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# Conflict of Laws -- Forum's Use of the Construction Given a Foreign Statute by a Third State

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tion of policies in view of then existing facts. Now the Supreme Court of the United States announces that the law must be tested by the application of policies upon *present* facts. If it does not meet the test, it must be replaced. The decision in the principal case is an enlightened one.

D. W. MARKHAM.

### Conflict of Laws—Forum's Use of the Construction Given a Foreign Statute by a Third State.

Plaintiff, a gratuitous guest in defendant's automobile, was injured in an accident occurring in South Carolina. Suit was brought in Georgia, and the South Carolina "guest statute"<sup>1</sup> was pleaded as the basis of recovery. The complaint, which relied on the host's unlawful speed, failure to equip the car with a suitable steering apparatus, operation of the car with knowledge of its defective condition, and inattention while driving, was *held* demurrable as failing to show that the accident was "intentional on part of the owner or operator or caused by his heedlessness or his reckless disregard of the rights of others" so as to permit recovery under the statute.<sup>2</sup>

In attempting to apply the rule of *lex loci*,<sup>3</sup> the Georgia court, as the forum, found it necessary to find the meaning of the terms "heedlessness or reckless disregard" as used in the South Carolina statute in order to construe and apply that statute to the facts alleged in the complaint.<sup>4</sup>

The statutes of a foreign jurisdiction are generally given the same construction by the courts of the forum as that given by the courts of last resort in the foreign state.<sup>5</sup> But the statute in question here had never been construed by the South Carolina court. In view of this fact, the forum considered the Connecticut court's construction of the Connecticut "guest statute"<sup>6</sup> on the presumption that South Carolina in adopting a statute verbally the same adopted it in view of previous Connecticut constructions. This presumption is supported by reason

<sup>1</sup> S. C. CODE (1932) §5908. This statute, passed in 1930, changed the common law rule of ordinary negligence to require intent or heedlessness or reckless disregard on the part of the owner or driver before his gratuitous guest could claim a right of action against him. See notes 8 and 20, *infra*.

<sup>2</sup> Lee v. Lott, 177 S. E. 92 (Ga. App. 1934).

<sup>3</sup> White v. Seaboard Air Line Ry., 14 Ga. App. 139, 80 S. E. 667 (1914); Wise v. Hollowell, 205 N. C. 286, 171 S. E. 82 (1933); GOODRICH, CONFLICT OF LAWS (1927) §92; RESTATEMENT, CONFLICT OF LAWS (1934) §§411X, 413.

<sup>4</sup> Lee v. Lott, 177 S. E. 92, 94 (Ga. App. 1934).

<sup>5</sup> Magnolia Petroleum Co. v. Turner, 188 Ark. 177, 65 S. W. (2d) 1 (1933); Georgia, Fla. & Ala. R. Co. v. Sasser, 4 Ga. App. 276, 61 S. E. 505 (1908); White v. Seaboard Air Line Ry., 14 Ga. App. 139, 80 S. E. 667 (1914).

<sup>6</sup> Conn. Pub. Acts 1927, c. 308.

and authority<sup>7</sup> and affords the forum a practical means of approximating the law of the foreign state. However, the forum did not content itself with an examination of Connecticut decisions but also considered Georgia and South Carolina rulings on degrees of negligence and willful misconduct.<sup>8</sup>

In view of the cases examined, the forum seems amply justified in sustaining the demurrer.<sup>9</sup> But suppose the Georgia definitions had been so different from those of Connecticut that if followed a different result would have obtained.<sup>10</sup> Would the forum, having presumed the *lex loci* to be the same as the law of Connecticut, feel inescapably bound by this "foreign law" to the exclusion of its own? The question involves more than the old difficulties of defining degrees of culpable conduct, for an adequate answer necessitates a choice between two conflicting views of the bases of conflict of laws.

The Restatement adopts the "vested rights" or "obligatio" theory of foreign created rights.<sup>11</sup> According to this view, the only source of the tort obligation is the *lex loci* and therefore that alone must determine the existence and the extent of the obligation.<sup>12</sup> This limits,

<sup>7</sup> Fuller v. South Carolina Tax Comm., 128 S. C. 14, 121 S. E. 478 (1924); Shiveley's Adm'r. v. Norfolk & W. Ry. Co., 125 Va. 384, 99 S. E. 650 (1919).

<sup>8</sup> Lee v. Lott, 177 S. E. 92, 94 (Ga. App. 1934). Under the Conn. decisions "heedlessness or reckless disregard" was construed as "heedless and reckless disregard." Bordonaro v. Senk, 109 Conn. 428, 147 Atl. 136, 137 (1929). And "wanton misconduct" is equivalent to "reckless disregard." Menzie v. Kalmonowitz, 107 Conn. 197, 139 Atl. 698, 699 (1928). The examination of the Georgia and South Carolina cases was to further define "wanton misconduct" and "recklessness."

Georgia has no "guest statute" but follows the "Mass. rule" (Massaletti v. Fitzroy, 228 Mass. 487, 118 N. E. 168 [1917]) of "gross negligence." Epps v. Parrish, 26 Ga. App. 399, 108 S. E. 297 (1923).

<sup>9</sup> Silver v. Silver, 108 Conn. 371, 143 Atl. 240 (1928); Bordonaro v. Senk, 109 Conn. 428, 147 Atl. 136, 137 (1929); Central of Ga. R. Co. v. Moore, 5 Ga. App. 562, 63 S. E. 642, 644 (1909); Buffington v. Atlanta, Birmingham & Coast R. Co. 47 Ga. App. 85, 169 S. E. 756, 757 (1933); Hull v. Seaboard Air Line Ry. 76 S. C. 278, 57 S. E. 28 (1907).

<sup>10</sup> The forum will not enforce a foreign statute if penal or if violative of the public policy of the forum. Southern Rwy. v. Decker, 5 Ga. App. 21, 62 S. E. 678 (1908). No constitutional provision expressly prohibits the forum from wholly disregarding the foreign facts and foreign law, though the due process clause has been applied as a limitation on legislative power in such cases as Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832 (1897). See, in this regard, Stumberg, *Conflict of Laws, Foreign Created Rights* (1930) 8 Tex. L. Rev. 173; note (1935) 13 N. C. L. Rev. 213. The Restatement enters a caveat here: RESTATEMENT, CONFLICT OF LAWS (1934) §45. But see Cardozo, J., in Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198, 202 (1918).

<sup>11</sup> RESTATEMENT, CONFLICT OF LAWS (1934) §43; Slater v. Mexican National Rwy., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900 (1904); Western Union v. Brown, 234 U. S. 542, 124 Sup. Ct. 955, 58 L. ed. 1457 (1914); Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198 (1918); BEALE, CONFLICT OF LAWS (1916) 106; GOODRICH, CONFLICT OF LAWS (1927) 10; Stumberg, *Conflict of Laws, Torts, Texas Decisions* (1930) 9 TEX. L. REV. 26.

<sup>12</sup> GOODRICH, CONFLICT OF LAWS (1927) §94. See Western Union v. Brown; Slater v. Mexican National Rwy.; Loucks v. Standard Oil Co., all *supra* note 11.

by implication at least, the power of the forum to do more than recognize and enforce a "foreign created right," the *lex fori* being material only as setting a policy beyond which the obligation will not be enforced there.<sup>13</sup>

A contrary view, as expressed by Cook, Lorenzen and others,<sup>14</sup> holds that there is nothing fundamental in the application of foreign law and that, in fact, the plaintiff's right is always determined by the *lex fori* which "imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurred."<sup>15</sup> Under this view the effect of the foreign law as a factor in the case "depends on ideas of expediency, policy, and fairness at the forum and not upon a hypothesis of power abroad to create rights."<sup>16</sup>

Since, in the last analysis, the forum must determine the rights of the parties before it, whatever legal rules and principles it chooses as a model for its decree, should not the approach to conflict of laws problems be from this pragmatic basis rather than from an *a priori* assumption of "foreign created rights"? Only by such an approach is reference possible to all the circumstances that might have a bearing on reaching the best result.<sup>17</sup>

The "foreign created rights" view as a valid and controlling principle is challenged by the Georgia court's holding that if the liability of the defendant had been of common law rather than of statutory origin, the *lex fori* rather than the *lex loci* would have controlled.<sup>18</sup> Also if the forum should consider the degree of negligence required to impose liability under the *lex loci* inconsistent with the policy of the forum, it might enforce a "right" different in scope from that of a "right" under the decisions of the foreign court, and this could not then be accurately called a "foreign right."<sup>19</sup> Even if a forum nominally adopts the *lex*

<sup>13</sup> *Cuba R. Co. v. Crosby*, 222 U. S. 478, 32 Sup. Ct. 132, 56 L. ed. 274 (1911).

<sup>14</sup> Cook, *The Logical and Legal Bases of the Conflict of Laws*, (1924) 33 YALE L. J. 457; Cook, *Recognition of Mass. Rights by N. Y. Courts* (1918) 28 YALE L. J. 67; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736; Stumberg, *loc. cit. supra* note 11; Stumberg, *loc. cit. supra* note 10.

<sup>15</sup> Learned Hand, J., in *Guinness v. Miller*, 291 Fed. 769, 770 (S. D. N. Y. 1923).

<sup>16</sup> Stumberg, *supra* note 10, at 174; Stumberg, *supra* note 11, at 21, n. 1.

<sup>17</sup> Stumberg, *supra* note 10, at 194.

<sup>18</sup> *Hall v. Slaton*, 168 Ga. 710, 148 S. E. 741 (1929) reversing 38 Ga. App. 619, 144 S. E. 827 (1928) (plaintiff suing for injury occurring in Alabama where ordinary negligence permits guest's recovery, is held to Georgia's requirement of gross negligence.) This is not the prevailing view, however: *Askowith v. Massell*, 260 Mass. 165, 156 N. E. 875 (1927); *Wise v. Hollowell*, 205 N. C. 286, 171 S. E. 82 (1933) but see note 20 *infra*; RESTATEMENT, CONFLICT OF LAWS (1934) §413 X.

<sup>19</sup> Cook, *Tort Liability and Conflict of Laws* (1935) 35 COL. L. REV. 202. Similarly, where damages are being assessed and estimated the rule of the forum may be applied. *Georgia, F. & A. Ry. Co. v. Sasser* 4 Ga. App. 276, 61 S. E. 505 (1908); *Dorr Cattle Co. v. Des Moines Nat'l Bank*, 127 Iowa 153, 98 N. W. 918, 922 (1904); Note (1932) 24 A. L. R. 1268.

*loci* as controlling, it may accept only the terminology of the foreign law and look to its own decisions for substantive definitions.<sup>20</sup>

Among the American decisions,<sup>21</sup> the results reached and the language employed seem to support the "vested rights" theory, but on closer examination, particularly of contract cases, it is evident that rulings have been shaped with a view to the result desired and without any real basic theory common to all the cases.<sup>22</sup> It is submitted that the hypothesis of the "vested rights" theory of conflict of laws does not accurately describe the legal phenomena with which it treats and that it involves limitations on the power of the forum which make it impractical and undesirable as a binding rule for the guidance of the courts.<sup>23</sup>

R. MAYNE ALBRIGHT.

### Constitutional Law—Police Power—Price Control of Milk.

The New York Milk Control Act prohibited the sale within the state of milk purchased from producers in other states at a price less than the minimum payable to producers within the state.<sup>1</sup> Plaintiff dealer in New York City purchased milk from producers in Vermont at prices below the minimum fixed by the Act, and sold it in New York both in the original containers and in bottles. Plaintiff was denied a dealer's license because he refused to comply with the provisions of the Act and the regulations thereunder. After being threatened with prosecution for trading without a license, plaintiff sued to enjoin enforcement of the Act. A District Court of three judges granted an injunction against the enforcement of the Act as to sales in the original cans but denied relief as to sales in bottles after removal from the cans.<sup>2</sup> On

<sup>20</sup> *Wise v. Hollowell*, 205 N. C. 286, 171 S. E. 82 (1933) (N. C. accepted the Virginia common law rule of "gross negligence" but applied its own definitions to the terms). See a criticism in (1934) 12 N. C. L. REV. 247. For a criticism of the N. C. rule of ordinary negligence, see Brogden, J., dissenting in *Norfleet v. Hall*, 204 N. C. 573, 169 S. E. 143 (1933). For a proposed statute for N. C., see (1930) 9 N. C. L. REV. 47.

<sup>21</sup> England does not recognize the "vested rights" theory in tort cases but requires the foreign wrong to be such as would have been actionable if committed in England. *Phillips v. Eyre*, L. R. 6 Q. B. 1 (Ex. 1870).

<sup>22</sup> *Stumberg*, *supra* note 10, at 184, 186.

<sup>23</sup> *Lorenzen*, *supra* note 14, at 751.

<sup>1</sup> New York Agriculture and Markets Law, Laws 1934, c. 126, 258m (4), article 21-A; formerly Laws 1933, c. 158, 312 (g), article 25 ("It is the intent of the legislature that the instant, whenever that may be, that the handling within the state by a milk dealer of milk produced outside of the state becomes a subject of regulation by the state, in the exercise of its police powers, the restrictions set forth in this article respecting such milk so produced shall apply and the powers conferred by this article shall attach. After any such milk so produced shall have come to rest within the state, any sale, within the state by a licensed dealer or a milk dealer required by this article to be licensed, of any such milk purchased from the producer at a price lower than that required to be paid for milk produced within the state purchased under similar conditions, shall be unlawful.")

<sup>2</sup> *Seelig v. Baldwin*, 7 F. Supp. 776 (S. D. N. Y. 1934).