probable intention of the parties and consideration to whether one rule or the other produces the best practical result."[22]

It should be noted that the validity of the contract was not in question, but rather whether there was a breach. The court could have relied solely on the conventional rule that matters of performance and breach of a contract are governed by the law of the place of performance,[23] because so far as the wife's performance was concerned, the place was England. The court, however, chose to enunciate and follow the "center of gravity" theory in deciding the applicable law. The *Auten* case was not the first case to utilize this theory[24] nor has it been the last, for subsequent to this case the theory has been employed by the New York state courts[25] as well as by the federal courts sitting in New York.[26] It is generally conceded by the federal courts in New York that the New York Court of Appeals has adopted this theory. Thus a federal district court in *Mutual Life Insurance Company v. Simon*[27] stated:

> "Abandoning unitary formulas such as 'the place of contracting' or 'the place of performance,' the New York Court of Appeals has adopted the 'grouping of contacts' theory. . . . This approach requires the application of 'the policy of the jurisdiction most intimately connected with the outcome of the particular litigation.' At the same time this doctrine enables the court, not only to reflect the relative interests of the several jurisdictions involved . . . but also to give effect to the probable intention of the parties and consideration to whether one rule or the other produces the best practical result."[28]

Much more could have been written about the various choice of law theories presently employed by the courts,[29] but this cursory back-

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[22] 124 N.E.2d at 102.

[23] Restatement, Conflict of Laws § 370 (1934) states: "The law of the place of performance determines whether a breach has occurred."

[24] The "center of gravity" theory was employed in New York in several cases prior to the Auten case, e.g., Rubin v. Irving Trust Co., 305 N.Y. 288, 113 N.E.2d 424 (1953); Jones v. Metropolitan Life Ins. Co., 158 Misc. 466, 286 N.Y. Supp, 4 (Sup. Ct. 1936).

[25] See e.g., Anderson v. Anderson, 147 N.Y.S.2d 353 (Sup. Ct. 1955).

[26] See e.g., Global Commerce Corp. v. Clark-Babbitt Industries, 239 F.2d 716 (2d Cir. 1956); Fricke v. Isbrandtsen Co., 151 F.Supp. 465 (S.D.N.Y. 1957).

[27] 151 F.Supp. 408 (S.D.N.Y. 1957).

[28] Id. at 411.

[29] In addition to these five theories, courts have also emphasized the law of the place where one or both of the contracting parties are domiciled, or in cases involving real estate the law of the situs. For a recent discussion of choice of law rules in Russia see Pisar, Soviet Conflict of Laws in International Commercial Transactions, 70 Harv. L. Rev. 593 (1957).

ground will suffice to present an analytical review of the Colorado decisions.

CONTRACT CHOICE OF LAW IN COLORADO

The first reported Colorado case involving the choice of law of a contract was *Roop v. Delahaye*[30] decided in 1874 by the Supreme Court of Colorado Territory. The action, instituted in Colorado, was based on a promisory note which the defendant claimed was invalid under the laws of Iowa where made. The Court apparently conceded that Iowa law would govern the validity of the note, but held that the defense that the note was made in a foreign state, upon a consideration which was void under a law of that state, should be specially pleaded.

Another early case, decided in 1887, was that of *Hochstadter v. Hays*,[31] which involved an action for the price of goods sold to a firm in Missouri, of which the defendant, a married woman, was a member. The law in Missouri at that time held that a married woman's contracts were valid only as against her separate estate in equity. The Colorado law was to the contrary—that a married woman could sue and be sued as a *feme sole*. But the court applied the Missouri law and held that a personal judgment against the defendant could not be sustained. The court said:

> "[I]t is a familiar principle that the nature, validity, obligation and interpretation of contracts are to be governed by the *lex loci*, and we are of the opinion that there is a defect of

[30] 2 Colo. 307 (1874).
[31] 11 Colo. 118, 17 Pac. 289 (1887).

> obligation in the contract sued upon which forbids judgment asked for. What the defendant undertook to do within her legal capacity to contract constitutes the obligation of her contract. . . . Substantially she undertook that her separate estate then existing might be subjected to the payment of the debt in case of default. This was the extent of the obligation of her contract. And this is all that the plaintiffs are entitled to ask any court, whether in Missouri or elsewhere, to enforce. We cannot change the nature of the contract or add to its obligations."[32]

Wolf v. Burke[33] involved an action on a parol contract, made and to be performed in Idaho, for the sale of mining land located in Idaho. The Colorado statute of frauds provided that every contract for the sale of land or any interest therein "shall be void unless the contract or some note or memorandum thereof is in writing."[34] The Colorado Supreme Court held that the law of Idaho, where the contract was made, determined the validity of the contract. Some courts have held that a statute of frauds relates to procedure[35] rather than substance, in which case the law of the forum governs; but the *Wolf* case definitely classifies the statute of frauds as substantive.

Although the Colorado decisions mentioned thus far, and also others[36] seem to favor the first theory discussed under the heading of law of the place of contracting, these decisions do not actually reject the other theories. The contests in these cases were all between the law of the place of contracting and the law of the forum, rather than between the law of place of contracting and the law of the place of performance, that intended by parties, that which upholds the contract, or that place which has the most significant contacts. However, in *Cockburn v. Kinsley*[37] the court was directly confronted with the problem of whether the validity of a contract should be governed by the law of the place where the contract was made, by the law of the place of performance, or by the law intended by the parties. In this case, a promissory note was executed in Colorado by the president and secretary of an Arizona mining corporation doing business in Mexico. The note was payable in Minnesota. The Colorado Court of Appeals held that the liability of the directors was to be determined by the law of Colorado, the place of making, which law the Court said was impressed on the note when made. The court expressly rejected the view that the law of Minnesota, the place of performance, should determine the contract's validity. The court stated:

> "The law is quite plain that where the contract is made in

[32] Id. at 123, 17 Pac. at 292.
[33] 18 Colo. 264, 32 Pac. 427, 19 L.R.A. 792 (1893).
[34] Gen. Stat. 1883, § 1517.
[35] Goodrich, Conflict of Laws § 88 (3d ed. 1949); Stumberg, Conflict of Laws 141 (2d ed. 1951).
[36] E.g., Ancient Order of the Pyramids v. Dixon, 45 Colo. 95, 100 Pac. 427 (1909); Sullivan v. German Nat'l Bank, 18 Colo. App. 99, 70 Pac. 162 (1902); Des Moines Life Ass'n v. Owen, 10 Colo. App. 131, 50 Pac. 210 (1897).
[37] 25 Colo. App. 89, 135 Pac. 1112 (1913).

> one state and performance is to be in another, the law of the place of performance governs with reference to all questions concerning the performance, whether the suit be brought in that place or not . . . and that the law of the place where the suit is brought governs in all questions concerning the remedy . . . and that the law of the place where the contract is made governs all questions concerning the validity of the note and the capacity of the makers thereof."[38]

The court also apparently rejected the theory that the law intended by the parties governs the validity, as the court in quoting Wharton on Conflict of Laws, sec. 427, states that a contract's "governing law should be determined by a fixed rule not dependent upon the intention of the parties."[39]

It cannot be denied that Colorado favors the theory that the law of the place of making governs the validity of a contract. But it should not be concluded that in all cases this theory is followed, for in *McKay v. Belknap Savings Bank*[40] the court appeared to follow the theory that the law intended by the parties or possibly the law which upholds the contract governs. In this case, a note was made in Colorado to bear interest at 8%, but in the event of default, interest was to be at the rate of 12%. The note was payable in New Hampshire where no higher rate than 6% was allowable. The Supreme Court, holding that the lower court properly allowed interest at the increased rate, stated:

> "The law upon this proposition is stated by Beach on Modern Law of Contracts, Vol. I, sec. 606, as follows: 'When at the place of contract, the rate of interest differs from that of the place of payment, the parties may stipulate for either rate, and the contract will govern, the parties having the right of election as to the law of which place their contract is to be governed.' "[41]

The decision, however, would have reached the same result had the court applied the law of the place of making. The *McKay* case is cited in *Baxter v. Beckwith*[42] wherein a note made and payable in Iowa was held to be governed by the laws of Iowa as to an interest provision valid in Iowa but invalid in Colorado. The court seemed to base its ruling on the "place of making" theory, but the court also stated:

> "The parties may legally stipulate the payment of interest according to the laws of the state where the instrument is made, or according to the laws of the place of payment, and the rate thus agreed upon may be recovered, although it may be illegal under the laws of the other state."[43]

The *McKay* and *Baxter* cases[44] indicate that Colorado approves the theory that the law intended by the parties (or the law which upholds the contract) governs the validity of a contract. However, it should be emphasized that the holding in the *McKay* case and the *dictum* of the *Baxter* case apply only to usury situations. Whether the court will ex-

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[38] Id. at 93, 135 Pac. at 1113.
[39] Id. at 95, 135 Pac. at 1114.
[40] 27 Colo. 50, 59 Pac. 745 (1899).
[41] Id. at 56, 59 Pac. at 747.
[42] 25 Colo. App. 322, 137 Pac. 901 (1914).
[43] Id. at 325, 137 Pac. at 902.
[44] Accord, Eccles v. Herrick, 15 Colo. App. 350, 62 Pac. 1040 (1900).

tend the McKay holdings to situations other than those involving interest is, of course, a matter of speculation.

The cases decided in the federal courts of the District of Colorado have given effect to the law of the place of making, but such decisions do not expressly reject the other theories. In *American Crystal Sugar Company v. Nicholas*[45] the federal court applied the law of Utah to determine the effect of the parol evidence rule on a contract made in Utah, but there was no actual contest between the different choice of law theories. *Gossard v. Gossard,*[46] also a federal case, involved the legal effect of a contract made in Illinois. The court in this case stated:

> "The law of the place where a contract is made governs its nature, validity, and interpretation, unless it appears that the parties when entering into the contract intended to be bound by the law of some other place."[47]

Although the court did not follow the theory that the law intended by the parties governs, as there was no need for such in the *Gossard* case, it appears from the above statement that the court was not adverse to the theory. There has thus far been no indication that the Colorado courts would extend this theory to the "proper law" as understood by the English decisions, that is, the law which the parties may fairly be presumed to have intended, but on the other hand there has been no indication that the courts would reject the theory.

It is only when the Colorado courts are confronted with the problem of determining the validity of a marriage contract that they are bound by statute to employ the law of the place of contracting. The pertinent statute of Colorado provides:

> "All marriages contracted without this state, which shall be valid by the laws of the country in which the same were contracted, shall be valid in all courts within this state. This section shall not be construed so as to allow bigamy or polygamy in this state."[48]

Spencer v. People[49] involved a proceeding on a petition charging a 30-year-old husband with contributing to the deliquency of a 15-year-old minor female to whom he was married. The Colorado Supreme Court, relying on the above-mentioned statute, held that since the mar-

[45] 124 F.2d 477 (10th Cir. 1941).
[46] 149 F.2d 111 (10th Cir. 1945).
[47] Id. at 112.
[48] Colo. Rev. Stat. § 90-1-5 (1953).
[49] 133 Colo. 196, 292 P.2d 971 (1956).

riage was entered into in the state of Utah, where it was deemed valid according to the laws of that state, the act of marriage was not an act of delinquency. The court in *Payne v. Payne*[50] also relied on said statute in holding that a marriage of a 16-year-old minor male, contracted in Texas and valid under the laws of Texas, could not be annulled under the Colorado statute making voidable all marriages wherein either party is under the age of 18 years.[51]

In contract choice of law situations, other than those involving the validity of a marriage contract,[52] the courts of Colorado are bound only by the cases previously decided. It is submitted that these cases do not actually limit the courts to any single theory. Had any one or all of the foregoing cases, except those involving marriage contracts, been decided under the "center of gravity" theory, the result or results would probably have been the same. In cases following the place of making theory, the place of making was actually the "center of gravity" of the contract. In cases involving usury where the place of performance was applied, said place of performance was probably the "center of gravity." Said theory has not yet found expression in the Colorado cases, but it no doubt will, when a particular factual situation warrants. Although the theory might appear somewhat nebulous and perhaps even arbitrary in its application, it can fulfill the expectations of the parties more adequately than the law of the place of making or any other single theory. In most cases there will be no necessity for the courts to look beyond the place of making, but where a situation arises when inequity would result by looking only to the place of making, it is predicted that the court would, and it is suggested that the court should, apply the "center of gravity" theory in determining what law is to govern the validity of a contract.

TORT CHOICE OF LAW RULES

The prevailing view as to tort liability in America is that the law of the place of wrong determines whether a person has sustained a legal injury.[53] According to this view, it is immaterial whether the harm in question was or was not a legal injury by the law of the forum or by the law of the place where the actor acted.[54] A few American courts have refused relief where the local law was substantially different from the foreign law, but most American courts have held that the existence of a cause of action at the forum is determined by reference to the substantive law of the place of the wrong or tort, regardless of the local law of the forum.[55]

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[50] 121 Colo. 212, 214 P.2d 495 (1950).

[51] Colo. Rev. Stat. § 46-3-1 (1953), provides: "All marriages wherein either party is under the age of eighteen years are hereby declared to be voidable."

[52] In New York the courts even apply the "center of gravity" theory to marriage contracts, e.g., see Anderson v. Anderson, 147 N.Y.S.2d 353 (Sup. Ct. 1955), wherein the court stated at page 355: "Moreover, all the significant factors involved in this cause of action are in this state. Except for the marriage all essential elements of the cause took place here: the parties met and lived in New York during their courtship; the proposal and acceptance, the representation and the actual execution of the affidavit for the license occurred in New York. We may borrow from the field of conflict of laws the principle of 'grounding of contacts' in which the courts apply the law of the state which has the most significant contacts with the particular matter involved."

[53] Restatement, Conflict of Laws § 378 (1934). Id. § 377 states: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

[54] Id. comment b.

[55] Stumberg, Conflict of Laws 183 (2d ed. 1951).

The rule in England is that the conduct must be wrongful under the civil or criminal law of the place where it occurred, and also actionable under the internal law of England.[56] A new approach, however, has been advocated by Professor Morris[57] for both England and America. He suggests that a proper law doctrine be applied to torts similar to the proper law doctrine as applied to the question whether the defendant is liable for breach of contract. Professor Morris asks, "Why should we not reach results which are socially convenient and sound by applying the proper law doctrine to the question whether the defendant is liable for tort?"[58] He states that the proper law approach intelligently applied would furnish a much needed flexibility. He concedes that in many cases there would be no need to look beyond the law of the place of wrong, so long as there is no doubt where the place is. But he suggests having a conflict rule sufficiently broad and flexible to take care of exceptional as well as normal situations, or else formulating an entirely new rule to deal with the exceptional situations. Otherwise, he claims, the results will offend our common sense.

TORT CHOICE OF LAW IN COLORADO

The courts in Colorado, both state and federal, have followed the general rule that the law of the place of the wrong determines whether a person has sustained a legal injury. In *Atchison, T. and S. F. Ry. Co. v. Betts,*[59] an early Colorado decision, the plaintiff sued in Colorado to recover damages for the death of a mule killed in New Mexico by the defendant's train. The court applied the general rule and held that the liability of the defendant was governed by the laws of New Mexico where the accident occurred.

The courts of Colorado also apply the law of the place of wrong in wrongful death actions. In *Denver & Rio Grande Ry. Co. v. Warring,*[60] the husband of the plaintiff was killed in New Mexico while in the employment of the defendant railroad. He was a resident of Colorado and his widow was appointed administratix in Colorado. She brought an action here to recover damages for wrongful death, basing her claim on the New Mexico statute. The court held that she was the proper person to sue, in accordance with the New Mexico statute, although under the wrongful death statute of Colorado the right to sue is in the heir. *Stolz v. Burlington Transportation Company,*[61] a federal case involving a wrongful death statute, held that the limitation of $5,000 in the Colorado wrongful death statute[62] does not apply in the action brought in the federal court in Colorado on a cause of action arising in Utah.

There appears not the slightest tendency to deviate from the well accepted rule that tort liability is governed by the *lex loci delicti.* Had there been any inclination to follow Professor Morris' proper law theory of a tort, it would have no doubt found expression in the case of *Pando*

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[56] See Cheshire, Private International Law Ch. XI (3d ed. 1947) for a discussion of the English rule.
[57] Morris, The Proper Law of a Tort, 64 Harv. L. Rev. 881 (1951).
[58] Id. at 883.
[59] 10 Colo. 431, 15 Pac. 821 (1887).
[60] 37 Colo. 122, 86 Pac. 305 (1906).
[61] 178 F.2d 514 (10th Cir. 1949).
[62] The limitation in a wrongful death action is now $25,000.

v. Jasper.[63] In this case plaintiff was injured in Kansas while riding as a passenger in an automobile driven and owned by defendant, when the automobile left the road and struck a pole. It appears from reading the case that plaintiff and defendant were both residents of Colorado and started their drive in Colorado, but happened to cross the border into Kansas. Professor Morris would advocate that the law of Colorado rather than Kansas would be the proper law of the tort, assuming, of course, that the only connection with Kansas was that the injury occurred there; and as a result, Professor Morris would no doubt apply the Colorado Guest Statute. The Colorado Supreme Court, however, stated that plaintiff's claim was governed by the *lex loci delicti,* but held that the lower court erred in admitting the Kansas Guest Statute in evidence when it had not been pleaded.

It is predicted that the courts of Colorado will be very reluctant to depart even slightly from the long-accepted rule that tort liability is governed by the law of the place of wrong; however, it is suggested that in exceptional situations the proper law of a tort as defined by Professor Morris should be afforded consideration by our courts.

[63] 133 Colo. 321, 295 P.2d 229 (1956).