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Richard V. Carpenter

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CONFLICTS: CONCURRENT LEGISLATIVE JURISDICTION IN DETERMINING TORT LIABILITY

RICHARD V. CARPENTER*

INTRODUCTION

In the past thirty years a few Supreme Court decisions have wrought a revolution in the theory of legislative jurisdiction applicable to workmen's compensation cases. Justice Brandeis writing for the majority in *Bradford Electric Co. v. Clapper*[1] held that the full faith and credit clause of the constitution compelled a court to give effect to the compensation law of the state of principal employment and to deny the common law tort remedy under the law of the state of injury, which also happened to be the forum. The first state, according to the Brandeis view, had exclusive legislative jurisdiction to define the jural relations between employer and employee. Justice Stone concurred in the result of this case but on the basis of judicial discretion and not of constitutional compulsion. Subsequently Stone wrote court opinions in which he developed the theory that in workmen's compensation cases with multiple state contacts, the court should weigh and appraise the governmental interest of each state involved and should apply the remedy provided by that state with the most substantial interest in the matter and best suited, at the time and place of trial, to effect a just result.[2] Later Justice Stone, writing for the court, reached the conclusion that in compensation cases with multiple state contacts, each interested state could properly apply its own remedy in the matter without compulsion to regard the interest or law of any other state or states. The injured workman or his family may freely elect the remedy which they choose to pursue and then pursue it in the appropriate forum.[3] Justice Douglas has gone even further. He dissented in *Magnolia Petroleum* on the ground that the injured workman should not be precluded from seeking supplemental remedy in Louisiana (the place of employment) merely because he had first sought and received his rem-

* Professor of Law, Loyola University, Chicago, Illinois.

[1] 286 U.S. 145 (1932).

[2] Alaska Packers Association v. Industrial Accident Commission of California, 294 U.S. 532 (1935); Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U.S. 493 (1939).

[3] Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).

edy in Texas (the place of injury) which the Texas statute purported to make exclusive. Finally Justice Douglas, writing the court's opinion in *Carroll v. Lanza,*[4] comes close to making his *Magnolia* dissent the law of the land although he does find some factual differences between the cases on which he purports to distinguish the two results. In any event the law today clearly recognizes the possibility of concurrent jurisdiction in two or more states at the same time to prescribe conflicting rights, duties, procedures and remedies incident to an industrial accident.

Now, we believe, a slower-moving revolution is at work in the field of conflict of tort laws, away from the search for some single state with exclusive jurisdiction to determine rights and liabilities, and toward the recognition of multiple concurrent jurisdictions to legislate concerning the same particular tortious action. For illustration let us consider the hypothetical case of *Lovelace v. Wolf,* first from the view of traditional American theories and then in the light of newer insights.

Lovelace v. Wolf

Walter Wolf and Lucy Lovelace are school teachers in State X where they were born and bred. One summer they journeyed to New York City in pursuit of academic credits toward master's degrees in education. There Walter professed increasing admiration and finally love for Lucy and their relationship burgeoned into a torrid romance. Unhappily by the time they returned to State X at the end of the summer, Walter's ardor had been diverted to other objectives and Lucy was left forlorn.

State X's law and policy relevant to such a situation reflect a chivalrous culture trustful and solicitous with respect to maiden innocence and suspicious and severe with respect to the predatory guile of men. Such is the virtue and decorum of social life in State X that few seduction suits have ever been filed. The decisions, however, have established a firm and liberal policy for redressing the wrongs of a maiden such as Lucy who has surrendered herself to a paramour induced by his false promise of marriage or by his fraudulent protestations of true love. New York, on the other hand, has long been case hardened by multiplicity of guileful women who prey upon concupiscent but sometimes relatively guileless males. The state is cynical with respect to the innocence of maidens who litigate their sins in hope of financial gain. Its legislature has therefore abolished the common law right of action to recover money damages for seduction.[5] Seduction, however, still remains a punishable offense under New York Penal Law section 2175.

Traditional American Theories

If under the foregoing circumstances Lucy should feel goaded to

[4] 349 U.S. 408 (1955).
[5] N. Y. Civil Practice Act. §61-b.

sue Walter in State X for damages suffered by reason of her seduction in New York, she would probably lose her case under traditional American theories governing the choice of laws. New York was clearly the place of wrong in the accepted sense.[6] Two rules which have been deemed elementary in the American law of conflicts are: (1) the law of the place of wrong determines whether a person has sustained a legal injury;[7] and (2) if no cause of action is created at the place of wrong no recovery can be had in any other state.[8] To put it another way, the place where a party has suffered an injury will have exclusive legislative jurisdiction to determine the nature and extent of any legal rights which he may have by reason of the injury.[9]

This American orthodoxy strove for an ideal uniformity of decision —tied in with so-called "vested rights" theory—so that all forums, regardless of variances in their domestic laws and regardless of multiple state contacts, would attach the same legal consequences to a given set of operative facts. It sought to prescribe unique contacts in each case which would give one territory rather than any other the exclusive jurisdiction to define authoritatively the ultimate legal consequences of the respective operative facts. The *rights* thus defined by a state found to have exclusive jurisdiction were said to be *vested* and entitled to recognition and enforcement by all other states. If *no rights* were granted by such state, then no rights could be granted or enforced by any other state.

Rigid adherence to these theories has occasionally led to wierd results —for example, those two well known case book decisions, *Slater v. Mexican National Railroad Co.*[10] and *Scheer v. Rockne Motors Corporation.*[11] In *Slater* a Texas widow and her children sued in a Federal district court in Texas for damages for the death of her husband caused by the negligence of his employer. The deceased had been a Texan and and defendant employer was a Colorado corporation operating a railway from Texas to Mexico City. The accidental death occurred across the international boundary in Mexico. Both Texas and Mexican laws provided a remedy under the circumstances for the bereft family of the

[6] RESTATEMENT, CONFLICT OF LAWS §377 (1934).
[7] *Id.* §378.
[8] *Id.* §384.
[9] To the direct contrary is the "local law" rule established in England since Machado v. Fontes, 2 Q.B. 231 (1897). The court there applied English libel law to permit plaintiff to recover damages for publication in Brazil of a Portuguese language pamphlet although Brazil would have allowed no recovery. The court stressed, however, that the publication was "wrongful" even in Brazil for the law of that country recognized such a publication as a criminal offense. Thus, incidentally, the ruling would squarely support Lucy's case against Walter.
[10] 194 U.S. 120 (1904). *Accord,* Carter v. Tillery, 257 S.W. 2d 465 (Tex. Civ. App. 1953). See sharp criticism by G. W .Stumberg, *Place of Wrong: Torts and the Conflict of Laws,* 34 WASH. L. REV. 388 (1959).
[11] 68 F. 2d 942 (2d Cir. 1934).

deceased. The Mexican remedy, however, was of an indefinite continuing type subject to change or termination with changing family circumstances—not dissimilar in principle to our alimony support decrees. The lower court found the defendant liable by orthodox application of Mexican law but then sought to convert the open-end Mexican remedy into a lump sum judgment similar to the Texan remedy. The Supreme Court upheld the Court of Appeals in reversing the judgment and dismissing the case. Justice Holmes in the court's opinion said:[12]

> 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. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.

After this *logical* demonstration that the forum could apply no remedy except that precisely prescribed by Mexican law, Justice Holmes further concluded that no Federal court had the power to make a decree of the kind contemplated by the Mexican statutes.[13] The widow and orphans were thus left without any remedy at all. Holmes has elsewhere criticized undue reliance on logic in the judicial process. His *Slater* rationale well illustrates that it is not logic (when formally correct) which causes bad decisions but rather the rigidity of questionable premises—in that instance the doctrine that the place of wrong has exclusive legislative jurisdiction.

The *Scheer* case involved the vicarious liability of a car owner for the negligent driving of his salesman bailee. The defendant had furnished a car to his Buffalo salesman whose territory was New York and Pennsylvania. On a trip into Ontario the salesman's reckless driving seriously injured his guest passenger, the plaintiff. The plaintiff originally recovered $40,000 judgment but the Court of Appeals reversed and ordered a new trial on the ground that the plaintiff must show that the salesman was acting within the scope of his authority when he drove the car into Canada. It was conceded that the Ontario law by its terms would impose liability on the New York owner by reason of the fact that he had given possession of the car to the negligent driver, regardless of whether the driver had gone beyond his authorized territory. The New York statute also would have imposed

[12] 194 U.S. 120, 126 (1904).
[13] *Id.* at 128.

liability on the car owner if the accident had occurred in New York. But Judge Learned Hand reached his decision by a rigid adherence to the doctrine of exclusive legislative jurisdiction.[14]

> The wrongful act here in question took place in Ontario; it was Clemens's driving; Ontario might of course make him liable. But in imputing his liability to the defendant that law had to reach beyond its borders, for the only acts by which the defendant connected itself with him were in New York. . . . It is clear that the defendant did not give him authority to go to Canada merely by giving him the car. Unless more than that was shown, the law of Ontario could not reach the defendant; the charge gave it extra-territorial effect, as much as though that province had pretended to fix liability on Clemens for injuries suffered in New York. As this went to the very heart of the case as it was presented to the jury, the judgment must be reversed.

It is surprising that Learned Hand of all judges should thus regard the foreign rule of law as exclusively applicable to the case, because Hand is commonly credited with being one of the first Americans to formulate the so-called "local law" theory of which we will speak later. In fact in this same *Scheer* opinion Hand expressed that theory:[15]

> We must remember that the question is never of enforcing a liability arising in another state; no court can do that but one of the state where it arose; in the case at bar this is acutely evident because the defendant was never there, and could fall under no liability until it went there. A liability implies a sanction, and a sanction a person to coerce. The sole question, here as always, is how far the court of the forum will adopt the law of another place as the standard for its own legal consequences.

In Hand's application the local court seems as restricted by the foreign rule of law and legislative jurisdiction as Holmes would have it bound and limited by the foreign "obligatio" or vested right. It is difficult to discover much difference between the two. The car bailment occurred in New York and the accident in Ontario. If both events had occurred in the same jurisdiction, New York or Ontario, the law of either jurisdiction would have held the defendant liable. The decision, however, made the defendant's immunity turn on a circumstance which by any functional approach would seem irrelevant—viz. that the accident occurred across the boundary in Ontario rather than in New York. This refusal to apply either Ontario or New York law of liability simply because the events were territorially separate seems highly unrealistic and succeeded only in frustrating the apparent policy of both jurisdictions. In fact both the *Slater* and *Scheer* decisions resemble macabre

[14] *Supra* note 11, at 943.

[15] *Id.* at 944. Professor D. F. Cavers has noted the anomaly or ambiguity in Judge Hand's theory and concludes that instead of a "local law" theory it should be known as the "homologous right" theory—not much dissimilar from Holmes' "obligatio" idea. Cavers, *Two "Local Law" Theories,* 63 HARV. L. REV. 822 (1950).

perversions of Solomon's famous judgment in that they have split the baby in half because the forum-jurisdiction in each case would neither enforce its own maternal claim by departing from the place of wrong rule nor enforce the rights granted by the other jurisdiction.

More recently, in 1956 the Court of Appeals in the second circuit reaffirmed the traditional American dogma applicable to conflicts in tort law. But Judge Frank, writing the court's opinion, himself questions the result. Defendant was a Delaware corporation doing business in New York as well as in Saudi Arabia. There its truck hit and seriously injured the plaintiff who was a resident citizen of Arkansas. Plaintiff filed his suit for damages in the United States District Court for the Southern District of New York. The court gave judgment against the plaintiff on the orthodox ground that Saudi Arabian law must apply to the alleged tort and plaintiff had offered no proof of Arabian law or the absence of it. Judge Frank adverted to criticism of this rigid "place of wrong" doctrine in the following footnote comment:

> Were this not a diversity case, it might perhaps be appropriate to suggest that the Supreme Court should reconsider the accepted doctrine (as to complete dominance of the 'law' of the place where the alleged tort occurred) which seems to have been unduly influenced by notions of sovereignty a la Hobbes.[16]

TRADITIONAL ESCAPES FROM PLACE-OF-WRONG RULE

American courts have not infrequently escaped the consequences of the rigid place-of-wrong rule when such consequences were not to judicial liking, either by invoking local public policy to defeat a foreign cause of action or by adroit characterization of the legal question in issue as one other than substantive tort law. Examples of the latter have occurred most frequently where courts have characterized questions such as burden of proof, evidentiary presumptions, statutes of limitation, measure of damages and the like, as procedural questions governed by the law of the forum rather than the place-of-wrong.[17] Some courts have used the characterization device with surprising freedom and variety to reach some preferred result. One may suspect an occasional procrustean tendency to fit an issue into a category traditionally governed by the state whose rule of law is the one the court wants to apply. Thus in another case-book favorite, *Levy v. Daniels' U-Drive Auto Renting Company,*[18] the court held the Connecticut car-

[16] Walton v. Arabian American Oil Co., 233 F. 2d 541, n. 4 (2d Cir. 1956), *cert. denied,* 352 U.S. 872 (1956).

[17] *E.g.,* Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919); Jones v. Chicago, St. P., M. & O. Ry. Co., 80 Minn 488, 83 N.W. 446 (1900); Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934). In one well-known case an Alabama court went so far as to enjoin the prosecution in Georgia of a tort action arising in Alabama lest the Georgia court characterize Alabama's rule of presumption as merely procedural and thereby escape its effect. Weaver v. Alabama Great Southern R. Co. 200 Ala. 432, 76 So. 364 (1917).

[18] 108 Conn. 333, 143 Atl. 163 (1928).

bailor liable under Connecticut law for injuries inflicted by its bailee in Massachusetts on the quixotic theory that the plaintiff's action lay in contract rather than tort. The court deemed the Massachusetts plaintiff to be a third party beneficiary of the Connecticut contract of bailment. The court might have justified the result reached in the case much more simply by characterizing the Connecticut statute as admonitory and therefore subject to Connecticut police power (as hereinafter discussed), rather than by applying any tort or distorted contract theory.

MODERN DEVELOPMENTS

Some American legal writers[19] and, more recently, a few of our courts have displayed considerable independence in criticizing the rigidity of old concepts of jurisdiction. They move away from the idea of a single territorial sovereignty having exclusive legislative jurisdiction and focus on a more realistic appraisal of the competing interests and policies of the jurisdictions involved. The change may perhaps be reflected in the contrasting treatment of legislative jurisdiction contained, respectively, in section 42 of the 1934 Restatement of the Law of Conflicts and in section 42 of the 1956 Tentative Draft of the Restatement. The former defines jurisdiction to be the power of a state to create interests which *under the principles of the common law* will be recognized in other states. The restrictive effect of these "principles of common law" applied to tort jurisdiction is indicated by sections 377 and 378 of the 1934 Restatement which we have discussed above.[20] The Tentative Draft, on the other hand, avoids reference to common law and says that a state has legislative jurisdiction *whenever its contacts with a person, thing, or occurrence are sufficient to make it reasonable to apply that state's law to create or affect legal interests.* The central core of jurisdiction is stated to be reasonableness and more than one state may at the same time have legislative jurisdiction in a given situation. Up to this writing the American Law Institute has not published any proposed revision of sections 377 and 378 of the 1934 Restatement mentioned above, but it would surprise and disappoint us if those sections, as finally revised, should attempt to cram the broad standard of reasonableness into the narrow vise of the old place-of-wrong rule.

The multiple legislative jurisdictions contemplated by the Tentative Draft is compatible with a "local-law" theory of judicial process in deciding a case involving foreign elements. According to such a theory a court may and should in a proper case tailor its local law on a pattern showing foreign design but the decision is still said to be local law. It may seem like tweedledee v. tweedledum to split hairs over whether a court is applying foreign law or is applying local law patterned after

[19] The earliest was Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457 (1924).

[20] See *supra* notes 7 and 8.

foreign law. The distinction, however, would contribute to at least one important practical result. Once the court assumes it is applying local law it may be expected normally to exercise much greater independence in adopting, rejecting or modifying foreign rules of law.[21] Legislative jurisdiction is no longer the exclusive monopoly of one state and foreign law loses its compulsive force. When a court is called upon to choose between conflicting rules of law of two or more jurisdictions (whether or not one of those jurisdictions be its own state) its power, strictly speaking, is limited only by full faith and credit and by due process, whose strictures, incidentally, have had a tendency to loosen in the field of conflict of laws.[22] It goes without saying, of course, that a good court should properly seek a good result by weighing and balancing the respective interests of the states involved and evaluating their policies. Inescapably such evaluation will be made in the light of the standards of reasonableness, fair play and justice personally accepted by the individual judges, as affected by the usages, traditions and policies of the court's own state or jurisdiction. In any event it is the forum-court which will determine the extent, if any, to which a foreign legislative jurisdiction will be permitted to affect the court's own local law making.

Gordon v. Parker[23] well illustrates the new approach. Here a Pennsylvania husband sued in Massachusetts for alienation of affections based on acts of adultery committed in Massachusetts by the Massachusetts defendant and plaintiff's wife. Pennsylvania had abolished all civil causes of action for alienation of affection but the action would lie so far as Massachusetts domestic law was concerned. The court applied Massachusetts law in deciding in favor of the plaintiff but it did so on no stereotyped place-of-wrong approach. Judge Wyzanski had this to say:[23a]

> This is not a situation in which the interests of Pennsylvania plainly outweigh those of Massachusetts. The social order of each is implicated. As the place of matrimonial domicil, Pennsylvania has an interest in whether conduct in any part of the world is held to affect adversely the marriage relationship between its domiciliaries. But, as the place where the alleged misconduct occurred and as the place where the alleged wrongdoer lives, Massachusetts also has an interest. She is concerned with conduct within her borders which in her view lowers the standards of the community where they occur. She is also concerned when her citizens intermeddle with other people's marriages. But admittedly she has little interest in the degree of affection one Pennsylvanian spouse has for another. . . .

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[21] Judge Hand to the contrary. See *supra* note 15.

[22] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954); Clay v Sun Insurance Office, Ltd., 363 U.S. 207 (1960); Wells v. Simonds Abrasive Company, 345 U.S. 514 (1953).

[23] 83 F. Supp. 40 (D. Mass. 1949).

[23a] *Id.* at 40-42.

> If the choice between Pennsylvania's interests and Massachusetts' interests presented in the case at bar were laid before a Massachusetts court, it seems to me probable that it would strike a balance in favor of its own Commonwealth.

This decision is one we would expect on either traditional or modern grounds. The notable feature of the opinion is the modern rationale which, we believe, would have led to the same result in favor of the plaintiff even though we were to transpose the facts by making Massachusetts the residence of all parties and Pennsylvania the place of misconduct. Here the court's concern in serving Massachusetts' interest in protecting the marriage relationship and in compensating the injured husband would presumably have outweighed Pennsylvania's disinterest in allowing civil claims for local acts of adultery. Doubt would arise under the transposed facts, we believe, only where the defendant was himself a resident in Pennsylvania who happened to be caught in Massachusetts for service of process during some incidental stop-over in that state. Under such circumstances the court might agree with Judge Learned Hand in doubting the legislative jurisdiction of Massachusetts to impose liability for Pennsylvania acts of adultery on a Pennsylvanian who was "neither physically present within its boundaries, nor resident there, nor bound to it by allegiance."[24]

Other decisions representing the new viewpoint may be divided into three principal groups, according to subject matter: (a) survivorship of actions, (b) intra-family liability and (c) admonitory legislation.

(a) Survivorship of Actions

The common law rule relating to survivorship is to the effect that a tort claim does not survive the death of the tort feasor but abates upon his death. The rule is due to the original view of tort liability as an extension of criminal or penal liability. Since death abates the liability of a criminal or penal defendant, medieval jurists assumed that claims against a tort feasor should likewise be extinguished by his death. The rule utterly disregards the compensatory nature of tort damages and shows no concern for the continuing injuries and urgent needs of the surviving victims. Traditionally the rule has been regarded as one of extinguishment affecting the substance and viability of the tort claim. In a case of conflict where an injury has occurred in one state which has abolished the archaic rule and recovery is sought against the tort feasor's estate in a second state which retains the rule, the second state has on occasion refused to enforce the cause of action on the ground of its own public policy.[25] Such refusal would not constitute a decision

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[24] Siegmann v. Meyer, 100 F. 2d 367, 368 (2d Cir. 1939). Also see *supra* note 14.
[25] Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934); Gray v. Blight, 112 F. 2d 696 (10th Cir. 1940).

on the merits. The reverse, however, did not hold, namely if the injury had occurred in the second state whose law extinguished the claim, the claim has traditionally been regarded as extinguished everywhere. It is the old principle which permits forum policy sometimes to serve as a shield but never as a sword.[26] But this accepted state of affairs was unsettled in 1953 by the California Supreme Court's decision in *Grant v. McAuliffe*.[27]

Grant v. McAuliffe involved an Arizona collision between two cars from California in which both drivers and all passengers were California residents. Pullen, the driver alleged to have been responsible for the accident, died as a result of injuries received and the other injured parties filed claims against his estate in California for money damages. Arizona at the time (unlike California) still clung to the archaic rule of survivorship and the trial court applied that rule to dismiss the claims. On appeal the Supreme Court of California reversed. Judge Traynor, speaking for the court, asserted that the precedents were inconclusive and proceeded to characterize survivorship as a procedural question governed by the law of the forum. Thus:

> We have concluded that survival of causes of action should be governed by the law of the forum. Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estates, which is a purely local proceeding. . . . Decedent's estate is located in this state, and letters of administration were issued to defendant by the courts of this state. The responsibilities of defendant, as administrator of Pullen's estate, for injuries inflicted by Pullen before his death are governed by the laws of this state. . . . Today, tort liabilities of the sort involved in these actions are regarded as compensatory. When, as in the present case, all of the parties were residents of this state, and the estate of deceased tort feasor is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the laws of this state relating to administration of estates. . . .

Critics were quick to attack the decision for its unorthodox result and for Traynor's highly suspect analysis of the precedents.[28] The best and most thorough going comment and criticism of the decision was made by Brainerd Currie who concurred enthusiastically with its result but agreed with its critics that it violated all precedents. At the end of a scholarly appendix in which he reviews the cases he concludes:[29]

The decision of the California Supreme Court in *Grant v.*

[26] Home Insurance Co. v. Dick, 281 U.S. 397 (1930).
[27] 41 Cal. 2d 859, 264 P. 2d 944, 949 (1953).
[28] Sumner, *Choice of Law Governing Survival of Actions,* 9 HASTINGS L. J. 128 (1958).
[29] Currie, *Survival of Actions: Adjudication v. Automation in the Conflict of Laws,* 10 STAN. L. REV. 205, 252 (1958).

> *McAuliffe* was, indeed, unorthodox; the cases exactly in point are to the contrary. But the question is whether the court is to be condemned for preferring rationality to orthodoxy.

It is interesting to note that in 1959, six years after his *Grant* decision, Judge Traynor had occasion to refer to Professor Currie's article as one of a series "that brilliantly set forth an affirmative new approach to conflict of laws."[30] He then offered the following critique of his own opinion in the *Grant* case:[31]

> Although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law.

At the same time he rationalizes his decision anew, this time weighing claims and interests of the parties and jurisdictions involved:

> California policy views damages for personal injuries as compensatory and the survival statute implements that policy by subordinating the interests of the decedent's heirs, legatees, devisees and creditors to the interests of the injured person. California contacts were more than sufficient to give the state an interest in applying its policy. Not only were the parties residents of California but the decedent's estate was being administered in California. The court parted company with the *Restatement* by expressly rejecting the law of the place-of-wrong. It applied California law and allowed recovery. Had it mechanically invoked the law of the place of wrong, it would have made an exception to the local law, defeating a legitimate interest of the forum state without serving the interest of any other state. Even though Arizona had a policy giving preference over injured claimants to heirs, legatees, devisees and creditors of an estate, there was no indication that it had any contact with the case other than the fortuitous occurrence of the accident in Arizona, hardly sufficient to give it an interest in the application of its policy. . . .

(b) Intra-family Immunity

In the meanwhile, in 1955, Judge Traynor wrote the opinion in another pathfinding decision, *Emery v. Emery*.[32] Here two small girls sued their father at their family domicile in California for injuries suffered in Idaho while riding in the family car. The court considered the threshold questions of how the plaintiffs' claim might be affected by their status, first as guest riders and second as minor children of the defendant. On the first point the court remained orthodox and referred to Idaho law which allows claims of guest riders where "reckless disregard of the rights of others" is charged or imputed to the defendant as

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[30] Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 655, 667 (1959).
[31] *Id.* at 670, n. 35.
[32] 45 Cal. 2d 421, 289 P. 2d 218, 223 (1955).

was here the case. On the point of intra-family immunity the court discussed three possible choices of law, viz.: "the law of the place where the injury occurred, the law of the forum, and the law of the state in which the family is domiciled". Judge Traynor dismissed the first choice with the words that it was "not a question of tort but one of capacity to sue and be sued and as to that question the place of injury is both fortuitous and irrelevant." Under the actual facts the forum and domicile were one and the same but Judge Traynor nevertheless carefully considered in which role California had an interest to choose its own law. He finally expressed this view:

> We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state inwhich the parties can, by participation in the legislative processes, effect a change in those incidents. Moreover, it is undesirable that the rights, duties, disabilities, and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries during temporary absences from their home. Since all of the parties to the present case are apparently domiciliaries of California, we must look to the law of this state to determine whether any disabilities or immunities exist.

The court thus found for the plaintiff by applying the law of the domicile rather than that of the place-of-wrong. American courts had previously invoked local immunity rules negatively on the ground of public policy to defeat out-of-state claims between family members.[33] We find only one American case, however—and that one decided only one year before—where the court of domicile indicated casually that it would allow recovery under local law against a resident, who would have been immune under the law of the place-of-wrong.[34]

The *Emery* decision has been followed by the Wisconsin and New Jersey courts[35] and has been rejected—on stare decisis principles—by the courts of Minnesota, Connecticut and Missouri.[36] The Wisconsin decisions, in particular, merit discussion.

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[33] Mertz v. Mertz, 271 N.Y. 466, 3 N.E. 2d 597 (1936); Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941).

[34] Johnson v. Peoples First National Bank and Trust Co., 394 Pa. 116, 145 A. 2d 716, 717, n. 1 (1954).

[35] Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W. 2d 814 (1959); Bodenhagen v. Farmers Mutual Insurance Co., Inc., 5 Wis. 2d 306, 92 N.W. 2d 759 (1958), 95 N.W. 2d 822 (1959); Koplik v. C. P. Trucking Corp., 27 N.J. 1, 141 A. 2d 34 (1958). See also Morin v. Le Tourneau, 102 N.H. 309, 156 A. 2d 131 (1959).

[36] Allen v. Nessler, 247 Minn. 230, 76 N.W. 2d 793, 799 (1956); Bissonnette v. Bissonnette, 145 Conn. 733, 142 A. 2d 527 (1957); Robinson v. Gaines, 331 S.W. 2d 653 (Mo. 1960).

Before 1959 the orthodox rule seemed well established in Wisconsin that the law of the place-of-wrong governed intra-family liability and immunity.[37] In 1957 a Wisconsin wife sued her husband (and his insurer) in Wisconsin for injuries suffered in an Illinois auto accident. Wisconsin law would permit her to sue her husband for damages while Illinois law at that time would not. The Wisconsin court initially purported to follow the orthodox doctrine by applying Illinois law. It nevertheless permitted the wife to recover against her husband on the unsupportable view that the Illinois legislature had intended its statute as remedial—barring such suits in Illinois courts but not precluding the creation of rights in Illinois which the wife could enforce in courts outside the state.[38] On reargument five months later the same court implied that its previous construction of the Illinois law was erroneous.[39] The court adhered to its decision, however, this time on the better reasoned rule of the *Emery* case, namely that intra-family liability or immunity is governed by the law of the family domicile and *not* of the place-of-wrong. The court refashioned its rationale the more readily because in the meanwhile it had heard the arguments on appeal of the *Haumschild* case. In fact the court decided the *Bodenhagen* case on reargument on the same day on which it had decided the *Haumschild* case.

In *Haumschild* a Wisconsin wife (at least de facto) sued her husband and his insurer in Wisconsin for injuries suffered in a California auto accident. California law at the time recognized no intra-spousal tort liability whereas Wisconsin law, of course, provided for such liability. On appeal the attorneys for plaintiff—appellant seem to have conceded the applicability of the law of California—the place-of-wrong. However, they seized on the *Emery* rule to argue that since California would refer the question to Wisconsin, the law of domicile, the Wisconsin court should accept the referral on principles of renvoi and should decide the case in the same way as the California court—in accordance with Wisconsin domestic law. The Wisconsin court refused to accept the renvoi doctrine on the assumption, rightly or wrongly, that it was contrary to prevailing American law. The court, however, was so beguiled by the rationality of the California choice of law that it adopted that choice as its own. It thus determined the question of intra-family liability by applying its own law as the law of domicile. So doing, it overruled six Wisconsin decisions in conflict, handed down from 1931 to 1956.

Reasons are obvious why the domicile has a greater interest than the casual place-of-wrong in regulating the jural relations between members

[37] See discussion of cases: Haumschild v. Continental Casualty Co., see *supra* note 35, at 818-19.
[38] Bodenhagen v. Farmers Mutual Ins. Co., 5 Wis. 2d 400, 92 N.W. 2d 759 (1959).
[39] *Id.* 5 Wis. 2d 306, 95 N.W. 2d 822 (1959).

of a family.[40] The insurance element involved in many such cases, and in practically all auto injury cases, provided another powerful inducement toward adoption of the domiciliary rule.[41] Public policy strongly favors the carriage of casualty insurance by owners and drivers of motor cars. When a family head buys such insurance the scope of coverage he seeks would normally extend to all risks imposed by the law of his domicile as well as by the law of any foreign state in which he might happen to be traveling at the time of an accident. A man domiciled in a liability state—namely a state whose law would render him liable for injuries to his wife or child or to a guest passenger—would be insuring against greater expected risks and presumably would be required to pay a commensurately higher premium, than a similar man domiciled in an immunity state. Where he has purchased and paid for insurance to protect his family and his guests, why should he be denied such protection because of the fortuitous circumstance that he was driving across an immunity state at the particular time of an accident. The insurer issued its policy in contemplation, principally, of risks imposed by the law of insured's domicile. True, it also must undertake any additional risks imposed by any other state where injury may occur and which is covered by the policy, but at the time of contracting the insurer can be expected to fix premium charges to cover all contemplated risks. It suffers no injustice. On the contrary strict application of the orthodox place-of-wrong rule affords insurers the prospect of windfall profits whenever it would enable them to escape liability on risks which they have undertaken and for which they have been paid premiums.[42]

(c) Admonitory Laws

"Admonitory" is the descriptive term sometimes applied to laws which impose specified risks and liabilities, without regard to fault or negligence, on persons engaged in particular enterprises subject to regulation. So the Connecticut statute involved in *Levy v. Daniels' U-Drive Auto Renting Co., Inc.*[43] imposed vicarious liability on entrepreneurs renting out autos; also Dram Shop Acts commonly impose vicarious liability on dram shop keepers for torts of intoxicated persons to whom they (the keepers) have sold or given liquor which caused the intoxication . Such legislation has a twofold purpose: first, to police particular activities within the state and induce greater care in their operation by imposing extraordinary sanctions and, second, to provide some assur-

[40] *Cf.* Wyzanski and Traynor quoted above, *supra* notes 23 and 32.
[41] *Supra* note 22.
[42] Ehrenzweig, *Guest Statutes in the Conflict of Laws: Towards a Theory of Enterprise Liability under "Foreseeable and Insurable Laws,"* 69 YALE L. J. 595, 599, 603 (1960); R. P. Cook, *What Law Governs Intra-family Liability?*, 27 INS. COUNSEL J. 143 (1960).
[43] *Supra* note 18.

ance for collection of adequate damages by tort victims of irresponsible auto bailees or drunks. Since traditionally we tend to circumscribe jurisdiction by territorial metes and bounds we note that admonitory laws have two territorial impacts, one at the place where the business is operated and the other at the place where the tort occurs. Since occurrence of the tort is prerequisite to liability of the entrepreneur, courts bound to the place-of-wrong dogma have been reluctant to apply sanctions under such laws except where the place-of-wrong as well as the place of business both happen to be within the law-making state. Such courts have disregarded the fact that a state's interest in policing an enterprise operated within its borders may be quite independent of whether ill effects occur within or without the state.

The Connecticut court in the *Levy* case seems to have sensed the narrowness of view reflected by any regulation of a local business which withholds its sanctions when connected with accidents outside the state—like a parent who punishes his child for trampling the flowers in his own garden but tolerates like conduct in the yards of his neighbors. But back in 1928 the Connecticut court, as we have seen, had difficulty disentangling itself from the place-of-wrong dogma and had to devise its own far fetched contract theory which allowed the tort victim to recover in the alleged status of a third party beneficiary.

Two Illinois cases and one Minnesota case provide the leading decisions on Dram Shop Acts.[44] The Illinois court held that the Illinois Dram Shop Act showed no legislative intent to impose liability on dram shop keepers with respect to their customer's torts committed outside the state. The Minnesota court construed its Dram Shop Act to the contrary. As must be clear by now, this writer prefers the approach of the Minnesota court. In justification of the Illinois court, however, it should be noted that the Illinois Act is a harsh law since it imposes liability on anyone who shall have caused the intoxication of the tort-feasor "in whole or in part". Thus if the tort-feasor started out stone sober and made the round of a dozen bars, the first bar keeper who sold him his first bottle of beer is equally liable under the law with the last one who sold him his last zombie. The court, emphasizing this penal character, held the Act must be strictly construed; absent explicit expression of legislative intent, the Act did not apply to out-of-state torts. The court nevertheless recognized the legislature's jurisdiction to impose such liability if it saw fit.

More subtle questions of jurisdiction are raised if we consider the possibility of a Minnesota court applying the Minnesota Dram Shop Act to an out-of-state dram shop keeper whose intoxicated cus-

[44] Eldredge v. Don the Beachcomber, Inc., 342 Ill. App. 151, 95 N.E. 2d 512 (1950); Butler v. Wittland, 18 Ill. App. 2d 578, 153 N.E. 2d 106 (1958); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W. 2d 365 (1957).

tomer commits a tort in Minnesota. Minnesota would possess recognized jurisdiction over the tort aspects of the event but on no traditional basis would it have jurisdiction to police or regulate the out-of-state keeper. The question arises whether its tort jurisdiction should extend to the imposition of liability on non-residents who were at no time present in or subject to the state and whose imputed liability is not based on fault, negligence, agency, ownership of property within the state or any other common law ground. Learned Hand would presumably answer the question in the negative.[45] But suppose the out-of-state keeper was located in Illinois and his intoxicated customer had committed his tort in Minnesota. Here where both states have statutes so similar in content and purpose it would seem strangely uncooperative to deny relief under the Minnesota law because the dram shop keeper operated in Illinois and to deny relief under the Illinois law because the customer's tort occurred in Minnesota.

Two recent cases have dealt with the problem and both have reached good results: *Osborn v. Borchetta*[46] and *Waynick v. Chicago's Last Department Store.*[47] In the *Osborn* case the Connecticut court held that the New York Dram Shop Act gave rise to a Connecticut cause of action where the liquor sale and intoxication occurred in New Yorkt and the subsequent accident occurred in Connecticut. A New York court had previously construed the Act (or its predecessor) back in 1884[48] as *not* imposing liability on a New York dram shop keeper for a customer tort in Vermont, although the court there implied it might have decided differently under the New York Act if Vermont had had a similar statute. This implication prompted one "place-of-wrong" theorist to suggest it would be more correct

> to suppose that the suit must be brought under the statute of the jurisdiction where the injury occurred (Vermont) and that the existence of a similar statute in the jurisdiction of the forum (New York) would make the action maintainable there.[49]

In this regard the rationale of the *Osborn* case is not as clear as it might be although we like the result reached. After reviewing the remedial as well as penal aspects of the New York Dram Shop Act the Connecticut court concluded that the obligations arising under it will be enforced in Connecticut. It dismisses the New York court's early holding that the Act had no extra-territorial effect with the statement that such holding "did not involve the rules of

[45] See *supra* notes 11, 14 and 24.
[46] 20 Conn. Supp. 163, 129 A. 2d 238 (1956).
[47] 269 F. 2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960).
[48] Goodwin v. Young, 34 Hun. 252 (N.Y. 1884).
[49] Annot., 22 A.L.R. 2d 1128, 1129 (1952).

conflict of laws and is not applicable to the present case." Now if the Connecticut court's action was really limited to enforcement of the New York Act, as the court purported, no pronouncement would be more directly applicable to the case than the New York court's judicial interpretation of its own Act. Actually, however, though perhaps unconsciously, the court was making and applying its own law in the case, by extending the purely domestic effect of the New York Act to the territory of Connecticut. Exercising its common law judicial authority to make law when necessary, it bridged the gap between the localized application of the respective statutes of New York and Connecticut. It was willing to do so because "the dissimilarities between the Dram Shop Act of New York and that in our own state was not sufficient to constitute an enforcement of rights under the former a contravention of our public policy."

The *Waynick* case presents somewhat the same situation with notable variations. Illinois was the place where defendant operated a dram shop and sold liquor to an intoxicated customer while the customer's tort was committed in Michigan. The Federal court in Illinois was the forum and we would ordinarily have expected the court to follow in the path blazed by the Illinois decisions in *Eldredge* and *Butler*.[50] In diversity cases *Erie Railroad Co. v. Tompkins*[51] is said to have relegated Federal courts to the role of a "ventriloquist's dummy" but here the Seventh Circuit Court of Appeals has spoken boldly with no prompting from state court precedents.

The plaintiffs rested their claims on the alternative bases of (1) the Illinois Dram Shop Act, (2) the equivalent Michigan Act, or (3) the common law. The Court of Appeals rejected the first two bases on the ground that the Illinois decisions precluded application of the Illinois Act to extra-territorial torts and a Michigan decision precluded application of its Act to an extra-territorial sale of liquor. The court nevertheless granted recovery on the basis of Michigan common law.

The court was concerned with the "vacuum" left by the localized application of the Dram Shop Acts of the two states and the injustice of leaving the plaintiffs without redress "for death and injuries sustained in what was evidently an appalling automobile accident." By Illinois law—at least in its domestic aspects—there would have been no recovery. The court therefore turned to the common law of Michigan, stressing, however, a penal section of the Illinois Code (not the Dram Shop Act) which provides punishment for anyone selling or giving liquor to an intoxicated person. The court relied on this statute to demonstrate that enforcement of the

[50] *Supra* note 44.
[51] 304 U.S. 64 (1938).

Michigan common law right of action would in no way offend the interest or public policy of Illinois. The court in effect recognized the concurrent jurisdictions of Michigan and Illinois. Michigan had exercised its jurisdiction affirmatively by granting a right of recovery while Illinois actions, in the court's view, constituted a non-exercise. Illinois law failed to grant any affirmative right of recovery under domestic law but it did not bar recovery under the law of any other state with legitimate jurisdiction. Accordingly the way was open for an Illinois court to adopt a rule of conflict of laws permitting it to enforce the Michigan common law right of action. Absent Illinois precedents the Federal Court of Appeals, sitting as an Illinois court, originated and applied such a rule to reach a just result in the case. When the time comes we hope the state courts will follow the same course.[51a]

General Discussion

Under the theory of multiple legislative jurisdiction either or any one of the jurisdictions in the circumstances of each of the cases which we have discussed, could be regarded as having a legitimate interest in the transaction to grant relief under its own domestic law or its law of conflicts. This might be subject to a caveat where the laws of two jurisdictions actually clash; for example, if Illinois affirmatively protected its dram shop keepers from liability for their customers' torts, any attempt by Michigan to impose liability on the Illinois keeper might well exceed the bounds of due process. Since the Illinois keeper was never present in Michigan and his connection with Michigan events was altogether too tenuous and remote to support any common law principle of liability, we believe Michigan's sword would then be ineffectual against the Illinois shield.

In a trial of any case involving multiple jurisdictions—each having substantial contacts with the transaction—a neutral forum in most circumstances might well think it sensible to apply the domestic law of the jurisdiction which is most favorable to the plaintiff. The plaintiff usually might achieve such result by selecting as his forum that jurisdiction which could be expected to be most favorable to his claim. It would be quite legitimate for him to do so.

It is clear our argument has carried us beyond the point to which most of the courts have gone in their departure from the orthodox place-of-wrong doctrine. Thus even Judge Traynor in the *Emery* case[52] continued to look to Idaho, the place-of-wrong, to determine defendant's liability to a guest rider. Yet the considera-

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[51a] Since this article was written the Illinois Supreme Court decided Cunningham v. Brown, — Ill. —, 178 N.E. 2d 153 (1961), indicating probable disagreement with the Waynick case.

[52] *Supra* note 32.

tions which favor application of domiciliary law to determine a man's liability to his wife and child, would seem to favor to only a slightly less degree, the application of the same law to his liability toward the next-door neighbor who rides with him. A state has a legitimate concern in the jural interrelations of any two of their citizens whether or not they are members of the same immediate family. This concern is in fact the basic justification for the decision in *Grant v. McAuliffe*.[53] It is therefore almost with a sense of shock that we come upon a 1958 decision by a California District Court of Appeals which scarcely reflects the enlightened views of the California Supreme Court expressed in the *Grant* and *Emery* cases.

Victor v. Sperry[54] involved a suit by a plaintiff injured in a collision with a car driven by defendant Sperry. All persons were residents of California but the accident occurred in Mexico. The California court found the plaintiff had suffered actual damages in excess of $40,000 but on appeal reduced judgment to $6,000 by applying the Mexican measure of damages which, in turn, reflected the comparatively low economic standards of that country. The Mexican formula prescribed 70% of $2 for each day of disability (subject to variations on the basis of such personal factors as age, etc.) plus certain addenda for so-called "moral damage." In this case both parties lived in California, subject to its laws and affected by its economic standards. Although Mexico was the fortuitous place-of-wrong California was the realistic place of injury since it was there that plaintiff endured his continuing injuries and economic losses. The court's exclusive emphasis on the place-of-wrong is an anachronism associated with the historical view of torts as a branch of criminal law. This view fuses or confuses the concept of tort with criminal liability which, of course, looks to the territorial law governing the act. It gives too little consideration to the compensatory element of tort law with which the place-of-wrong often has but minor and remote contact. If an American traveling in Mexico were injured by a Mexican we would not try to impose American standards of compensation on the Mexican; likewise if the American injured a Mexican while in Mexico we would compensate the Mexican by standards of Mexico. But the *Victor* decision was quite different since both parties were residents of California and the Mexican contact with the case was fortuitous and ephemeral. The decision harks back to the deplorable result reached in *Slater v. Mexican National Railway* discussed earlier in this paper.[55]

Today a court disposed to accept the reality of concurrent juris-

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[53] *Supra* note 27.
[54] Victor v. Sperry, 329 P. 2d 728 (Dist. Ct. App., 4th Dist. of Cal., 1958).
[55] *Supra* note 10.

diction as illustrated in the cases discussed would presumably decide differently both the *Slater* and the *Scheer*[56] cases. It would recognize the absurdity of a decision frustrating the policies manifest in the laws both of the foreign and the local jurisdiction, on the logical premise that it was restricted by the precise form of remedy prescribed by the Mexican jurisdiction, in the one instance, and in the latter case by the limitation on Ontario's jurisdiction over the New York defendant.

Lovelace v. Wolf Revisited

Suppose we now re-examine our hypothetical case of *Lucy v. Walter* as affected by the recognition of concurrent jurisdiction. New York's interest in abolishing the civil remedy for seduction was to eliminate litigation as an instrument of blackmail, shakedown and fraud. Its interest would seem to be paramount only with respect to litigation in its own courts. State X also has substantial contacts with Lucy's case. It was and is the residence of both parties. It would have been the likely place of fulfillment of the promise or expectation of marriage which was an element in the seduction. There Lucy would face most of the social consequences of her bertrayal—possibly some trauma of conscience or loss of reputation, and even the mockery and sly boasts of Walter. All this would amount to continuing social damage to a resident-citizen of State X which would justify that State's reasonable concern. Since the damage was caused directly by the wrongful and intentional act of another resident-citizen, it would not seem unreasonable for State X to extend to the case its own seduction remedies. If it did so it would not affront the sovereign power of New York by imposing sanctions against New York activities in view of the fact that New York would have no interest in protecting such activities and in fact itself penalized them.

The State X judges could easily dismiss Lucy's complaint on the authority of the traditional American place-of-wrong rule. If, however, they recognized the concept of concurrent jurisdiction, the effect of that concept on the seduction case would probably depend on their personal preferences between the local and the New York law, and possibly on their insights into the respective worthiness of the two particular persons before them, Lucy and Walter. In any event the recognition of concurrent jurisdiction would permit them far greater latitude than the old place-of-wrong theory in their effort to achieve a just result.

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[56] *Supra* note 11.