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Conflict of Laws -- Departure from Lex Loci

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after July, 1964.[38] Hardly can a club be a private association where the members do not meet together.

It seems apparent that *Northwest La. Restaurant Club* is a relatively "easy" case, and that the court had little trouble concluding that the members were not in such a relation that the private club exemption should be invoked to protect rights of private association. Such a protectable association did not exist. Because of the ease in deciding that this was indeed a "sham organization,"[39] the court here simply was not called upon for extensive articulation of the precise factors that led to the decision.

However, hard cases will come, and more judicial refinement of the factors considered will be necessary and welcomed. For example, what will be the decision in regard to the genuinely private club that grows larger and larger? Will the greater number of members, many of whom perhaps do not know one another, render the club so "open to the public" that it will cease to be exempted? How would a court hold on a facility, such as a golf course, which ordinarily constitutes a place of public accommodation, but operates as a "private" club, with associational interests existing among the members?[40]

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Conflict of Laws—Departure from Lex Loci

In *Clark v. Clark*[1] the New Hampshire court applied its own law and allowed a guest passenger to sue her host for ordinary negligence rather than applying the stricter Vermont guest statute. The parties were both from New Hampshire; the automobile accident occurred in Vermont. The decision was a logical extension of that court's recent holdings in the area of conflicts law. Earlier in *Thompson v. Thompson*[2] the court abandoned its adherence to strict *lex loci delicti* which requires application of the law of the place of the wrong, overruled a long line of cases, and applied the

[38] *Id.* at 153.
[39] *Id.* at 153.
[40] Professor Van Alstyne suggests this problem. Van Alstyne, *Civil Rights: A New Public Accommodations Law for Ohio*, 22 OHIO ST. L.J. 683, 688 (1961).

[1] ——N.H.——, 222 A.2d 205 (1966).
[2] 105 N.H. 86, 193 A.2d 439 (1963).

law of New Hampshire when deciding an interspousal tort suit. They followed *Thompson* with a consistent holding in *Johnson v. Johnson*[3] by refusing to invoke their own interspousal law when the litigants were from Massachusetts even though the accident occurred and suit was brought in New Hampshire. In a third case, *Dow v. Larrabee*,[4] the court held that Massachusetts law should decide the degree of care necessary in a suit between New Hampshire residents over an auto accident that occurred in Massachusetts. The holding was based upon a finding that Massachusetts was the state with the most significant relations.[5]

Clark v. Clark is the final and complete rejection of traditional *lex loci* application. The court candidly explained in *Clark* that in their recent holdings they had thought the "mechanical rule ought to be discarded, but unlike some of the other states . . . [they were] unwilling to abandon it completely until reasonably sure that a more satisfactory rule was available to take its place."[6] Now they are reasonably sure.

New Hampshire follows a small number of states[7] which have been persuaded to embark upon what North Carolina Justice Rodman terms an "uncharted sea."[8] The courses taken have varied considerably as the courts ventured from the relatively smooth waters of *lex loci delicti.*

For example, California in the first case[9] to "break the ice"[10] characterized a tort case as a question of "family relationship" which should be decided by the law of the domicile. Pennsylvania weighed the relative interests of the states involved in reaching its decision.[11] Similarly New York applied what it calls the "center of

[3] 107 N.H. 30, 216 A.2d 781 (1966).
[4] 107 N.H. 70, 217 A.2d 506 (1966).
[5] *Id.* at —, 217 A.2d at 508.
[6] ——N.H. at ——, 222 A.2d at 207.
[7] See, Lauritizen v. Larsen, 345 U.S. 571 (1953); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955); Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 82 N.W.2d 365 (1957); Wilson v. Faull, 27 N.J. 105, 141 A.2d 768 (1958); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
[8] Shaw v. Lee, 258 N.C. 609, 616, 129 S.E.2d 288, 293 (1963).
[9] Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).
[10] Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 134, 95 N.W.2d 814, 816 (1959). The court reviewed many cases but considered California as the first state to depart from *lex loci.*
[11] Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964), 43 N.C.L. Rev. 586 (1965).

gravity" theory.[12] Wisconsin used a three step analysis and optimistically predicted a forth-coming "common law of conflicts that will be administered with uniformity as jurisdictions generally adopt this rule."[13]

Legal scholars have suggested lists of factors to be considered in decision making by courts that reject *lex loci.* An article by Professors Cheatham and Reese sets out nine factors,[14] and Professor Yotema's scheme embodies seventeen.[15] The New Hampshire court in the *Clark* case relied explicitly upon the five "choice-influencing considerations" as outlined and elaborated upon in a recent law review article by Professor Leflar.[16] Other authorities have written extensively on the question, invariably urging an abandonment of *lex loci delicti* in favor of a decision making process that would balance the policies and interests of the contact states.[17] The *Restatement (Second),* "Conflict of Laws," § 379 (Tent. Draft No. 9 1964) also reflects the current trend and reverses the *Restatement's* traditional position.[18]

In the face of and despite the overwhelming academic mandate

[12] Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[13] Wilcox v. Wilcox, 26 Wis. 2d 617, 633, 133 N.W.2d 408, 416 (1965).

[14] Cheatham & Reese, *Choice of the Applicable Law,* 52 COLUM. L. REV. 959 (1952).

[15] Yotema, *The Objectives of Private International Law,* 35 CAN. B. REV. 721 (1957).

[16] Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L. REV. 267 (1966).

[17] DICEY, CONFLICTS OF LAWS (7th ed. 1958); STUMBERG, CONFLICTS OF LAWS (3d ed. 1963); Cavers, *A Critique of the Choice-of-Law Problem,* 47 HARV. L. REV. 173 (1933); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility,* 58 HARV. L. REV. 361 (1944); Cheatham & Reese, *Choice of the Applicable Law,* 52 COLUM. L. REV. 959 (1952); Cook, *The Logical and Legal Bases of the Conflict of Laws,* 33 YALE L.J. 457 (1924); Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212, 1233 (1963); Harper, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays,* 56 YALE L.J. 1155 (1947); Hill, *Governmental Interest and the Conflict of Laws,* 27 U. CHI. L. REV. 463 (1960); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws,* 33 YALE L.J. 736 (1924); Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212, 1251 (1963); Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959); Weintraup, *A Method for Solving Conflicts Problems: Torts,* 48 CORNELL L.Q. 215 (1963); Yntema, *The Hornbook Method and the Conflict of Laws,* 37 YALE L.J. 468 (1928).

[18] RESTATEMENT, CONFLICT OF LAWS § 378 (1934), applies the law of the place of the wrong in traditional *lex loci* fashion.

and growing acceptance by other courts, North Carolina continues to reject categorically all assaults upon *lex loci*.[19] The North Carolina court has been criticized in this *Review*[20] for refusing to alter its position but, as one case surveyor has observed, evidences no propensity for change.[21] Upon viewing the varied results of the courts which have been blown by "the winds of change"[22] and the result of *Clark v. Clark* in particular, it is not difficult to understand the court's reluctance. For example, the future decisions of the New Hampshire court will be based upon "the court's preference for what it regards as the sounder rule of law, as between the two competing ones."[23] Certainly, predictability and consistency are not lightly to be sacrificed to such open ended discretion.

However, it is clear that in a limited class of cases strict application of *lex loci* renders results which are not in keeping with established policy and preference as expressed in the substantive law of North Carolina. The most prominent examples are motor vehicle cases containing the following common elements: (1) All parties to the litigation are residents of the forum state. (2) The action results from a tort by one against the other. (3) The commission of the tort occurred while the parties were in transit, having left the forum state together and intending to return.

It is submitted that these cases should be excepted from the *lex loci delicti* doctrine and that this can be done without a substantial departure from the present rules. *Lex loci* was firmly entrenched in the law before the automobile afforded a cheap, fast, convenient, but not always safe means of interstate travel.[24] Thus, this factor was not a primary consideration when formulating tort law in the area of conflicts. That it has become a consideration demanding special treatment should not now be denied. This is especially true

[19] See, *e.g.*, Cobb v. Clark, 265 N.C. 194, 143 S.E.2d 103 (1965); Conrad v. Miller Motor Express, Inc., 265 N.C. 427, 144 S.E.2d 269 (1965); Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Crow v. Ballard, 263 N.C. 475, 139 S.E.2d 624 (1965).

[20] See 43 N.C.L. REV. 586 (1965); 42 N.C.L. REV. 419 (1964).

[21] Wurfel, *Conflict of Laws, N. C. Case Law*, 43 N.C.L. REV. 895, 899 (1965).

[22] *Ibid.*

[23] —— N.H. at ——, 222 A.2d at 209.

[24] Hipps v. Southern Ry., 177 N.C. 472, 99 S.E. 335 (1919); Harrison v. Atlantic Coast Line R.R., 168 N.C. 382, 84 S.E. 519 (1915); Hancock v. Telegraph Co., 142 N.C. 163, 55 S.E. 82 (1906). *Accord*, Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963).

when the cases are examined in the light of the applicable North Carolina law.

Two particular situations should be analyzed. First is where a North Carolina wife is denied an action against her husband in tort because the law of the place of the wrong would deny a wife such an action.[25] Second is where a North Carolina guest is required to show gross rather than ordinary negligence on the part of his North Carolina host under a guest statute of the *lex loci*.[26] In the circumstances above North Carolina substantive law would allow the wife to sue her husband[27] and require the guest only to prove ordinary negligence.[28] North Carolina's position is based in the first instance upon a statute favoring a wife,[29] and in the second upon a continued refusal either by statute or judicial decision to lower a host's standard of care to his guest.[30]

Those states which do forbid interspousal suits generally do so in order to encourage domestic harmony[31] while those requiring a greater degree of negligence on the part of the host seek to avoid collusive suits[32] and to discourage ingratitude on the part of the guest.[33] It is clear that these considerations do not influence the North Carolina court when deciding its own law.[34] Neither do they influence decisions when the court applies the law of another juris-

[25] Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941); Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931).

[26] Nix v. English, 254 N.C. 414, 119 S.E.2d 220 (1961); Baird v. Baird, 223 N.C. 730, 28 S.E.2d 225 (1943); Brumsey v. Mathias, 216 N.C. 743, 6 S.E.2d 495 (1940); Farfour v. Fahad, 214 N.C. 281, 199 S.E. 521 (1938); Wright v. Pettus, 209 N.C. 732, 184 S.E. 494 (1936); Wise v. Hollowell, 205 N.C. 286, 171 S.E. 82 (1933).

[27] N.C. GEN. STAT. § 52-4 (1965); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (1920).

[28] McGee v. Cox, 267 N.C. 314, 148 S.E.2d 132 (1966); Boykin v. Bissette, 260 N.C. 295, 132 S.E.2d 616 (1963); Nantz v. Nantz, 255 N.C. 357, 121 S.E.2d 561 (1961).

[29] See note 27 *supra*.

[30] See note 28 *supra*.

[31] Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws*, 15 U. PITT. L. REV. 397 (1954).

[32] Silver v. Silver, 280 U.S. 117, 123 (1929); Ehrenweig, *Guest Statutes in the Conflict of Laws*, 69 YALE L.J. 595 (1960).

[33] This reflects the adage that a dog should not bite the hand that feeds it. See, *e.g.*, Chaplowe v. Powsner, 119 Conn. 188, 175 Atl. 470 (1934).

[34] See notes 27-28 *supra*.

diction since the question then is the law of the *loci* and not why it is applied.[35] Therefore, the court is precluded from examining the status of the litigants or the purpose of the foreign state's law.

The problem is clear. North Carolinians risk the loss of the liberal protection of their own law when they leave the state in an automobile either with their husband or as a guest passenger. This is true although they depart from the state in property licensed by the state, driven by a driver licensed by the state, covered with insurance issued in accordance with and paid for at a rate which contemplates liability in accordance with state law.[36] There is some support for a change in the area of conflicts which would allow a more equitable result in these cases.

In *Bogen v. Bogen*[37] the North Carolina court allowed an Ohio wife who was injured by the negligence of her husband on North Carolina roads to sue although she probably could not have maintained her action in Ohio.[38] The majority opinion did not depart from *lex loci* since North Carolina was both the *loci* and *fori*, but in applying its law the court used strong and poetic language to express a prejudice for allowing a wife to sue her husband.[39] They quoted an earlier opinion where the idea that husband and wife are one is ridiculed as "an inference drawn by courts in a barbarous age"[40] and where the court in reaffirming a belief in tort relief for a wife said: "Civilization and justice have progressed thus far with us, and never again will 'the sun go back ten degrees on the dial of Ahaz.' Isaiah, 38:8"[41] It would seem that such strong belief in a wife's rights would be present sixty-six years later, but in conflicts cases we sometimes do indeed allow "the sun to go back."

[35] Cobb v. Clark, 265 N.C. 194, 143 S.E.2d 103 (1965); Petrea v. Ryder Tank Lines, Inc., 264 N.C. 230, 141 S.E.2d 278 (1965); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963); *cf.* Lowe's North Wilkesboro Hardware, Inc., v. Fidelity Mut. Life Ins. Co., 319 F.2d 469 (4th Cir. 1963); Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941).

[36] See, for discussion on insurance and suggestion that parties may purchase coverage with the liability imposed by the principal place of driving in mind, Ehrenweig, *Guest Statutes in the Conflict of Laws*, 69 YALE L.J. 595 (1960).

[37] 219 N.C. 51, 12 S.E.2d 649 (1941).

[38] The court did not have to decide the correct Ohio Law. *Id.* at 54, 12 S.E.2d at 652.

[39] *Id.* at 53, 12 S.E.2d at 651.

[40] Crowell v. Crowell, 180 N.C. 516, 523, 105 S.E. 206, 210 (1920).

[41] *Id.* at 524, 105 S.E. at 210.

Ironically, the three dissenting judges in *Bogen*[42] would have abandoned the strict *lex loci* doctrine and refused the wife her action on the basis that the right to compensation is a chose in action which is personal property. Since the situs of personal property is the residence of the owner, they would have applied the law of the domicile. The dissent was somewhat ahead of its time, for the reasoning is similar to the "center of gravity" theory used by some courts today.[43]

It is also significant that in 1963 a federal court sitting in North Carolina, when faced with the problem of how the North Carolina court would decide a conflicts question, anticipated a "more flexible approach which would allow the court in each case to inquire which state has the most significant relationships. . . ."[44] A subsequent decision by the North Carolina Supreme Court makes it clear the federal court incorrectly stated the North Carolina law.[45] However, the implication is that a federal judge felt the court was on the threshold of, or at least amiable to, change.

The recent passage of the Uniform Commercial Code[46] and other statutes permit the courts to deviate from strict *lex loci.* The Code allows the parties to agree which state's law will apply in a contract situation when two jurisdictions are involved;[47] the Workman's Compensation Act provides compensation provisions for employees incidentally injured outside the state;[48] and the Insurance Act deems insurance contracts to have been made in this state and subject to its laws if property, lives or interests in the state are covered or if applications were taken in the state.[49]

The New Hampshire court states that North Carolina clings to *lex loci* but speculates that its "failure to reject it has resulted from an unwillingness to abandon established precedent before they were sure that a better rule was available, not to any belief that the old

[42] 219 N.C. at 55, 12 S.E.2d at 211.

[43] See, *e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[44] Lowe's North Wilkesboro Hardware, Inc. v. Fidelity Mut. Life Ins. Co., 319 F.2d 469, 473 (4th Cir. 1963).

[45] Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963); Wurfel, *Conflict of Laws, N.C. Case Law,* 43 N.C.L. REV. 895, 896 (1965).

[46] N.C. GEN. STAT. §§ 25-1-101 to -10-107 (1965). The Code becomes effective midnight, June 30, 1967.

[47] N.C. GEN. STAT. § 25-1-105 (1965).

[48] N.C. GEN. STAT. § 97-36 (1965).

[49] N.C. GEN. STAT. § 58-28 (1965).

rule was a good one."[50] Whether or not this is the North Carolina court's position, there is good argument for the court making express exceptions to protect legal rights now often nullified by crossing state boundaries. As suggested, the exception would be a very narrow one and apply only to residents injured in automobiles driven by a resident while in transit from and intended to return to the state of residence. This approach would allow the court to alleviate inequities and effect clear policies while awaiting a suitable alternative, if the court desires an alternative, to *lex loci delicti.* Such an approach would preserve predictability and consistency in North Carolina conflicts law.

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Constitutional Law—Criminal Law—The "Mere Evidence" Rule—Applicability to the States

The mere evidence rule of *Gouled v. United States,*[1] that it is a violation of the fourth amendment prohibition against unreasonable search and seizure to take evidence from a defendant's premises unless that evidence is contraband, stolen property, or an instrumentality of a crime, was declared by the United States Supreme Court in 1921. Courts have found it difficult to apply the instrumentality exception, and the theory of the rule has been harshly criticized.[2] After the decision in *Mapp v. Ohio,*[3] which requires that evidence taken in violation of the fourth amendment be excluded in state trials, the question was certain to arise whether *Gouled* should be applied to the states.[4]

[50] —— N.H. at ——, 222 A.2d at 207.

[1] 255 U.S. 298 (1921).

[2] MAGUIRE, EVIDENCE OF GUILT § 5.04 (1957); 8 WIGMORE, EVIDENCE §§ 2184a, 2264 (McNaughton rev. ed. 1961).

[3] 367 U.S. 643 (1961).

[4] Although the mere evidence rule rests primarily on the fourth amendment, the peculiar origin of the rule in Boyd v. United States, 116 U.S. 616 (1886), gave rise to a theory that the rule rests on a dual basis of the fourth and fifth amendments. *Boyd* did not involve a search at all, but a court order to produce incriminating documents. In invalidating the order the United States Supreme Court first announced that a search for mere evidence was prohibited by the fourth amendment. Next the order was declared invalid under the fifth amendment prohibition against self-incrimination. Although a dissent insisted that the fifth amendment alone was the correct basis for the decision, a third justification for the holding was added: