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Conflict of Laws -- Tort and Partial "Release" in Different Jurisdictions -- What Law Governs Construction of Instrument

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effect is telling the modern highwaymen how to ply their trade without civil liability,[21] except for their plunder. The formula is simple: "Show your blackjacks, but don't move them or touch your victims."

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Conflict of Laws—Tort and Partial "Release" in Different Jurisdictions—What Law Governs Construction of Instrument.

At common law a release of one joint tort-feasor results in the release of all others. It makes no difference whether the respective acts of the several tort-feasors were in concert, merely concurrent, or even successive;[1] it matters only that the combined acts produced a single, indivisible injury.[2] The reason generally assigned for this result is that a single injury represents a single cause of action, which cannot be split by being released as to one tort-feasor while being preserved as to another. A release is thus regarded as an absolute, unconditional extinction of a cause of action.[3] This reasoning gave rise to the judicial presumption that a release, even if granted to less than all who were (allegedly) jointly responsible for the injury, was executed only in exchange for a complete satisfaction of the claim. It was the view of the courts, therefore, that to allow the injured party to release one joint tort-feasor and subsequently to recover a judgment from another theoretically would permit the victim to recover more than he had lost.[4] Assuming the soundness of this reasoning at the time at which it evolved, it is nevertheless highly questionable whether the use of this irrebuttable presumption is a just method of preventing excessive recoveries now.

[21] I assume that the defendants might have been bound over to keep the peace or been charged with an attempt at extortion.

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[1] Intentional torts by their very definition at common law must have been concurrent in order to give rise to joint tort-feasorship. See Garrett v. Garrett, 228 N.C. 530, 46 S.E.2d 302 (1948); PROSSER, TORTS § 46, n. 29 (2d ed. 1955).

[2] Sheppard v. Atlantic States Gas Co., 72 F. Supp. 185 (E.D. Pa. 1947); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956); PROSSER, *op. cit. supra* note 1, § 46. A few American jurisdictions have attempted to make a common-law distinction (both in negligent and intentional torts) between tort-feasors who act in concert and those whose acts are merely concurrent. Husky Refining Co. v. Barnes, 119 F.2d 715 (9th Cir. 1941) (Idaho law); Bee v. Cooper, 217 Cal. 96, 17 P.2d 740 (1932). There is a considerable variance between the laws of the several jurisdictions as to the effect of a release given to one who is subsequently adjudged not to have been jointly liable with those charged with the injury. See, *e.g.*, Bolton v. Ziegler, 111 F. Supp. 516 (N.D. Ind. 1953); Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945); Holland v. Southern Pub. Util. Co., 208 N.C. 289, 180 S.E. 592 (1935); Howard v. J. H. Harris Plumbing Co., 154 N.C. 225, 70 S.E. 285 (1911); Harris v. City of Roanoke, 179 Va. 1, 18 S.E.2d 303 (1942); Papenfus v. Shell Oil Co., 254 Wis. 233, 35 N.W.2d 920 (1949).

[3] Roper v. Florida Pub. Util. Co., 131 Fla. 709, 179 So. 904 (1938); PROSSER, *op. cit. supra* note 1, § 46.

[4] Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956).

Today the situation often arises where one of several joint tort-feasors wishes to settle his share of the injured party's claim without resorting to the courts. The consideration paid for such a settlement is usually the settling tort-feasor's fractional share of the total amount claimed by the victim or a lesser amount agreed upon through compromise. In many American jurisdictions a general release given to the settling tort-feasor, even where the instrument specifically reserves the injured party's rights against other alleged tort-feasors, will still result today in a complete extinction of the cause of action and a bar to further recovery.[5] This has led to the development and use of the covenant not to sue, by which the settling tort-feasor can be protected from further action by the plaintiff,[6] leaving the plaintiff free to seek the remainder of his damages from the other joint tort-feasors.[7] The practical difference between a release and a covenant is virtually nil[8] as far as the settling tort-feasor is concerned. Many courts, however, continue to adhere rigidly to the technical distinctions, finding a common law release wherever the traditional form and language appear, even though the intent of the parties may otherwise be indicated plainly to the contrary.[9] Some jurisdictions, however, have enacted statutes eliminating the presumption and automatic extinction of the cause of action.[10] Others have greatly lessened the harshness of the common law rule in many instances by construing instruments as covenants, especially where there is a specific reservation of rights against other joint tort-feasors or an otherwise clear indication that the settlement was not made in complete satisfaction of the injury.[11] Apparently only Virginia still adheres to the rule that any settlement with one or all joint tort-feasors conclusively presumes a complete satisfaction which bars any further recovery on the claim.[12]

[5] Butler v. Norfolk So. Ry., 140 F. Supp. 601 (E.D.N.C. 1956); PROSSER, *op. cit. supra* note 1, § 46 and cases therein cited.

[6] What effect the settlement might have upon the other tort-feasors' right to contribution from the settling tort-feasor varies among the jurisdictions. At common law the right to contribution was not recognized, but many states have enacted contribution statutes with widely varying effect. The UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 5 provides that the settling tort-feasor may be liable to the other tort-feasors for his fractional share of the judgment rendered against them, less the consideration paid for the release. To date this Act has been adopted in Arkansas, Delaware, Maryland, New Mexico, Pennsylvania, Rhode Island, and South Dakota.

[7] Lysfjord v. Flintkote Co., 135 F. Supp. 672 (S.D. Cal. 1955).

[8] Pellett v. Sonotone Corp., 26 Cal.2d 705, 160 P.2d 783 (1945).

[9] See generally PROSSER, *op. cit. supra* note 1, § 46.

[10] *E.g.*, W. VA. CODE ANN. § 5481; MO. ANN. STAT. § 537.060 (1953). For those states which have enacted the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 4, see note 6 *supra*.

[11] United States *ex rel* Marcus v. Hess, 154 F.2d 291 (3d Cir. 1946); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Lysfjord v. Flintkkote Co., 135 F. Supp. 672 (S.D. Cal. 1955); Rector v. Warner Bros. Pictures, Inc., 102 F. Supp. 263 (S.D. Cal. 1952); Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903).

[12] Shortt v. Hudson Supply & Equip. Co., 191 Va. 306, 60 S.E.2d 900 (1950);

With these varying attitudes among the several jurisdictions, a problem arises where an injury occurs in one jurisdiction and a settlement is executed in another. Such a problem was presented in *De Bono v. Bittner*.[13] The defendant, Bittner, a resident of New York, was injured in an automobile accident in Virginia when struck head-on by another motorist, also from New York, and immediately thereafter from the rear by a Pennsylvania driver. Bittner and his two passengers, also New York residents, settled their respective claims with the first driver.[14] They executed general releases in favor of the driver while specifically reserving their respective rights of action against all other joint tortfeasors. The settlement was executed in New York, the resident jurisdiction of all parties thereto, and apparently all were represented and advised by New York counsel who addressed themselves to New York law. Clearly such an instrument would be regarded in New York, by judicial interpretation, not as a common law release but as a covenant not to sue.[15] In this case Bittner's two passengers sued him, alleging that he was jointly liable with the first driver for their injuries. The court, recognizing that the situation presented a case of first impression, held that under Virginia law the instrument had the legal effect of a common law release and was thus a bar to further recovery by the plaintiffs. Also recognizing that New York law was apparently contemplated in the execution of the "release" (and that therefore the parties did not intend to extinguish their claims), the court nevertheless held that the instrument was so related to the tort as to be a matter of substantive right[16] and "that this [right to enforce a tort claim] must therefore be governed by the law of the situs of the tort."[17]

Bland v. Warwickshire Corp., 160 Va. 131, 168 S.E. 443 (1933). *Compare* Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003 (1941) *and* Richardson v. Pacific Power & Light Co., 11 Wash. 2d 288, 118 P.2d 985 (1941) *with* Tucker v. Brown, 20 Wash. 2d 740, 150 P.2d 604 (1944). Pennsylvania apparently applied the presumption rule to all settlements prior to the enactment of PA. STAT. ANN. tit. 12, § 2085 (Supp. 1958), in 1951, which incorporates the *Uniform Contribution Among Tortfeasors Act*. Sheppard v. Atlantic States Gas Co., 72 F. Supp. 185 (E.D. Pa. 1947); Smith v. Roydhouse, Arey & Co., 244 Pa. 474, 90 Atl. 919 (1914). This rule would seem to have been abrogated under the act. But *compare* Wilbert v. Pittsburgh Consolidation Coal Co., 385 Pa. 149, 122 A.2d 406 (1956) *with* Caplan v. Pittsburgh, 375 Pa. 268, 100 A.2d 380 (1953).

[13] 13 Misc. 2d 333, 178 N.Y.S.2d 419 (Sup. Ct. 1958), *aff'd mem.* 10 App. Div. 2d 556, 196 N.Y.S.2d 595 (1960).

[14] The settlements were actually made with the driver's estate, the driver being fatally injured in the accident.

[15] Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903).

[16] Plaintiff argued that the contract was independent of the tort, that the *lex fori* should govern. The court said that a release went to the very right to maintain a tort action and was consequently substantive in nature. While it did not specifically so state, the court was apparently relying upon the concept embodied in the *Restatement, Conflict of Laws* to the effect that in the enforcement of tort claims, the law of the situs of the tort can govern the substantive rights of the parties. See note 19 *infra*.

[17] 178 N.Y.S.2d at 420.

The same result was reached in *Bittner v. Little*,[18] a case growing out of the same accident involved in *De Bono*. The defendant in the latter case was here suing the Pennsylvania driver in the federal district court in that state. Thus the case was heard by a court sitting in a jurisdiction connected with neither the situs of the tort nor the place of settlement. Nevertheless, and in spite of the fact that the Pennsylvania state court had never previously decided the issue, the court reached the same result as that in *De Bono* and on much the same reasoning, apparently relying upon its interpretation of the *Restatement, Conflict of Laws*.[19]

It is significant that not once in the trial or appellate phases of either of these cases did any court discuss another important aspect of the conflict of laws problem, to wit: the *lex loci contractus*, the law of the place of contracting, generally governs the construction of a contract.[20] While the *lex loci delicti*, the law of the tort situs, may determine the rights of the parties as affected by a release or covenant, it does not seem necessarily to follow that such jurisdiction's laws should govern the *construction* of the instrument. Here the construction would involve the determination of whether the instrument is a release or a covenant not to sue. Certainly in this respect the law contemplated by the parties (usually the *lex loci contractus*) should be paramount to the law of the tort situs which, in these cases, is extremely fortuitous. It is submitted that the rule applied in the above two cases constitutes an unwarranted and unnecessary extension of the "vested rights" theory of the conflict of laws.[21] It would seem that a more just result could be obtained if such an instrument were construed in the light of the law under which it was drawn.[22] After the legal nature of the instrument had been thus ascer-

[18] 270 F.2d 286 (3d Cir. 1959), *affirming* 168 F. Supp. 30 (E.D. Pa. 1958).

[19] The court cited *Restatement, Conflict of Laws* § 389 (1934): "A liability to pay damages for a tort can be discharged or modified by the law of the state which created it." *Quaere* whether this or any other section of the *Restatement* makes this an *exclusive* power of the tort situs jurisdiction.

[20] As was mentioned in note 16 *supra*, the trial court in *De Bono* did discuss the plaintiffs' contention that the *lex fori* should prevail, but even counsel apparently failed to couch his argument in terms of the law as contemplated by the parties.

[21] The so-called vested rights theory conceives that the law of the jurisdiction wherein the injury occurs vests in the victim a right of action which he may enforce in any appropriate forum but entirely subject to the law which gave him the right. It is upon this theory that the appropriate sections of the *Restatement* are predicated. See 2 BEALE, THE CONFLICT OF LAWS §§ 378.1, .2, 389.1 (1935); GOODRICH, CONFLICT OF LAWS §§ 6-9 (1949); Ehrenzweig, *Release of Concurrent Tortfeasors in the Conflict of Laws*, 46 VA. L. REV. 712 (1960). See generally RESTATEMENT, CONFLICT OF LAWS §§ 311-390 (1934).

[22] In Western Spring Serv. Co. v. Andrew, 229 F.2d 413, 418 (10th Cir. 1956), the court said in relation to a settlement in a multiple tort-feasor case: "These contracts were made in Nebraska and would be controlled by the law of that state. Whether they be construed as a release or a covenant not to sue . . . depends upon the intent of the parties since that is the controlling factor." *Cf.* Combined Ins. Co. of America v. Bode, 247 Minn. 458, 77 N.W.2d 533 (1956). Unfortunately the rule in the principal cases has been followed more often than not. See, *e.g.*,

tained, its effect upon the rights of the parties to the tort action could be determined by applying the *lex loci delicti.* In this way the laws of the respective jurisdictions would receive their due weight in the determination of the overall effect of the settlement on the rights of the plaintiff and the tort-feasors.[23]

Although it might not have altered the result in these two cases, due to Virginia's isolated position on all tort settlements, the application of this rule could make a very decisive difference in other jurisdictions. In North Carolina, for example, covenants not to sue are recognized, but great significance is attached to the technical form and language used in the instrument.[24] *Shapiro v. Embassy Dairy*[25] involved a situation which was substantially similar to that in the two cases just discussed. In this case the plaintiffs, New York residents, were injured in North Carolina in a collision between the automobile in which they were riding and the defendant's truck. Prior to this action they had settled with their own driver, apparently also a New York resident. The settlement was negotiated and executed in New York with an instrument, very like the ones in *De Bono* and *Bittner,* which released the driver while specifically reserving the plaintiffs' rights against the other tort-feasors.[26] The federal district court which tried the case conceded that a "release" with reservation of a right of action had never confronted the North Carolina court, but it determined that this state would construe the instrument to be an absolute release of all joint tort-feasors.[27] And

Smith v. Atchinson, T. & S.F. Ry., 194 Fed. 79 (8th Cir. 1912) ("the contract by its terms is tied to the tort"); Preine v. Freeman, 112 F. Supp. 257 (E.D. Va. 1953); Goldstein v. Gilbert, 125 W. Va. 250, 23 S.E.2d 606 (1942).

[23] The question then might arise as to what law should govern the right of the remaining tort-feasors to contribution from the one who settled. Since it is the *lex fori* which ultimately creates any right to contribution that may exist, through the rendering of a judgment against the tort-feasors, it would seem just and consistent to allow this law to control the creation and extent of such a right. This seems particularly appropriate since this is a right which can never be affected by any agreement between the plaintiff and the settling tort-feasor.

[24] Butler v. Norfolk So. Ry., 140 F. Supp. 601 (E.D.N.C. 1956).

[25] 112 F. Supp. 696 (E.D.N.C. 1953).

[26] "I . . . remise, release and forever discharge the said Joseph J. Kirch [the plaintiff's driver] and the Maryland Casualty Company [from any claim] . . . I ever had, now have or may have . . . upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents. . . . I hereby expressly reserve all my rights against Embassy Dairy, Ins. [sic.] and/or Augustus B. Bunce, arising out of accident which occurred on February 13, 1949, on U.S. Route 301, near Wilson, N. C." 112 F. Supp. at 697.

[27] The federal district court claimed to find support for its conclusion by way of a dictum in Howard v. Harris Plumbing Co., 154 N.C. 224, 227, 70 S.E. 285, 286 (1911), where the North Carolina Supreme Court quoted Judge Cooley: "where the bar accrues in favor of some of the wrongdoers by reason of what has been received from or done in respect to one or more others, . . . the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to all. And so a release of one releases all, although the release expressly stipulates that the other defendants shall not be released." There is no other

while acknowledging that under New York law the instrument would be regarded as a covenant, the court nonetheless applied its version of the North Carolina law to *construe* it as well as to determine its legal effect upon the rights of the parties in the tort action. Again, this decision was based solely upon the reasoning that since North Carolina was the situs of the tort its laws should govern all phases of the determination of the substantive rights in the tort action. Thus there exists the anomaly of having one jurisdiction, which clearly recognizes technical covenants not to sue, failing to give such effect to an instrument which meets all of the requirements of a covenant in the jurisdiction in which it was drawn and executed. This decision is objectionable for two reasons. First, it unduly extends the vested rights concept. Second, it ignores the clear intentions and expectancies of the parties. The North Carolina law, as pronounced by this court, continues to follow the common-law rule of presuming complete satisfaction whenever the word "release" appears in an instrument. If this be the true state of our law, it is submitted that a statute ought to be enacted to require the courts to look further than the mere technical form and language of an instrument in determining if it has been executed in exchange for complete satisfaction.

It should be emphasized that an inflexible application of the *lex loci contractus* in construing the instrument of settlement is no more to be advocated than a similar application of the *lex loci delicti.* Certainly in adopting a conflicts rule the courts should be guided as much by a desire for flexibility to meet unusual situations as by the desire for uniformity and certainty of result.[28] It would seem, however, that the paramount consideration should be what law the parties contemplated in executing the settlement and release. Conceivably, a specific stipulation as to the law intended by the parties to govern the transaction would be controlling unless such law were repugnant to the *lex fori* or the *lex loci delicti.*[29] Absent some clear indication of the governing law, the construction should be made with regard to the law of the jurisdiction which has had the most significant contacts with the settlement and release. In the instant cases, as in most, this would be the *lex loci contractus.*[30]

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language in the *Shapiro* case to indicate that the court considered that the plaintiff had received satisfaction in his settlement with the driver. In 1929, eighteen years after the *Howard* case was decided, N.C. Gen. Stat. § 1-240 (1953) was amended to allow contribution among tort-feasors. In view of this, *quaere* whether the above quotation represents the law in North Carolina today.

[28] Cook, The Logical and Legal Bases of the Conflict of Laws 340-41 (1929).

[29] The choice of law should not be unlimited however; the law stipulated should be that of a jurisdiction which has some significance with respect to the transaction. See, *e.g.*, Combined Ins. Co. of America v. Bode, 247 Minn. 458, 77 N.W.2d 533 (1956).

[30] Ironically, this approach has received its greatest support from the New York courts. See, *e.g.*, Smith v. American Flange Mfg. Co., 139 F. Supp. 917

In conclusion, it is submitted that any conflict of laws rule which requires the application of a particular law irrespective of other relevant factors is unsound. In a situation where a tort occurs in one jurisdiction and a partial settelment in another, the inflexible administration of the *lex loci delicti* in the construction of the legal nature of the instrument of settlement will frequently work a substantial injustice through the defeat of the plainly-expressed intent of the parties even where such intent is not repugnant to the laws of either the forum or the situs of the tort. This supremacy of the *lex loci delicti,* for which the courts claim to find support in the *Restatement,* is nothing more nor less than a sacrifice of justifiable flexibility for the sake of mere uniformity.

ALLAN W. MARKHAM

Demurrer Ore Tenus—Amendment—Relation Back.

In *Stamey v. Rutherfordton Elec. Membership Corp.*[1] the plaintiff alleged separate causes of action for wrongful death and for pain and suffering. The defendant answered, and the trial court sustained the plaintiff's motion to strike several of the defenses alleged. On appeal before the supreme court the defendant demurred *ore tenus* on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer *ore tenus* was sustained without prejudice to the plaintiff's right to move for leave to amend.

Twenty-five months after the accident the plaintiff amended the complaint. The defendant demurred to the amended complaint on the ground that the amendment constituted new matter and therefore was barred by the statute of limitations. The trial court sustained the demurrer. On appeal[2] the supreme court refused to allow the amendment to relate back and held that the cause of action for wrongful death was vulnerable to a proper plea of the statute of limitations.[3]

In many prior decisions the North Carolina court has classified a plaintiff's complaint as either a "defective statement of a good cause of action" or a "statement of a defective cause of action."[4] The court has

(S.D.N.Y. 1956); New Amsterdam Cas. Co. v. Stecker, 1 App. Div. 2d 629, 152 N.Y.S.2d 879 (1956); Kaufman v. American Youth Hostels, Inc., 13 Misc. 2d 8, 174 N.Y.S.2d 580 (Sup. Ct. 1957); *cf.* Bierman v. Marcus, 140 F. Supp. 66 (D. N.J. 1956).

[1] 247 N.C. 640, 101 S.E.2d 814 (1958).

[2] 249 N.C. 90, 105 S.E.2d 282 (1958).

[3] Since the statute of limitations can never be taken advantage of by demurrer, Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952), the court vacated the order sustaining the demurrer and remanded the cause.

[4] The substantive distinction between a defective statement of a good cause and a defective cause is discussed in 1 MCINTOSH, NORTH CAROLINA PRACTICE & PROCEDURE § 1189, at 644 (2d ed. 1956). A good definition of the two terms is set out in *Davis v. Rhodes,* 231 N.C. 71, 73, 56 S.E.2d 43, 45 (1949): "When the defect goes to the substance of the cause and not to the form of the statement, it is a defective cause of action which cannot be made good by adding other allegations