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Around the turn of the century a Texas switchman named Slater was killed in Mexico due to the negligence of his employer, a Colorado corporation which operated a railroad from Texas to Mexico City. The switchman's widow and children, all citizens and residents of Texas, brought a diversity action in the federal court in Texas against the railroad for damages. On appeal, the Supreme Court, in Slater v. Mexican National R.R. Co., held that the Mexican remedy, support and pensions during necessity or until marriage, was beyond the power of the Federal courts to grant. The trial court attempted to substitute a common law remedy in the form of lump sum damages based on a jury verdict but on appeal the judgment was reversed and the action ordered dismissed. Although Texas had its own wrongful death statute and had no policy against enforcing a liability for wrongful death arising in another jurisdiction, the Supreme Court reached its decision by strict adherence to the "obligatio" or "vested rights" doctrine which would vest in the territorial jurisdiction where an injury is incurred the exclusive legislative power to determine and define all the incidents of legal liability. The upshot of the case was that the bereft widow

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1. 194 U.S. 120, 128 (1904).
2. In the course of the Court's opinion, Justice Holmes articulated the vested rights doctrine in the following language:
   But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori. . . . 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 the 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 founda-
and her dependent children were left without a remedy for the death of their bread winner killed through the defendant's negligence. This is a particularly harsh result in face of the probability that the Mexican courts also would be disinclined to supervise its paternalistic remedy for the benefit of an American family living outside of Mexico.³

The vested rights theory articulated in Slater by Justice Holmes⁴ dominated the traditional rules governing the choice of law in this country. With respect to torts, the courts purported to look exclusively to the law of the place of injury to determine the existence and extent of tort liability.⁵ The place of injury is defined as the state or jurisdiction where the last event necessary to make an actor liable for an alleged wrong takes place—namely where the harmful act has its injurious consequences.⁶ Two rules have been deemed elementary: (1) the law of the place of wrong determines whether a person has sustained a legal injury; and (2) if no cause of action is created at the place of wrong no recovery can be had in any other state.⁷ To put it another way, in a context of "legislative jurisdiction", the territory in which a party has suffered an injury will have exclusive jurisdiction to define the nature and extent of any legal rights which he may have by reason of the injury. This orthodoxy was believed to have the considerable advantages of simplicity and relative certainty in application. All forums, regardless of variances in their domestic laws and regardless of multiple state contacts, were expected to attach the same legal consequences to a given set of operative facts. In the case of torts, this theory sought to fix the place of wrong as the unique contact which would give the government of that 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 the laws of 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. The Slater decision dramatically illustrates the unfortunate consequences which may flow

⁴ Supra note 2.
⁶ Id. at § 377.
⁷ Id. at § 384.
from rigid application of these traditional principles.

Mention should be made that American courts frequently escaped the rigidity of the place-of-wrong rule when its consequences were not to judicial liking. This could be accomplished either negatively by invoking public policy to refuse to enforce some particular foreign cause of action or, more broadly, by adroitly characterizing the legal question in issue as one other than substantive tort law. Examples of the latter have occurred most frequently when 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 of the place-of-wrong. Similarly questions of intra-family tort liability have been held to belong to family law thus to be governed by the law of domicile rather than of the place of wrong. Some courts have used the device with surprising freedom and variety to reach some preferred result. One may suspect a more than occasional procrustean tendency to fit an issue into a category traditionally governed by the state whose rule of law the court wants to apply.

The vested rights theory and the inflexible place-of-wrong rule long had its critics, particularly in academic law school circles, more recently reflected in judicial opinions. Judge Learned Hand was an important spokesman for a group who proposed the so-called "local law" or "homologous law" theory. The premise of this doctrine was that no court could enforce a liability except one created by the law of the state in which it sat. Accordingly, a court was regarded as invoking its own law in imposing liability with respect to an occurrence in another jurisdiction, even though such liability was patterned after,

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9. In Levy v. Daniels U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928), the court applied Connecticut law to impose vicarious liability on a Connecticut renting agency for tort injuries caused in Massachusetts by one of its customers on a novel rationale characterizing the plaintiff as a third party beneficiary under the Connecticut bailment contract.

10. In considering the question whether a New York court would enforce a liability created under the law of Florida, Judge Learned Hand referred to the view expressed in the Slater case, supra notes 1 and 2, and went on to comment:

But strictly speaking, it is impossible for a court to enforce any liability except one created by the law of the state in which it sits. That state may take for its model a liability created by another state, merely because the other state creates it. Usually indeed it will do so when the other state is civilized; but the liability enforced is the creature of its own will: its law of the conflict of laws alone determines when it will fashion a liability after the foreign liability. Thus, except as the law of Florida furnished a pattern which New York accepts, it has nothing whatever to do with the case; and if the common law still obtained in New York, a nice question would arise.

or homologous to, the corresponding liability imposed by the law of such other jurisdiction.

Judge Hand may seem to have been splitting hairs in trying to distinguish between the enforcement of foreign liabilities (and correlative rights) and of local liabilities patterned after foreign liabilities, but the distinction contributes at least one important practical result. When courts assume they are applying local law they naturally exercise greater independence in adopting, rejecting, or modifying foreign rules of law, particularly when such foreign rules would impinge on some local interest or policy. This "local law theory" may have been a necessary step in the development of the flexibility with which courts today are approaching choice of law questions. Legislative jurisdiction is seldom the exclusive monopoly of one state and therefore foreign law loses its compulsive force. It is the law of the case only to the extent the forum court sees fit to adopt it as the local rule of law. When a court is called upon to choose between conflicting rules 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, as indicated by the following decisions, have been loosening under the suzerainty of the modern Supreme Court.

Wells v. Simond Abrasive Co.\(^\text{11}\) involved an Alabaman's wrongful death in Alabama. Eighteen months later the decedent's administratrix filed a diversity action in Pennsylvania for damages under the Alabama Wrongful Death Act. The Supreme Court held that a Pennsylvania court could properly disregard the two year statute of limitations built into the Alabama statute and could apply the Pennsylvania one year limitation to give judgment for the defendant. This holding went beyond a mere refusal to enforce the foreign claim—a dismissal without prejudice; it appears to have been res judicata. Chief Justice Vinson, speaking for a majority of five to three, said:

> The states are free to adopt such rules of conflict of laws as they choose, . . . subject to the Full Faith and Credit Clause and other constitutional restrictions. The Full Faith and Credit Clause does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of the sister state.\(^\text{12}\)

\(^{11}\) 345 U.S. 514 (1953).

\(^{12}\) Id. at 516. Chief Justice Vinson went on to say in his opinion:

> [T]here have been divergent views when a foreign statutory right unknown to the common law has a period of limitation included in the section creating the right. The Alabama statute here involved creates such a right and contains a built-in limitation. The view is held in some jurisdictions that such a limi-
Richards v. United States\textsuperscript{13} involved an action under the Federal Torts Act for death in a Missouri air crash allegedly due to an act of negligence in Oklahoma on the part of an agency of the United States. The Federal Torts Act, by anomaly or inadvertence, accepts liability of the United States “in accordance with the law of the place where the act or omission occurred”\textsuperscript{14} (emphasis added). The Supreme Court dutifully looked to the law of Oklahoma, but then, assuming that Oklahoma courts would apply the traditional place-of-wrong rule (a lateral variation of renvoi), ended up by applying the substantive law of Missouri which limited the amount of recovery. In the course of his opinion for a unanimous court Chief Justice Warren used language which reveals the present attitude of the Supreme Court toward the modern trend:

Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason to saddle the Act with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. \ldots \textsuperscript{15}

and:

Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.\textsuperscript{16}

With these preliminaries we have set the stage for an examination of what the state courts have actually been doing in the past seventeen years or so in reworking rules governing the choice of law in the field of torts. Justice Traynor, then of California’s Supreme Court, issued the earliest important decision leading the new trend and we will begin with that.

\textsuperscript{13} 369 U.S. 1 (1962).
\textsuperscript{14} 28 U.S.C. § 1346(b) (1964).
\textsuperscript{15} 369 U.S., at 12-13.
\textsuperscript{16} Id. at 15.
A. Survival of Actions

Grant v. McAuliffe 17 involved an Arizona collision between two cars from California in which both drivers and all passengers were California residents. 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 common law rule against survival of tort actions and the trial court applied that rule of the place of wrong to dismiss the action. On appeal the Supreme Court of California reversed. Justice Traynor, speaking for the court, stated the "local law" theory 18 and went through the judicial process of analyzing California's contacts 19 with the cause of action. However, he seems to have regarded these parts of his rationale as mere make-weights and, in the end, he based the decision on a dubious characterization of the issue (survival of the action) as one of procedure rather than substance. This questionable ploy enabled him to escape the place-of-wrong rule without rejecting it outright and to apply the California rule of law.

Justice Traynor's decision in this case is of rather narrow application since the common law rule that personal tort actions die with the person of the plaintiff or the defendant is of diminishing importance. More and more states are modifying the rule, and Arizona itself did so in 1955, two years after Justice Traynor's decision. 20 Since Grant, three cases have presented similar problems of choice-of-law with respect to the question of survival of a tort action. An Arkansas and a Minnesota court both applied the law of the place of wrong, thereby

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17. 41 Cal. 2d 859, 264 P.2d 944 (1953).
18. 264 P.2d 944, 946: "In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state. . . . But the forum does not adopt as its own the procedural law of the place where the tortious acts occur. It must therefore be determined whether survival of causes of action is procedural or substantive for conflict of law purposes." (Italics added) See also note 9, supra.
19. Id. at 949: "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. This approach has been followed in a number of well-reasoned cases. . . . It retains control of the administration of estates by the local legislature, and avoids the problems involved in determining the administrator's amenability to suit under the laws of other states. . . . 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 the deceased tort-feasor is being administered in this state, plaintiff's right to prosecute his causes of action is governed by the laws of this state relating to administration of estates."
allowing recovery in the first case and denying it in the latter.21 The Seventh Circuit Court of Appeals, in a diversity case initiated in Illinois, on the contrary, refused to enforce an action for a decedent’s pain and suffering under the survival statute of South Carolina on the ground it was contrary to the policy and “deep rooted tradition” of Illinois.22 The court was apparently not influenced by the Grant rationale although it cited that case in a footnote.

Nevertheless, the general impact of the Grant decision has been substantial. Critics were quick to attack the decision for its unorthodox result and for Justice Traynor’s highly suspect analysis of the authorities on which he relied to support his characterization of the issue as one of procedure. The most thoroughgoing comment and criticism of the decision was made by the late Professor Brainerd Currie who concurred enthusiastically with its result but agreed with its critics that it violated all precedents.23

In 1959, six years after his Grant decision, Justice Traynor had occasion to refer to Professor Currie’s critique as one of a series “that brilliantly set forth an affirmative new approach to conflict of laws.”24 He then offered the following critique of his own opinion in the Grant case:

[A]lthough 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.25

At the same time he rationalized his decision anew, this time weighing the 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

21. Nelson v. Eckert, 231 Ark. 348, 329 S.W.2d 426 (1959); Allen v. Nessler, 247 Minn. 230, 76 N.W.2d 793, 799 (1956). It may be noted, however, that the Minnesota court has subsequently rejected the place of wrong rule and permitted recovery under its more liberal domiciliary law in cases involving intra-family liability, Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966), and guest statutes, Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966), Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968). Therefore Allen v. Nessler is probably no longer good authority. 22. Hartness v. Aldens, Inc., 301 F.2d 228, 229-30 (7th Cir. 1962).
23. Currie, Survival of Actions: Adjudication v. Automation in the Conflict of Laws, 10 STAN. L. REV. 205, 252 (1958). He concludes an appendix reviewing the cases as follows:
The decision of the California Supreme Court in Grant v. 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.
25. Id. at 670, n.35.
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.\textsuperscript{26}

Justice Traynor’s rationalization of his \textit{Grant} decision still leaves many questions unanswered. Suppose the deceased tortfeasor had left heirs and creditors in Arizona who would be seriously affected by the California court’s decision in charging his estate. Would Justice Traynor then have applied Arizona law? Suppose further, there were not enough assets in the California estate to satisfy the claims of the injured parties, but that the deceased also left property in Arizona subject to ancillary administration. Even if we assume the ancillary probate court in Arizona subscribed to Justice Traynor’s principles applied in the \textit{Grant} decision, could we expect it to defer to California law in this instance? Certainly here Arizona’s interest could not be said to be insubstantial, any more than was California’s. Is it likely that Arizona would weigh its own and California’s relative interest on a fine scale and come up with the decision that California’s law should prevail? It seems more probable that Justice Traynor’s court would abide by its decision in the administration of the California estate, but that the Arizona court would not be compelled by any constitutional mandate of due process or full faith and credit to deliver the Arizona assets to the California executor for administration in accordance with California law. Arizona would have the power to apply its own law and policies in administering the estate within its own jurisdiction and in adjudicating the respective claims of creditors, tort victims and heirs.\textsuperscript{27}

\textsuperscript{26} Id. at 670.

\textsuperscript{27} Later events indicate the Arizona courts might not have taken a very strong stand to enforce local policy as to non-survival-of tort claims against a non-resident estate. \textit{Supra}, note 20.
B. *Intra-family Immunity or Liability*

In 1955, Justice Traynor wrote the opinion in another path-finder decision, *Emery v. Emery.* This followed the Grant decision by two years but was prior to his rearticulation of Grant's rationale in the *Texas Law Review.* In *Emery* two small girls sued their father and sixteen year old brother at their family domicile in California for injuries suffered in Idaho while riding in a car owned by their father and operated by their brother. The court considered the threshold questions of the effect on their claims of their status, first as guest riders, and then as unemancipated members of the same family as the defendants. On the first point the court remained orthodox and referred to Idaho law although under all the facts this apparently did not affect the outcome of the case. The plaintiffs could have recovered under the guest statutes of either Idaho or California. On the question of intra-family immunity, Justice Traynor discussed three possible choices of law: the law of the place of injury, that of the forum, or that of the state in which the family is domiciled. He 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." In *Emery* the forum and domicile were the same, but Justice Traynor was careful to distinguish the role in which he thought California had an interest in applying its own law:

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 in which 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. Justice Traynor's point that the parties, including the little girls, could participate in the legislative process of their domicile and hence were in a sense responsible for its laws and should be ruled by them, may stretch realism a bit, but

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29. Id. at 222.
30. Id. at 223.
otherwise he does present persuasive reasons to justify the domicile in applying its own rule of intra-family liability to an out-of-state tort. It should be noted that before Emery American courts had sometimes refused to enforce out-of-state claims between family members on the ground of local immunity rules and public policy.\textsuperscript{31} However Emery seems to be the first instance of an American court applying domiciliary law to permit one member of the family to recover against another on the merits, when such recovery would have been denied by intra-family immunity law of the place of wrong.

Since Emery, the courts of the District of Columbia and of twelve states in addition to California have applied the domiciliary rule of that decision to questions of intra-family liability or immunity.\textsuperscript{32} In contrast, the courts of Connecticut, Louisiana, North Carolina and Tennessee have refused or failed to follow the Emery lead and have continued to apply the place-of-wrong rule to questions of intra-family liability.\textsuperscript{33} Missouri also initially fell into this latter group by reason of a 1960 decision, but in 1969 it seems implicitly to have overruled this holding by a decision involving the analogous question of host-guest liability.\textsuperscript{34} We may additionally note here that other state courts which have adopted the domiciliary rule of Babcock v. Jackson,\textsuperscript{35} which involved host-guest liability, may be expected on a fortiori principles to favor the Emery rule. This would add the states of Florida,
Kentucky, Mississippi, Oregon and Rhode Island to the group first mentioned above.  

Of the states adopting the Emery rule there were six instances in which the more liberal rules of the domicile resulted in recovery in personal injury actions between spouses or other members of the same family although recovery would have been barred by family immunity rules prevailing in the respective states where the injuries were sustained. In six other instances the domiciliary courts denied recovery by applying their local immunity rules and rejecting the place-of-wrong doctrine. In such situations the plaintiffs very likely could have avoided these unfavorable results by filing suit in the state where the injuries were suffered. In these latter cases, the courts went beyond the purely negative attitude of pre-Emery courts which sometimes invoked local public policy to refuse to enforce admittedly valid rights created under the laws of another state. The Arizona case of Schwartz v. Schwartz is unique. It involved a suit between a New York wife and husband for injuries suffered in an Arizona accident. The court allowed recovery under New York's rule of inter-spousal liability despite Arizona's own immunity rule. Here too the plaintiff was hardly well advised to bring her suit in Arizona although she was fortunate in the outcome.

The predominant trend today unquestionably favors Emery's domiciliary rule as opposed to the traditional place of wrong doctrine, at least so far as intra-family liability is concerned. The next question is whether this new rule should be applied mechanically as a substitute for the place of wrong test, as an inflexible mandate binding the forum court to a particular choice of law. The New Hampshire and Wisconsin courts seem to have so regarded it.

36. Footnotes 90 and 91 infra.  
37. Alaska, Arizona, California, Minnesota, New Hampshire and Wisconsin. See citations note 32 supra.  
39. Supra note 31.  
41. Haynie v. Hanson, 16 Wis. 2d 299, 114 N.W.2d 443 (1962); Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966). These decisions are in accord with the unqualified language of Sections 379(1) and 390g of the tentative draft of Restatement Second of Conflict of Laws, Draft No. 9, ALI April 24, 1964, which flatly states that the local law of the state with the most significant relationship with the parties determines their rights and liabilities and that the issue of intra-family immunity is determined by the local law of their domicile. However, this statement is substantially toned down by Section 69 of the Proposed Official Draft, Part II of the Restatement dated May 1, 1968 which simply says that the applicable law in such a case will usually be the local law of the state of the parties' domicile. See discussion in text at note 190 infra.
The Wisconsin case of *Haynie v. Hanson* involved a Wisconsin accident in which a wife was injured by the alleged negligence of her husband, both Illinois residents. Although Wisconsin law would prescribe recovery, the court applied the immunity rule of the domicile and dismissed the action. The decision displays superficial consistency with *Emery* but it is doubtful that it can be justified by any realistic consideration of the competing interests and policies of the two states involved. The Wisconsin court eventually came to this view of its own accord for in 1968 it overruled the *Haynie* case in *Conklin v. Horner*, a suit involving a one car accident in which all the occupants were residents of Illinois. The suit was brought by all guest passengers against the driver of the vehicle, although Illinois law would have prohibited such a suit in the absence of a showing of gross negligence. Wisconsin was the place of wrong and had a policy of permitting injured parties to recover for injuries actually suffered within the state. It considered its own law and policy as better than that of Illinois. In reaching its decision it was strongly influenced by Professor Leflar's analysis of choice influencing considerations of which we will speak later.

The New Hampshire decision reached the same result as *Haynie v. Hanson* and still stands. However, the New Hampshire court has refused to extend it to a situation where the married couple had moved to an immunity state only after the cause of action had arisen but before it was filed.

In opposition to the New Hampshire and the initial Wisconsin view is the decision of the Kentucky court in *Arnett v. Thompson*. Kentucky had liberal laws permitting recovery in intra-family suits and in host-guest situations. It had approved the principles underlying *Emery* in a situation where its residents were injured in a less liberal state. But in *Arnett* it allowed an Ohio wife to recover from her husband for injuries suffered in a Kentucky accident although Ohio was a family immunity state. The court said candidly that it would apply Kentucky law whenever justified by Kentucky's sufficient interest. In an analogous situation involving the issue of host-guest liability the New York Appellate Division similarly applied its own local law to permit

42. Id.
43. 38 Wis. 2d 468, 157 N.W.2d 579 (1968).
45. Supra note 41.
47. 433 S.W.2d 109 (Ky. 1968).
recovery between Ontario parties. 48

C. Measure of Damages

In 1961, beginning with a series of airline decisions, New York came to the center of the stage in the drama of developing new choice-of-law principles.

In August, 1958, a Northeast Airlines plane departed from LaGuardia Airport in New York on a flight to Nantucket Island in Massachusetts. Approaching its destination it crashed and burned at Nantucket, killing all on board. Among the many who died in the catastrophe were the following passengers: Kilberg, Pearson and Dean—all residents of the state of New York. All had purchased their flight tickets at LaGuardia Airport before boarding the ill-fated plane. Within the appropriate time period after the accident, the respective personal representatives of the individual deceased passengers brought suit in the New York court against Northeast Airlines, a Massachusetts corporation. The cases presented some interesting conflict of laws questions. The Massachusetts death statute, which governed the legal consequences of the disaster so far as Massachusetts was concerned, limited the recovery for the death of each victim to a maximum of $15,000; contrariwise, the New York constitution explicitly prohibited any statutory limitation on damages for injuries resulting in death. Further, a New York statute prescribed that pre-judgment interest should be included in the amount of judgment, while Massachusetts made no such provision in its law and its practice was to the contrary.

1. The Kilberg Case 49

In addition to a count under the Massachusetts death statute, the Kilberg complaint included a count in contract on the theory that the airline had breached its contract for safe carriage of the passenger to his destination. The contract count seemingly provided an excellent opportunity on traditional terms for the court to avoid the Massachusetts limitation of damages, since the ticket had been purchased and the contract made in New York and a large part of the performance was in that state. New York reasonably could have been regarded as the "center of gravity" of the contract by virtue of its having the most significant contacts. The New York trial court, indeed, upheld the con-

tract count by denying a motion to dismiss as a matter of law. The appellate division, however, reversed and ordered the granting of the motion for dismissal of the contract count, choosing to follow earlier New York precedents which had rejected the contract theory for recovery of damages from carriers in similar situations.50 The New York Court of Appeals affirmed the appellate division on this point and unanimously rejected the contract theory as a basis for suit.51

Judge Desmond, writing for the majority of four out of seven judges, went on to observe in well-deliberated dicta that the court's decision did not mean that the plaintiff would be limited to a $15,000 recovery for the wrongful death.52 Although the suit was under the Massachusetts death statute, the New York court did not regard itself as bound by the built-in limitation of that statute in view of the strong public policy against any statutory limitation on the amount of damages for injuries resulting in death. Judge Desmond thought the court had found a way of attaining this result "without doing violence to the accepted pattern of conflict of law rules".53 This was done by characterizing the question of damages as one of "procedure" rather than "substance" and, consequently, as subject by tradition to the law of the forum rather than of the place of the injury. Two judges dissented from this part of the majority opinion, including Judge Froessel, of whom we shall speak later, while a third, Jude Fuld, merely disassociated himself on the ground that it was a dictum not required for decision of the narrow issue presented by the appeal—viz., the propriety of the dismissal of the contract count.

Shortly after the court of appeal's decision in Kilberg, the New York court was presented with a somewhat analogous conflict of laws question in the case of Davenport v. Webb.54 This was a New York action for damages resulting from a New Yorker's wrongful death occurring in Maryland. The issue was whether the New York court should include in the amount of recoverable damages an item for pre-judgment interest for the period between the date of death and the entry of judgment. Such interest was prescribed by New York statute but was not allowable by the law of Maryland. The New York trial court included such pre-judgment interest on the authority of the New York Court of Appeals dicta in its Kilberg opinion. On appeal the appellate division reversed the trial court on this point and struck out the item of

52. Id. at 39-42, 172 N.E.2d at 527-29.
53. Id. at 40, 172 N.E.2d at 528.
pre-judgment interest. It distinguished the Kilberg case in two respects. It held first that the New York legislature had not indicated an intention to apply the pre-judgment interest statute to out-of-state injuries and, second, that in any case the New York statutory rule as to interest did not indicate so strong a state public policy as did the constitutional prohibition involved in the Kilberg case. The New York Court of Appeals affirmed.

The court of appeals' opinion in Davenport disclosed sharp discrepancies with Judge Desmond's rationale in his Kilberg opinion. Desmond had sought to justify the Kilberg rule with the simple dichotomy between “substance” and “procedure”, holding that the measure of damages is procedural and hence governed by the law of the forum. Judge Dye, writing for the court in the later case said:

The overwhelming weight of authority, recognizing that 'the question of the proper measure of damages is inseparably connected with the right of action', has long held that the measure of damages for a tort is to be treated as a matter of substance, governed by the law of the place where the wrong occurred. This has been particularly true in the area of wrongful death actions. Such actions did not exist at common law; they are creatures of statute. Therefore, as we said on another occasion, 'Right and remedy coalesced' and are 'united'.

The court nevertheless continued to adhere to the result indicated by the Kilberg dicta, justifying it merely as an enforcement of New York’s strong public policy which did not extend to the question of pre-judgment interest.

Judge Desmond, author of the Kilberg opinion, concurred in the Davenport decision with curious ambivalence:

I concur in the result only, since much of the discussion in the majority opinion is inconsistent with our stated grounds for decision in Kilberg v. Northeast Airlines . . . The result here is correct, however, since there is no New York public policy or other bar to our following Maryland's law as to interest on a recovery for a wrongful death in Maryland.

As a matter of fact the statutory provision for pre-judgment interest on a claim seems more closely related to matters of procedure than does the measure of damages. Designed in part to deter defendants from delaying tactics, it may affect procedure by its inducement to speed the preparation for trial. The Davenport decision seems logically incompatible with the procedure-characterization rationale of Kil-

55. Id. at 393, 183 N.E.2d at 903.
56. Id. at 395, 183 N.E.2d at 904.
57. Id. at 395, 183 N.E.2d at 905.
On the other hand, the two decisions together make clear that the New York Court of Appeals has modified its Kilberg rationale and has elected to stand on its evaluation of its own governmental interest and public policy.59

2. The Pearson Case

Following the Kilberg decision the United States District Court for the Southern District of New York tried the Pearson case under its diversity jurisdiction. Deeming itself bound by the Kilberg dictum, the trial court entered judgment under the Massachusetts statute without regard for the $15,000 limitation on damages prescribed by that statute.60 Upon appeal, a panel of the Court of Appeals of the Second Circuit reversed and remanded on the constitutional ground that enforcement of the remedy under the Massachusetts death statute, without regard for the limitation built into the statute, would violate full faith and credit.61 Judge Kaufman dissented. Upon motion by the plaintiff-appellee a rehearing was ordered before the whole court en banc in view of the great significance of the issue—namely, the constitutional power of the states to develop conflict of law doctrine.

58. On the other hand if we adopt the corrected view that damages and the right to pre-judgment interest go to the substance of a plaintiffs claim, a contrary decision in the Davenport case might have posed a question of due process. The official reports of the case reveal no contacts which might have supported any assertion by New York of legislative jurisdiction to expand the liability of the non-resident defendant for the Maryland tort. (See note 73, infra.) If the defendant had been an interstate carrier transporting passenger victims whom he had picked up in New York, the minimal contact would have been sufficient to support the imposition of New York's rule as to interest.

59. The groping rationalization of the Kilberg rule by the New York court is reminiscent of the false start of the California Supreme Court in its rationale of the revolutionary decision in Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944, 949 (1953). See text accompanying footnote 17, supra. In his original opinion Justice Traynor, like Judge Desmond in the Kilberg case, supported his choice of California law by characterizing the question as one of procedure. Six years later he repudiated this reasoning but reaffirmed the result reached by weighing the claims of the parties against the respective interest and policies of the states involved. See note 24, supra. As a matter of fact the New York court has gone much further in its Kilberg decision than did the California court in Grant v. McAuliffe. In the latter case Arizona's sole contact with the event was the fortuity that the accident happened to occur within its territory. In Kilberg, Massachusetts had an additional contact in that the defendant was a Massachusetts corporation regularly doing a large part of its business there. Moreover, Grant involved a common-law type of action where the courts have traditionally played a creative, law-making role, whereas Kilberg involved a death action unknown at common law, for which statutory prescription has ordinarily been deemed essential.


61. 307 F.2d 131 (2d Cir. 1962).
On the rehearing the whole court overruled the panel decision by a six to three vote, and affirmed the trial court. Judge Kaufman now wrote the majority opinion. Referring to the panel decision he said:

[T]he inference seemed inescapable that, in effect, the panel majority had exalted the *lex loci delictus* to constitutional status with the consequence that New York was barred from applying the whole or any part of its wrongful death policy to the events occurring in Nantucket. If this is indeed the rationale of the panel's opinion, then it is the first decision to 'freeze' into constitutional mandate a choice-of-law rule derived from what may be described as the Ice Age of conflict of laws jurisprudence—at a time when that jurisprudence is in an advanced state of thaw. A majority of this Court rejects this rationale. . . .

Judge Friendly's dissent is practically required reading for a complete understanding of the problem involved in the *Pearson* dispute. Judge Friendly is clearly prepared to recognize that more than one state may often have concurrent—or pluralistic—legislative jurisdiction over the same set of operative facts. Thus under the *Kilberg-Pearson* facts he would presumably concede that New York had sufficient contacts to justify its extension of its death statute to the Massachusetts disaster. The point was that neither the New York legislature nor the New York court made any pretense of invoking the New York statute. The court explicitly purported to be enforcing the Massachusetts statute, but in its own free-wheeling fashion, without regard to the built-in limitation which was an integral part of the statute. Judge Friendly disapproved:

[I]t does not follow that when New York looks to a statute of a sister state as the source of a claim enforceable in its courts, the Constitution allows it to decline, in the Supreme Court's words, 'to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depends'.

Judge Friendly's argument may seem to have some merit in a wrongful death action since traditionally such actions were outside the purview of common law and have been regarded as based only on statutory enactments. It is suggested, however, that this position rests on too rigid a concept of the common law. The genius of common law is manifest in its creative vitality and ability to grow and develop as courts acquire new knowledge and insights and are faced with new circumstances and needs. Thus, under the *Kilberg-Pearson* facts, a New York court was

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62. 309 F.2d 553 (2d Cir. 1962).
63. *Id.* at 557.
64. *Id.* at 565.
called upon to adjudicate a claim for damages arising from a death occurring in Massachusetts. In point of fact it applied the ready-made law neither of Massachusetts, which would have limited recovery to $15,000, nor of New York, which simply did not apply to the situation. Instead, by its own common law vitality it created its own remedy by interweaving elements of the Massachusetts statute which granted a cause of action and of the New York constitution which prohibited any statutory limitation on the amount of recovery.65

3. The Dean Case (Gore v. Northeast Airlines, Inc.)66

Gore, a resident of the District of Columbia but the executor of Dean's New York estate, brought an action for Dean's death in the New York state court which was removed to the United States District Court for the Southern District of New York. There, on authority of the Kilberg rule, the plaintiff attacked the defendant's affirmative defense that any recovery would be subject to Massachusetts' statutory limitation on damages. In this instance, surprisingly, the district court denied the motion and allowed the affirmative defense to stand. It distinguished the case from the Kilberg-Pearson situation on the sole ground that none of the deceased's next of kin (who were beneficiaries of the suit) were residents of New York at the time the suit was brought, although three out of five had been residents at the time of the accident.

This discrimination on the basis of residence presented numerous questions. To what extent should the choice of law in a Kilberg situation be affected by the domicile of the deceased or of his survivors who will benefit from any recovery of damages for his wrongful death, or by any post-death change of domicile by such survivor. The discrimination may pose a constitutional problem under the equal protection clause. However, these questions were muted for the time being when four years later the Second Circuit Court of Appeals reversed the district court in the Dean case and held that the right of Dean's survivors to damages for his death could not be destroyed by their subsequent change of domicile.

Along similar lines, it is interesting to speculate what the New York Court of Appeals would have done if a Pennsylvanian and an Oklahoman had also been on board the ill-fated plane and died in Nantucket along with Kilberg, Pearson and Dean.67 Pennsylvania has a

65. Id. at 560, 561.
67. Trauth v. Northeast Airlines, Inc., Unreported Federal Civil Action No: 149-256 (S.D.N.Y. 1961). Federal District Judge refused to apply the Kilberg rule because deceased and the plaintiff were residents of New Jersey.
wrongful death statute providing compensatory damages without arbitrary limit for the negligently caused death of a decedent. In a 1964 action for damages for the death of a Pennsylvanian in a Colorado air crash during a flight from Pennsylvania to Arizona, the Pennsylvania Supreme Court adopted the Kilberg rules allowing the more liberal damages permitted by Pennsylvania law. A year or more later, the New York Court of Appeals upheld wrongful death actions filed by the Pennsylvania estates of two Pennsylvanians who were killed in an air crash in Maryland on the return from a round trip flight between Philadelphia and Puerto Rico, although there were no survivors who could have sued under the Maryland statute. The court held that the plaintiffs could recover under the wrongful death and survival statutes of Pennsylvania as "the place having the most significant relationship with, and the greatest interest in, the issue presented." Here the New York court showed itself willing to disregard the law of the place-of-wrong in favor of the more protective law of the Pennsylvania domicile where the flight had originated and was to terminate. This decision provides some support for the view that the New York court would today be equally favorable to the claim in respect of any Pennsylvanian who had been on the ill-fated Kilberg flight to Nantucket. It would seem inconsistent if the court did not afford the same protection just because the flight originated in New York rather than in Pennsylvania. The law and policies of the two states are the same and a grouping of the contacts of Pennsylvania (domicile) and of New York (flight origin and forum) should lead to a result in keeping with the twin policies of the two states.

The case in behalf of the Oklahoman may seem less persuasive since his home state continues to adhere to the place-of-wrong rule in wrongful death cases. However, despite the policies which Oklahoma may wish its courts to enforce at home in the administration of their choice of law rules, it could hardly intend that foreign courts treat Oklahoma citizens faring abroad less favorably than they treat the citizens of any other state. It somehow offends our sense of fair play and equal protection to grant full compensation for the death of one party and to deny it with respect to another party killed under identical circumstances, solely because of the difference in residence of the deceased or

70. Id. at 343, 266 N.Y.S.2d at 517, 213 N.E.2d at 799.
of their survivors. Nevertheless, such prestigious courts as those of New York and California both seem headed in the direction of giving paramount importance on the issue of damages to the factor of residence of the victim and of his survivors.

New York residence, taken alone, would seem a tenuous minimal contact to justify New York's claim to legislative jurisdiction. If Kilberg had purchased his ticket and enplaned at Boston instead of LaGuardia and thereafter crashed to his death at Nantucket, this writer would until recently have supposed that any attempt by the New York court to increase the airline's liability by applying the Kilberg rule would violate our historical concept of due process. Nevertheless, the New York courts have gone that far and even farther.

A New Yorker visited Maine for a few days and there accepted a ride in a car registered and insured in Maine and owned and driven by a Maine resident. An accident ensued within Maine boundaries and the New Yorker was killed. Shortly thereafter the defendant conveniently moved to New York where the victim's administrator brought suit against him for wrongful death under the Maine statute. Maine's statute as of the time of the accident would have limited recovery to $20,000. Further, Maine's guest statute would have precluded recovery absent any extraordinary negligence on the defendant's part. Even so, in the ensuing case of Miller v. Miller, the New York Court of Appeals applied New York law on both issues and allowed full recovery of damages.

It is true that certain extenuating circumstances existed in the Miller context which we have thus far omitted. For one thing the defendant was a native and ex-resident of New York who had moved to Maine

72. The clause of the California Workmen's Compensation statute involved in Alaska Packers Ass'n v. Industrial Acc. Comm'n., 294 U.S. 532 (1935), was by its terms restricted to residents of the state who entered contracts of hire within the state and suffered injuries in the course of employment outside the state. Nevertheless the United States Supreme Court applied the law to a non-resident migrant worker on the authority of California decisions. California courts had extended the statute to non-residents as well as residents on the ground that otherwise the entire statute would be invalid because it violated the privileges and immunities clause of the United States Constitution. Some states have departed from the California approach and upheld a state's privilege to discriminate against non-residents in dispensing benefits under their workmen's compensation laws. 147 A.L.R. 925 (1943); 12 A.L.R. 1207 (1921). However, such discrimination can be defended more easily in the case of workmen's compensation than in the case of civil remedies for tort. In the former case, the state is dispensing insurance funds set up by state mandate and subject to its control and regulation. In such funds the state has an interest very nearly proprietary in nature. On the contrary, a state has no proprietary interest in the outcome of an ordinary civil tort action. Opinion contra: B. Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS 719 (1963).


for business purposes just a year or so before the accident. He returned to New York and re-established his residence there shortly after the accident. Moreover, he was a brother of the deceased victim and presumably was not personally aggrieved at the application of his insurance to the relief of his own close relatives. In fact, the New York court candidly treated the problem as one of interstate insurance. It commented on the fact that in fixing premium rates for Maine policies insurance companies made no distinction for possible statutory limitations on recovery by reason of the Maine wrongful death act or guest statute. As a final make-weight argument it pointed out that subsequent to the accident the Maine legislature had amended its wrongful death act to remove the arbitrary limitation on damages. The court said: “Any claim that Maine has a paternalistic interest in protecting its residents against liability for acts committed while they are in Maine, should they move to another jurisdiction, is highly speculative.”

The New York courts have quickly busied themselves in extending the scope of the Miller decision and in staking out claims of New Yorkers against all the world. The appellate division has followed its lead in a situation which presented none of the extenuating circumstances existing in Miller. Tjepkema v. Kenney was a suit for the wrongful death of a New Yorker in Missouri allegedly due to negligence of defendant, a Missouri resident. The court struck out the partial affirmative defense that recovery, if any, must be subject to Missouri's statutory limitation of $25,000. The court ruled that New York's measure of damages must apply since the decedent and all plaintiffs were New York residents. The defendant's residence in Missouri where the accident occurred was treated as a fact of no importance. The far reaching consequences of this rule are evidenced by the fact that in this case jurisdiction with respect to the Missouri defendant was based solely on quasi-in-rem attachment of his insurer's obligations under his auto insurance policy in accord with the rule of Seider v. Roth. The Seider rule is one recently developed by the New York courts whereby they assert quasi-in-rem jurisdiction against any tort defendant in the world who happens to carry liability insurance with an insurance company doing business in New York. Since New York is the financial and insurance center of this country and perhaps of the world, this rule seems to expose most responsible defendants to the ubiquitous jurisdiction of the New York courts regardless of the defendant's lack

75. Id. at 21, 290 N.Y.S.2d at 742, 237 N.E.2d at 882.
of contacts or relationship with that state. Professor Leflar and other academicians have questioned the constitutionality of the Seider rule but it has been upheld by the Second Circuit Court of Appeals sitting en banc, and Judge Friendly has predicted that it would be upheld by the United States Supreme Court. In fact the Supreme Court denied certiorari in that case.

The California Court has not yet gone to the extremes of the New York Court. Its leading decision involving the choice of law as to measure of damages was handed down in Reich v. Purcell. An Ohio family driving to California on a route through Missouri was there struck by a car driven by a Californian on his way to Illinois. The mother and one child of the Ohio family were killed. Subsequent to the accident the survivors of the family moved their residence to California where they sued the California defendant on various counts including one for the wrongful death of Mrs. Reich. On this count the parties stipulated that judgment be entered for $55,000 or $25,000 depending on the court’s ruling on the application of the Missouri limitation of damages. Neither Ohio nor California law placed any limit on damages. The trial court applied the Missouri law to limit recovery to $25,000, but the supreme court reversed and directed the trial court to enter judgment for the higher amount. Justice Traynor, writing the opinion, said that the plaintiffs’ domicile at the time of the accident was the determining consideration. Their subsequent removal to California gave that state no interest in applying its own law, although, since its law was the same as Ohio’s, it had no apparent policy of protecting the defendant, its domiciliary, from the enhanced liability under Ohio law. The judge said that Missouri had little or no interest in limiting the amount of compensation since none of the parties resided there. The result was therefore predictable under Kilberg and Babcock principles.

Yet the decision still left open the question of what the California court might have done if the defendant had been a resident of Missouri at the time of accident. In this event he could well have a reasonable expectation and perhaps a right to demand that his liability for a tort committed in his home state be governed by the more lenient law of that state. The California court’s opinion does not indicate that it would go as far as the New York court in Miller v. Miller and follow-

78. R. LEFLAR, AMERICAN CONFLICTS LAW 90, n.5 (1968).
80. 63 Cal. Rptr. 31, 432 P.2d 727 (1967).
Conflicts Rules Affecting Torts

ing cases. Privately, however, Justice Traynor (now retired) has ex-
pressed doubt that the fact of defendant's residence in Missouri would
have made any difference in the outcome of the decision.

Turning now to the general reaction of courts throughout the land to
the revolutionary Kilberg rule: the courts of California, Pennsylvania,
Iowa, Florida and Rhode Island have adopted the Kilberg rule and
abandoned the place-of-wrong rule as the sole standard for the measure
of damages.\textsuperscript{81} We have discussed the California and Pennsylvania
cases. The Iowa court applied its own measure of damages in a head
on collision of two Iowa cars in Minnesota whose laws would have
limited the amount of recovery. The Florida court held that Illinois
law should not be allowed to limit damages sought against an aircraft
manufacturer for the death of a Floridian in an Illinois plane crash on
the return leg of a round trip journey between Florida and Illinois. The
airline ticket had been purchased and issued in Florida. The Rhode
Island court adopted a somewhat different approach in \textit{Woodward v.
Stewart}.\textsuperscript{82} The suit was for the wrongful death of a Rhode Island resi-
dent in a Massachusetts auto collision involving only Rhode Island
parties and cars. Here, however, suit was brought under the Rhode
Island and not the Massachusetts wrongful death statute. The court
thus followed the reasoning of Judge Friendly in his dissent from the
\textit{Pearson} decision.\textsuperscript{83}

In \textit{Tiernan v. Westex Transport, Inc.},\textsuperscript{84} following the \textit{Woodward}
decision, a federal district court in Rhode Island allowed a suit to be
filed under both the Massachusetts and Rhode Island wrongful death
statutes for the death of a Rhode Islander in Massachusetts while rid-
ing in the car of a Delaware corporation driven by a New Yorker, which
was struck by the tractor trailer of a Texas corporation driven by a
Vermont. None of the defendants had an office or any substantial
relationship with either Massachusetts or Rhode Island. The judge said
that Massachusetts' interest in limiting recovery under its statute was
limited to the protection of its citizens from large recoveries and to the
deterrence of negligence on its highways. No Massachusetts defendant
was here involved and the allowance of a larger recovery would not con-
flict with Massachusetts' concern in deterring negligence. On the other

\textsuperscript{81.} Reich v. Purcell, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); Griffith v. United
Airlines, 416 P. 1, 203 A.2d 796 (1964); Fabricius v. Horgen, 132 N.W.2d 410
(Iowa 1965); Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743 (Fla. 1967); Wood-
ward v. Stewart, 243 A.2d 917 (R.I.), \textit{cert. denied,} 393 U.S. 957 (1968); Tiernan v.

\textsuperscript{82.} \textit{Supra} note 81.

\textsuperscript{83.} \textit{Supra} note 64.

\textsuperscript{84.} \textit{Supra} note 81.
hand Rhode Island had a substantial interest in the case and could apply its own law and measure of damages. The court did not mention that none of the domiciliary states limited damages for wrongful death although this was a fact.

Also, in a diversity case filed in Indiana by the estate of a Kentucky decedent, all of whose heirs and beneficiaries were Indiana residents, against an Indiana corporation for the decedent's death in an Illinois accident, the Seventh Circuit Court of Appeals applied the Indiana $10,000 limitation of damages on the ground Indiana had the most significant relationship with the cause of action. The effect of the ruling was to deprive the court of diversity jurisdiction.

On the other hand Kansas, Oklahoma, Maryland, Missouri, Arkansas and Texas have recently affirmed their allegiance to the place-of-wrong standard for measuring damages, while federal courts have applied such standard in diversity suits initiated in Maine, Ohio, Delaware and North Carolina respectively.

The Warsaw Convention, currently limiting recovery for wrongful death on an international flight to $8,300 except where the defendant has been guilty of "wilful misconduct", would prevail over the Kilberg rule.

D. Guest Statutes

In 1960 one Jackson drove Miss Babcock and others, all New York residents, for a week-end trip to Ontario where he collided with a wall, seriously injuring Babcock. She sued Jackson and, upon his death, his estate for damages. Ontario's guest statute would have barred recovery and the lower court dismissed the action on that ground. The appellate division affirmed without opinion over one strong dissent. The court of appeals reversed, rejecting the traditional choice of law rule.

85. Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965).
which would have applied the law of the place of injury. Judge Fuld, speaking for the majority of five to two, said such rule depended on the "vested rights" doctrine which:

. . . has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act. . . . More particularly, as applied to torts, the theory ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. It is for this reason that . . . there has in recent years been increasing criticism of the traditional rule by commentators and a judicial trend towards its abandonment or modification.

The court then described the "center of gravity" or "grouping of contacts" doctrine developed in conflicts cases involving contracts, concluding that this doctrine likewise afforded an appropriate approach for accommodating the competing interests in tort cases with multi-state contacts.

Judge Fuld then proceeded to compare the respective contacts of New York and Ontario to the case before the court and concluded that New York's concern was unquestionably the greater and more direct, whereas the interest of Ontario was minimal. He then referred to New York's policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence—evidenced by the legislature's refusal to enact a statute denying or limiting recovery in such cases. The New York courts, he said, had no reason or warrant to depart from state policy simply because the accident, solely affecting New York residents and arising out of operation of a New York auto, happened beyond its borders. On the other hand, Ontario had no conceivable interest which would be affronted by New York's granting a remedy between New Yorkers for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law. The court stressed that the issue was not whether the defendant had violated some rule of the road or standard of conduct prescribed by Ontario for motorists generally, but rather whether the plaintiff, because she was a guest in the defendant's automobile, was barred from recovering damages for a wrong concededly committed.

90. Id. at 478, 240 N.Y.S.2d at 746, 191 N.E.2d at 281.
91. "Justice, fairness and 'the best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." Id. at 481, 240 N.Y.S.2d at 749, 191 N.E.2d at 283.
92. Id. at 483, 240 N.Y.S.2d at 751, 191 N.E.2d at 284.
Babcock was the first decision in which an American court has departed from the place-of-wrong rule in choosing the law to govern host-guest liability. In Emery v. Emery\(^9\) we have seen that even the progressive Justice Traynor adhered to tradition in respect of host-guest liability. To be sure in that case the result would apparently have been the same whether he had looked to California or to Idaho law. The Emery facts also differed somewhat from those of Babcock in that the New York court had to choose between the Ontario rule which prohibited outright any recovery by a guest, while Emery involved the choice between varying standards of negligence pre-requisite to a host’s liability. This distinction, however, is without functional difference because Idaho’s “reckless disregard” standard for hosts did not apply to motorists generally. The issue concerned the application of this standard to a host-guest relationship which centered in California, as in Babcock the issue concerned the application of the Ontario immunity rule to a host-guest relationship which centered in New York.

Initially the New York Court of Appeals applied its own Babcock rule with considerable caution. This is exemplified by its 4-3 decision two years later in Dym v. Gordon\(^9\)\(^4\) when it refused to apply the rule in a suit between two New Yorkers for injuries suffered in Colorado whose guest statute also precluded recovery. The court distinguished the case from Babcock on the ground the host-guest relationship had not arisen in New York but was centered in Colorado where the two New York parties were spending the summer as summer students in the university. Further, the accident involved a collision with another car occupied by non-New Yorkers who might have been adversely affected by allowing the New York plaintiff to share in the maximum insurance provided by the defendant’s insurance policy. However, the Dym decision appears to have been a temporary aberration overruled in effect by Macy v. Rozbicki\(^9\)\(^5\) and explicitly by Tooker v. Lopez.\(^9\)\(^6\) We will therefore not attempt to criticize its shortcomings and its inconsistencies with the Kilberg and Babcock philosophy.

The majority of states whose courts have considered similar cases since the Babcock decision have followed its lead. Three years prior to Babcock the Pennsylvania court had decided a case similar in facts to Babcock, but continued to apply the law of the place of wrong which precluded recovery.\(^9\)\(^7\) In view of its subsequent adoption of the Kil-
berg rule in respect of the measure of damages and of the Emery rule in respect of interspousal liability, it is not improbable that the Pennsylvania court would today follow the Babcock decision in respect of host-guest liability.88

Since the Babcock decision the courts of at least eight states have decided cases in accord with its philosophy: Wisconsin, Minnesota, New Hampshire, Kentucky, Missouri, California, Rhode Island and Iowa.99 Also, the courts of Florida, Oregon and Mississippi have strongly endorsed its view.100

On the other hand, the courts of four states have continued to adhere to the place of wrong rule in respect of host-guest liability. West Virginia rendered its decision in 1963 when it was unaware of the Babcock case which had been decided shortly before.101 Delaware, Maryland and Michigan have refused to follow Babcock.102 The Michigan case of Abendschein v. Farrell103 in 1968 is particularly interesting. Its facts were almost identical with those of the Babcock case. A Michigan host and passenger were involved in an accident on a short trip into Ontario whose guest statute precluded recovery. The trial court barred recovery on the basis of the Ontario law. The appellate court reluctantly affirmed on the ground it was compelled to do so by a 1939 decision of the Michigan Supreme Court. However, it discussed at length the principles underlying the Babcock decision and unanimously approved of them. It expressed the hope that on appeal its own decision would be reversed by the state supreme court. On appeal, however, the supreme court sharply disagreed with the appellate judges and affirmed the judgment of the lower court, citing with

89. Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); Kopp v. Rechzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Wessling v. Paris, 417 S.W.2d 259 (Kentucky 1967); Kennedy v. Dixon, 439 S.W.2d 173 (Missouri 1969); Fuller v. Greenup, 267 Cal. App. 2d 10, 72 Cal. Rptr. 531 (1968); Woodward v. Stewart, 243 A.2d 917 (Rhode Island), cert. denied, 393 U.S. 957 (1968); Brown v. Church of Holy Name, 252 A.2d 176 (Rhode Island 1969); Fuerste v. Bemis, 156 N.W.2d 831 (Iowa 1968).
90. Hopkins v. Lockheed Aircraft Corp., 201 So. 2d 743, 747 (Florida 1967); Casey v. Mason Construction & Engineering Co., 247 Ore. 274, 428 P.2d 898 (1967); Mitchell v. Craft, 211 So. 2d 509 (Mississippi 1968), but see Browning v. Shackleford, 196 So. 2d 365, 372 (Mississippi 1967) which seems to have been decided otherwise, on an issue of pleading.
93. Supra note 102.
strong approval Judge Van Voorhis’ dissenting opinion in the Babcock case.

We assume that any court which today would follow the place-of-wrong rule with respect to intra-family liability would a fortiori apply it to the choice of law governing host-guest liability. This would include Connecticut, Louisiana, North Carolina and Tennessee.104

We can again ask whether the domiciliary rule of Babcock should be regarded as an inflexible mandate binding the forum court in any choice of law in respect of host-guest liability. We have already commented on this problem in connection with the domiciliary rule of Emery v. Emery applicable to intra-family liability.105 The problem was presented in the New York case of Kell v. Henderson,106 decided by the appellate division, involving facts which were the reverse of those in Babcock. Ontario residents drove into New York intending to return to Ontario. In New York their car collided with a bridge due to the alleged negligence of the host driver and an injured guest sued for damages in the New York court. The court cited both Babcock and Dym and allowed recovery under New York law which was affirmed by the appellate court:

In our view Babcock v. Jackson . . . is inapplicable here because Babcock was not intended to and did not change the established law of the State of New York that a guest has a case of action for personal injuries against a host in an accident occurring within this State whether those involved are residents or domiciliaries of this State or not.107

The Kell decision seems sound on the principle that a forum is justified in applying and enforcing its own law whenever its relationship with the suit has substantial significance. This would be true under the facts of the Babcock case when New York was the domicile of all the parties involved in an out-of-state tort. It is also true under long established territorial theory when New York is the actual place of injury. In either case New York would have a legitimate interest justifying the enforcement of its policy to allow adequate compensation for injuries actually suffered by its own residents anywhere, or by non-residents within its own territory.

To interpret Babcock as making domicile the all determining factor determining the choice of law, even to defeat forum law and policy,
would be substituting a factor every bit as mechanical and regrettable as the place-of-injury rule has heretofore been.

**E. Proper Parties to Wrongful Death Actions**

Traditionally the law of the place of wrong has been held to determine the person entitled to bring suit for wrongful death. Where the controlling statute designates specific beneficiaries, or the administrator or personal representative of the deceased to bring the action, only such persons may sue. States have differed as to whether a foreign administrator may bring the action without qualifying locally. The prevailing and better view has not required the action to be brought by a locally appointed administrator, the theory being that such action is not brought on behalf of the estate but as a trustee for the benefit of the individuals designated by statute. This is a question of local procedure rather than of conflict of laws.

In this area also, at least two recent decisions indicate some erosion to the place-of-wrong rule. Thus *Long v. Pan American Airways* involved an air crash in Maryland whose law restricted recovery of any substantial amount to surviving relatives who had been dependent on the decedent. Although no such relative survived, the New York Court of Appeals permitted recovery by looking to the more liberal law of Pennsylvania, the domicile of the decedent and the survivors and the state with the most substantial relationship to the flight. The Seventh Circuit Court of Appeals approved the same principle by dicta in *Watts v. Pioneer Corn Co.*

**F. Direct Action Statutes**

Some three states plus Puerto Rico have statutes in some form which permit an injured party to sue directly the insurer of the tortfeasor, either alone or upon joinder with the tortfeasor. Such laws are called “direct action statutes”. In 1954 the United States Supreme Court held in *Watson v. Employers Liability Assurance Corp., Ltd.*

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110. Id.
111. Id.
112. LOUISIANA REV. STAT., title 22, Sec. 655; RHODE ISLAND GENERAL LAWS 1956, title 27, ch. 7, Sec. 27-7-1 (limited to situations where no jurisdiction can be obtained over the insured); WISCONSIN STATS. Sec. 260.11, subdiv. 1, and Sec. 85, 93 (limited to motor vehicle cases); PUERTO RICO LAWS, Ch. 26, Secs. 2001 and 2003(1) (1958).
113. 348 U.S. 66 (1954). See however the Supreme Court's refusal to permit suit
that Louisiana could enforce its direct action statute against a foreign insurance company despite the fact that the insurance policy specifically prohibited direct actions against the insurer until after final determination of the insured’s obligation to pay personal injury damages either by judgment or agreement. In this case the plaintiff was a resident of Louisiana who had been injured in that state from the use of a hair waving product manufactured by the insured. The insurance policy had been negotiated and issued in Massachusetts and delivered in Massachusetts and Illinois, under whose laws the clause prohibiting direct actions was lawful and binding. Against the defendant’s arguments that Louisiana’s application of its direct action statute under such circumstances violated due process and full faith and credit, the Supreme Court upheld Louisiana’s power on the basis of its legitimate interest in safeguarding the rights of parties injured there. Justice Frankfurter concurred on the narrower ground that the defendant insurance company had long ago filed a formal consent to direct suits in order to obtain a certificate to do business in the state. The majority, however, would apparently have not required such consent as a prerequisite to its holding. The Watson rule would presumably not apply to the Wisconsin direct action statute which by its express terms is made not applicable to non-resident tort-feasors and their insurers where the insurance policy contains no direct action clause.\footnote{114. Wisconsin Code, Sec. 260.11-subdiv. 1.}

Although the choice-of-law issue in the Watson case fell technically in the contract category, its relevance to tort remedies is obviously important. If the Louisiana plaintiff had brought suit in Illinois, the Illinois court would predictably have upheld the provision of the Illinois insurance contract and dismissed the direct action against the insurer. The question still remains as to what action a forum such as Illinois might take if the injured party sought to sue locally under the Louisiana direct action statute for an injury inflicted in that state by an insured Louisianan.

The decisions bearing on the question are divided and turn to some extent on the peculiarities of the particular direct action statute involved. In \textit{Oltarsh v. Aetna Insurance Co.}\footnote{115. 15 N.Y.2d 111, 256 N.Y.S.2d 577, 204 N.E.2d 622, 624, 625 (1965).} a New York resident, injured on a visit to Puerto Rico because of the negligence of a Puerto Rico corporation, brought suit in New York under the Puerto Rico direct action statute against the insurer, a Connecticut corporation doing business in

\begin{itemize}
  \item under the Louisiana direct action statute for a marine tort, in view of the federally expressed policy of limited liability of ship owner: Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954).
\end{itemize}
both Puerto Rico and New York. The lower courts dismissed on the ground that direct actions violated New York public policy. The court of appeals reversed in an opinion characterizing the issue "in traditional rubrics" as whether the right to direct actions was procedural and necessarily governed by the law of the forum or substantive and hence governed by the law applicable under choice of law principles. The Puerto Rico statute, said the court, went beyond merely defining the proper parties to suits involving insurance contracts and providing a procedural short cut for those injured by an insured tort-feasor. Rather, the statute created a separate and distinct right of action against the insurer where no such right had previously existed. It transcended procedure and implemented Puerto Rico's legitimate interest in safeguarding the rights of any persons injured within its borders. The New York court therefore entertained the action.

On the other hand in two earlier suits under the Louisiana direct action statute, the United States Second Circuit Court of Appeals and the New York Court of Appeals differed from one another in their conclusions on whether the suits could be prosecuted in New York. Both courts adverted to the venue provisions of the Louisiana statute which required any direct action thereunder to be brought in prescribed parishes of Louisiana. It is established constitutional law that Louisiana's restrictive venue prerequisites could not deprive other states of jurisdiction by any mandate of full faith and credit if any other such state saw fit to entertain the action. Against this background the Federal Circuit Court of Appeals in Collins v. American Auto Insurance Co. held that a federal court sitting in New York should accept diversity jurisdiction of a direct action under the Louisiana statute. Two years later the New York Court of Appeals reached a contrary result in Morton v. Maryland Casualty Co. and simply acquiesced in Louisiana's self imposed restrictions to local venue. The Oltarsh court commented that even the Morton court had implicitly recognized that the statutory right to bring direct action was substantive in character for the purpose of conflict of laws but had merely carried out Lousiana's legislative intent in restricting enforcement to Louisiana's courts.

118. Supra note 116.
119. Supra note 116.
120. Supra note 115, 204 N.E.2d at 624, 256 N.Y.S.2d at 580, 15 N.Y.2d at 116.
The substantive nature of rights created by both the Louisiana and Puerto Rico statutes is further recognized by decisions permitting direct actions to be brought against insurers in federal courts even though joinder of the insured tort-feasors would have eliminated diversity jurisdiction.\textsuperscript{121}

In contrast to the New York \textit{Oltarsh} decision, the Missouri court recently dismissed a suit brought under the Louisiana direct action statute on the simple ground that such statute created no substantive rights but was merely procedural in character and hence of no force in the Missouri forum.\textsuperscript{122} The result thus reached was the same as that of the \textit{Morton} case,\textsuperscript{123} but the Missouri court’s broad characterization of the direct action statute as procedural was so all inclusive that it could be equally applied to forestall enforcement of any direct action statute of another state—not only of Louisiana’s. The court did not rule on the further argument that the direct action in any event could not be enforced in Missouri because it violated the state’s public policy, but neither did it discredit such argument.

Mississippi has also refused to enforce the Louisiana direct action statute, basing its decision, like the New York court in \textit{Morton}, on Louisiana’s legislative intent to restrict venue to its own local courts.\textsuperscript{124}

The Wisconsin direct action statute is in a special class. It is supplemented by another code provision explicitly making the insurer liable directly to the persons entitled to recover, irrespective of whether such liability be \textit{in praesenti} or contingent and to become fixed or certain by fixed judgment against the insured.\textsuperscript{125} Such provision would make it difficult for any foreign court to characterize the effect of the Wisconsin statute as other than substantive. A Minnesota court and more recently a federal district court sitting in Illinois have construed the Wisconsin statute as substantive and have permitted direct action against the insurers.\textsuperscript{126} Substantive or not, the Michigan and Illinois

\textsuperscript{121} Lumbermens Mut. Casualty Co. v. Elbert, 348 U.S. 48, (1954); Aponte v. American Surety Co. of N.Y., 276 F.2d 678 (1st Cir. 1960).
\textsuperscript{122} Noe v. U.S. Fidelity & Guaranty Co., 406 S.W.2d 666 (1966). The Court said: “It is the general rule that the court at the forum determines, according to its own rules as to conflict of laws, whether a given foreign law is substantive or procedural, but in making this determination it will give consideration to the interpretation of the foreign law by the courts of that state.” \textit{Id.} at 668. \textit{See also} Penny v. Powell, 162 Tex. 497, 347 S.W.2d 601 (1961).
\textsuperscript{123} \textit{Supra} note 116.
\textsuperscript{125} Sec. 85.93, \textit{supra} note 112.
Supreme Courts have invoked their own public policies to deny enforcement of the Wisconsin statute.\textsuperscript{127}

One premise asserted by the courts to support the controversial decision in \textit{Seider v. Roth}\textsuperscript{128} was that New York could constitutionally provide for a direct action against an insurer doing business in New York by a New York resident with respect to an injury suffered elsewhere. The so-called \textit{Seider} rule served to force an insurer to defend in the New York court a claim against a non-resident for injuries suffered outside New York. Judge Keating of the New York Court of Appeals and Judge Friendly of the federal court of appeals treated the rule as equivalent to a judicially created direct action statute and thus within the constitutional power of the state.\textsuperscript{129}

G. \textit{Statutes of Limitation}

Limitations on the time for bringing suit on a cause of action have traditionally been characterized as "procedural" for purposes of conflict of laws, and hence subject to the forum law.\textsuperscript{130} Some thirty-eight states have modified the application of this doctrine by enacting some form of borrowing statute whose general effect is to bar suit on a foreign cause of action which would be barred by a shorter time limitation under the law of the state where the action arose.\textsuperscript{131} These borrowing statutes are frequently—perhaps generally—not applied when either of the parties are residents of the forum. Moreover, the courts have themselves developed exceptions by excluding from the procedure-characterization any time limitation which is "built into" a statute creating a particular substantive right, or which specifically qualifies a particular substantive right created by statute.\textsuperscript{132} Such limitations are analogous to contract stipulations which fix a period of time within which rights under a contract may be enforced. The Supreme Court early ruled that under due process any such valid limitation in a foreign contract may not be disregarded or extended by a forum which itself has no

\begin{itemize}
\item \textsuperscript{127} Lieberthal v. Glens Falls Indemnity Co., 316 Mich. 37, 24 N.W.2d 547 (1946); Marchlik v. Coronet Insurance Company, 40 Ill. 2d 327, 239 N.E.2d 799 (1968).
\item \textsuperscript{128} \textit{Supra} note 77.
\item \textsuperscript{130} Goodrich, \textit{Conflict of Laws} 152; (4th ed. 1964); Stumberg, \textit{Principles of Conflict of Laws} 146 (3rd ed. 1963); Leflar, \textit{American Conflicts Law} 303 (1968).
\end{itemize}
substantial relationship with the transaction.\textsuperscript{133} This decision remains a
benchmark in the conflict of laws to the present time. On the other
hand, if the time limitation at the forum is shorter than that stipulated
in a contract or specified in a foreign statute, the forum is free to apply
its own more restrictive rule on a procedural basis.\textsuperscript{134}

In line with the modern trend, courts may be expected to act with
increasing flexibility in choosing the statute of limitation to apply to
actions with multiple state contacts, even when such actions are based
on foreign statutes with built-in time limitations for enforcement. Thus
the New Jersey court and the Seventh Circuit Court of Appeals (on
appeal from a diversity case in Indiana) applied the forum's longer
statute of limitation to permit recovery in wrongful death actions which
would have been barred by the time limitation prescribed by the foreign
statutes under which the suits were brought.\textsuperscript{135} To the contrary have
been decisions respectively by the Arkansas and Missouri courts and
by a federal district court sitting in a New York diversity case.\textsuperscript{136}

H. \textit{Admonitory Legislation and Vicarious Liability}

Recent dram shop cases deserve some attention because of the novel
judicial approaches adopted by the respective courts. These approaches
contrast sharply with that of the 1928 Connecticut court in \textit{Levy v.
Daniels U-Drive Auto Renting Co.}\textsuperscript{137} The latter court, in its effort
to escape the law of the place of injury which afforded no recovery
to the injured plaintiff, felt impelled to characterize the personal in-
jury action as one brought by the third party beneficiary of the car
renting contract. Since the car had been rented by the tort-feasor
in Connecticut, the court allowed recovery under the law of the place
of contract which imposed liability on car renting agencies for cus-
tomer's torts.

The dram shop cases all involved liquor sales by defendant dram
shop operators in one state followed by automobile accidents in neigh-
boring states in which the respective intoxicated customers injured the
respective plaintiffs. \textit{In Osborn v. Borchetta},\textsuperscript{138} the sale was in New

\begin{itemize}
\item \textsuperscript{133} Home Insurance Co. v. Dick, 281 U.S. 397 (1930).
\item \textsuperscript{134} Wells v. Simonds Abrasive Co., \textit{supra} note 11.
\item \textsuperscript{135} Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176, 180 A.2d 129 (1962);
\textit{Gianni v. Fort Wayne Air Service, Inc., 342 F.2d 621 (7th Cir. 1965)}.
\item \textsuperscript{136} McGinty v. Ballentine Produce, Inc., 241 Ark. 533, 408 S.W.2d 609 (1966);
Curiss-Wright Corp., 224 F. Supp. 236 (S.D.N.Y. 1963)}. \textit{See also Glick v. Ballente-
line Produce, Inc., 343 F.2d 839 (8th Cir. 1965)}; \textit{Glick v. Ballentine Produce, Inc.,
396 S.W.2d 609 (Mo. 1965)}.
\item \textsuperscript{137} \textit{Supra} note 9.
\item \textsuperscript{138} 20 Conn. Sup. 163, 129 A.2d 238 (1956).
\end{itemize}
York and the accident in Connecticut. Both New York and Connecticut had dram shop acts but the New York court had long since construed its Act as having no extra-territorial effect and not applying to out-of-state torts. Nevertheless, the Connecticut court held the New York defendant liable under the New York Act, making no pretense of applying its own Act to a dram shop operator doing business only in New York. It dismissed the apparently inconsistent prior construction of the Act by the New York court with the following words:

The reasoning of the (New York) court in holding that the statute had no extraterritorial effect did not involve the rules of conflict of laws and is not applicable to the present case, where the action is brought in the state where the injuries occurred, whose courts give effect to the remedial statutes of a sister state.\textsuperscript{139}

Although this articulation of the distinction between the early New York case and the situation facing the Connecticut courts is less than satisfactory, the Connecticut court reached a good result. Where the New York Act would provide a remedy when the liquor sale and the tort injury have both occurred in New York, and where the Connecticut Dram Shop Act would do likewise when the liquor sale and the tort injury have both occurred within Connecticut, it would leave an anomalous vacuum in the law to deny the remedy simply because the sale occurred in one state and the injury in another. In this situation the Connecticut court realistically, but perhaps unconsciously, exercised its common law authority to make new law necessary to extend the purely domestic effect of the New York Act to the territory of Connecticut. It bridged the gap between the localized application of the respective statutes of the two states because “the dissimilarities between the Dram Shop Act of New York and that in our own state are not sufficient to constitute an enforcement of rights under the former a contravention of our public policy.”\textsuperscript{140}

Both of the other cases involved liquor sales in Illinois followed by customer torts in second states. In each instance suits were filed in Illinois, although one was brought in the federal court on the ground of diversity. Both complaints recited multiple counts including one under the Illinois Dram Shop Act and one in common law. The court in each case rejected the first count on the authority of earlier Illinois Supreme Court decisions to the effect that the Illinois Dram Shop Act did not apply to customer torts outside Illinois.\textsuperscript{141} However, in the

\begin{footnotesize}
\begin{enumerate}
\item[139.] Id. at 167, 129 A.2d at 241.
\item[140.] Id. at 165, 129 A.2d at 165.
\item[141.] Butler v. Wittland, 18 Ill. App. 2d 578, 153 N.E.2d 106 (1958) where all litigants were Illinois residents; Eldridge v. Don the Beachcomber, 342 Ill. App. 151, 95
\end{enumerate}
\end{footnotesize}
first case, *Waynick v. Chicago's Last Department Store*,\(^\text{142}\) the Seventh Circuit Court of Appeals entered judgment for the Michigan plaintiff, invoking the common law of Michigan as the place of wrong to impose liability on the Illinois dram shop operator. Although the court assumed no remedy was available under the Illinois law, the circuit 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.”\(^\text{143}\) The court therefore turned to Michigan common law, 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. This statute demonstrated to the court that enforcement against the Illinois dram shop of the Michigan common law right of action would in no way offend the interest or public policy of Illinois. Absent Illinois precedents, the Federal Court of Appeals, sitting as an Illinois court, adopted a rule of conflict of laws permitting it to enforce the liability imposed by Michigan common law on an Illinois defendant who had not come within the state of Michigan, owned no property there, and had neither performed nor authorized the performance of any action there.

In the second case, *Colligan v. Cousar*,\(^\text{144}\) the Illinois appellate court reached a similar result evidencing an intent to apply the common law of Indiana as place of wrong to impose liability on the Illinois dram shop operator. This ratified the earlier federal decision and is the more interesting because in the interval the Illinois Supreme Court, in an action involving dissimilar facts not related to conflict of laws, had held that the Illinois Dram Shop Act had effectively abrogated all common law remedies against tavern operators for injuries by an intoxicated customer.\(^\text{145}\)

The Illinois appellate court subsequently distinguished the *Waynick* and *Colligan* cases from the facts presented to it in *Liff v. Haezbroeck*.\(^\text{146}\) In the latter case the court refused to follow the earlier cases in imposing liability on the Illinois tavern keeper on the ground that

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\(^{142}\) 222 F.2d 322 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960).

\(^{143}\) *Id.* at 326.


the injured plaintiff had been the drinking companion of the customer tortfeasor. An interesting feature of the court’s opinion was its reliance on Illinois authorities to exonerate the defendant without any reference to the law of Iowa where the injury was actually sustained.

The judicial ingenuity exercised in the *Waynick* and *Colligan* cases to avoid the effect of the early Illinois dram shop decisions might not have been necessary had the view of the appellate court in *Graham v. General U.S. Grant Post No. 2665* been upheld. Rejecting the authority of the earlier decisions the court here imposed liability on the defendant for a tort which occurred in Wisconsin, where Wisconsin, having no comparable dram shop act would impose no similar liability. However, the Illinois Supreme Court has recently rejected this view on appeal.

Two other recent cases of interest imposed vicarious liability under local statute for tort injuries inflicted outside the state. *Farber v. Smolack* involved a New York statute which imposed on car owners liability for torts committed by persons using cars of such owners with the latter’s permission. The New York Court of Appeals held a New York owner liable under this statute for the death of a passenger in his car and injuries to others which were caused by the negligence of the man to whom the owner had lent his car for a round trip to Florida. The accident occurred on the return trip in North Carolina whose laws have imposed no liability on the owner. All parties were New York residents and the Court relied for support on an extension of the *Babcock* rule.

*Myers v. Gaither* concerned a District of Columbia statute prohibiting any one from leaving keys in an unattended car and imposing on violators liability for any injuries inflicted by thieves or other takers of the car in its operation on a public highway. The District of Columbia Court of Appeals construed this statute broadly to cover injuries caused by a thief in driving a stolen car on a Maryland highway.

In *Mitchell v. Craft*, the Mississippi Supreme Court applied its own comparative negligence statute, and not Louisiana’s contributory negligence rule, to wrongful death actions arising from a two car collision in Louisiana but involving only Mississippi residents. The Missis-

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147. *Supra* note 141.
148. *Id.*
152. 211 S.2d 509 (Miss. 1968). See note 100, *supra.*
sippi court expressed approval of the Babcock rule and this decision is a logical extension of its principles.

In *Kaufman v. American Youth Hostels*,\(^{158}\) in 1959, the New York Court of Appeals held that Oregon law determined the immunity of a New York charitable corporation for the death of a New York child riding in its bus in Oregon. In 1963, after the Babcock decision, a New York trial judge and the appellate division held in *Blum v. American Youth Hostels*\(^{154}\) that *Kaufman* had been overruled by the Babcock case. Curiously both suits involved deaths incurred in the same accident—one instance of where delay in prosecution worked to the advantage of the plaintiff. In the later *Blum* case the plaintiff recovered by application of New York law.

The Rhode Island Supreme Court also refused to apply the charitable immunity law of Massachusetts to a Massachusetts tort where the parties were all residents of Rhode Island.\(^{155}\)

**Conclusion and Comment**

The foregoing has been a roughly chronological review of the relevant court decisions during the past seventeen years. These decisions represent, and even constitute, the new developing trends in the judicial process of choosing the law applicable to torts affecting the interests of more than a single state. The development, even in any particular state, has been selective and sporadic. Progress has been empirical so far as the courts are concerned, one step and one issue at a time, and not in accordance with any grand design or full blown legal theory. Only later have the courts come to accept and rely upon more general supporting theories, mostly derived from academic sources.

For illustration, the California Supreme Court in *Grant v. McAuliffe*\(^{156}\) and the New York Court of Appeals in *Kilberg v. Northeastern Airlines, Inc.*\(^{157}\) originally based their novel application of forum law on the spurious characterization of the respective issues involved as "procedural". Subsequently the courts retracted such characterization in favor of more realistic reasons for their choice of forum law. The California court initiated the domiciliary rule with respect to the issue of intra-family liability in *Emery v. Emery*\(^{158}\) but expressly refrained

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156. Supra notes 17, 24 and 25.
157. Supra notes 49 and 52.
158. Supra note 28.
from doing so with respect to the issue of host-guest liability. Not until 1968, in *Fuller v. Greenup*,\(^ {159} \) did a California court have occasion to adopt a domiciliary rule to govern the latter issue of law. In 1958, a few years after the California Supreme Court’s departure from the place of wrong rule in its *Grant* and *Emery* decisions, a district court of appeals in the case of *Victor v. Sperry*,\(^ {160} \) involving only Californian parties, saw no way of enlarging the wholly inadequate measure of damages prescribed by Mexico, the place of wrong. Only in 1967 did the California Supreme Court finally have occasion in *Reich v. Purcell*\(^ {161} \) to abandon the place of wrong rule with respect to damages.

The course of the New York courts has been even more erratic. The Kilberg\(^ {162} \) dicta, while applying forum law with respect to the non-limitation of damages for wrongful death, refrained from doing so with respect to prejudgment interest on the amount of damages recovered. To date this distinction still prevails in the New York decisions for the subjective reason that the judges do not feel so strongly about allowing recovery of interest on a claim as they do about recovery of adequate damages for personal injuries or losses actually suffered.\(^ {163} \) Again, in *Babcock v. Jackson*,\(^ {164} \) the New York court set out the most generalized principles up to then adopted by any American court to determine the choice of law applicable to a tort. Yet only two years later the New York court seemed to disregard those principles in its *Dym* decision,\(^ {165} \) where the operative facts were similar except for such mechanical distinctions as the length of time the New York parties had been present in Colorado (the place of injury) and the initiation of their host-guest relationship in Colorado rather than New York. Then, in *Macey v. Rozbicki*,\(^ {166} \) it modified its *Dym* ruling and in *Miller v. Miller* and following cases\(^ {167} \) completely abandoned it and moved on to an extreme position favoring its own forum law at least with respect to the measure of damages and host-guest liability where one of its own domiciliaries is the injured party.

In the face of these inconsistent and conflicting decisions theories have emerged from academic and judicial sources which attempt to rationalize a basis for the new jurisprudence and to lay down guidelines for

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159. 267 Cal. App. 2d 10, 72 Cal. Rptr. 531 (1968).
161. 67 Cal. 2d 527, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).
162. Supra note 49.
163. Supra note 54.
164. Supra note 89.
165. Supra note 94.
166. Supra note 95.
167. Supra notes 74, 76 and 96.
its future development. The American Law Institute has long since abandoned the vested rights approach which led to the place of wrong rule enshrined in the original Restatement of 1934. It has been slow in reformulating new principles to substitute for it. Section 6 of its current Proposed Official Draft\(^{168}\) states that a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. This is indubitably correct granted that the legislative directive is clear, but in the vast majority of cases no such statutory directive exists, or if it does exist, its application to occurrences with multi-state elements is not clear. Section 6 goes on to enumerate factors which it deems relevant to the choice of the applicable rule of law. Some of these factors relate mostly to questions of contract or property law involved in planned transactions such as the protection of justified expectations and the certainty, predictability and uniformity of result. The enumerated factors more closely related to choice of tort law are the relevant interests and policies of the forum and of other states with respect to the determination of a particular issue. Section 145\(^{169}\) more specifically sets forth the general principle that the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in Section 6. Succeeding sections go on to say with respect to particular torts (\textit{e.g.}, personal injuries, injuries to tangible things, etc.) that the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied. Thus the Restatement continues to reflect a bias for the place of wrong doctrine—modified by a will-of-the-wisp search for the “most significant relationship”. The authors apparently continue to aspire to an ideal uniformity of result regardless of which state may be the forum.

If the Restatement doctrine of “most significant relationship” was universally adopted and could be evenly applied pursuant to some reliable system of judicial cybernetics it might be expected to discourage forum shopping and to achieve uniformity of result—the chief virtues now attributed to the place-of-wrong rule. Unfortunately, adjudication remains a very human process and no system of cybernetics has been able to assure much uniformity of result in decisions by courts sitting

\(^{169}\) Proposed Official Draft II, dated May 1, 1968.
in states with conflicting interests and policies. The influence of this "most significant relationship" standard may thus be more apparent than real. Judges may be more ready to invoke it to justify their decisions than to be influenced by it while reaching those decisions.

In contrast to the Restatement's approach is that based on the local-law premise that every court may properly apply its own substantive law to any transaction or event with which it has any significant relationship. It recognizes that the forum has the power of choice subject to only minor constitutional restraints. The Kentucky court has been the most forthright in stating this view. It adopted the Babcock rule in Wessling v. Paris when it applied its own host-guest law to permit recovery in an action involving Kentucky residents and an Indiana accident. One year later in Arnett v. Thompson it again applied its own inter-spousal liability rule to allow recovery in a suit between an Ohio wife and husband for injuries suffered in a Kentucky accident. It said:

... the conflicts question should not be determined on the basis of a weighing of interests, but simply on the basis of whether Kentucky has enough contacts to justify applying Kentucky law. Under that view if the accident occurs in Kentucky (as in the instant case) there is enough contact from that fact alone to justify applying Kentucky law. Likewise, if the parties are residents of Kentucky and the only relationship of the case to another state is that the accident happened there (as in Wessling), there is enough contact with Kentucky to justify applying our law. The fact that we will apply Kentucky law where Kentucky people have an accident in Ohio or Indiana does not require that we apply Ohio or Indiana law where people of one of those states have an accident here, because the basis of the application is not a weighing of contacts but simply the existence of enough contacts with Kentucky to warrant applying our law.

It may be significant that the court in reaching its decision stressed particularly that it did not consider sound the claimed potential of family disunity that was the basis of Ohio's interspousal immunity doctrine and found that the policy of Kentucky law was to allow recovery for injuries or death resulting from negligence. This clearly illustrates the "better rule of law" consideration discussed below.

Any realistic approach to a choice of law problem must take into consideration the particular perspective of the forum court which is called upon to make the choice. A court of one state will of necessity
view the relative governmental interests and policies of its own state and of a second state differently than will a court of the second state. The Restatement recognizes this when it says a court, subject to constitutional restrictions, will follow a statutory directive of its own state on a choice of law. Even absent a clear statutory directive, courts show an aptitude for choosing a rule of law which will promote the interest or implement the policy of their own state, particularly when they believe so doing will lead to a better result than a contrary choice. The foregoing review of cases bears this out. Thus courts do this with or without any pretense of claiming their particular state to be the one "with the most significant relationship" to the issue involved or of seeking uniformity.

In a 1966 law review article, Professor Leflar has reviewed the work of a number of legal scholars who have attempted to identify and define the unexpressed policy factors which they believe actually influence the judicial process of choosing applicable law in cases involving multi-state elements. It was Leflar's objective to restate and explain these factors with sufficient particularity that they themselves could be used as a practical (but not a mechanical) test of the rightness of choice-of-law rules and decisions. He succeeded in reducing the various schemata of his predecessors to five major choice-influencing considerations. He believes that if the courts come to recognize these considerations as the actual motivations underlying their choice-of-law decisions and acknowledge them as proper and legitimate criteria, then they can do a better job in making their decisions. They can drop their blind reliance on mechanical rules (e.g., place of wrong and various domiciliary and situs rules) and forego the manipulation of procedure-substantive characterizations. They could also cease the pretense of seeking and applying the law of the state with "the most significant relationship" to the issue involved.

He listed his five choice-influencing considerations: A. Predictability of results; B. Maintenance of interstate and international order; C. Simplification of the judicial task; D. Advancement of the forum's governmental interests; and E. Application of the better rule of law. We will comment on them in the order stated.

A. Predictability of results: This is a consideration of prime importance in any case involving socially favored consensual transactions

174. Supra note 169 at § 6 (1).
such as contracts and property arrangements of one kind or another, but it is not relevant in the area of unintentional torts. It includes the ideal of uniformity of decision regardless of the deciding forum, which would thus discourage forum shopping. This has been the chief virtue of the traditional place-of-wrong doctrine but it plays little part in the new trend of decisions in tort cases. Some preliminary forum shopping is very much in order in this day and age.\textsuperscript{176} If Kilberg had brought his action against the Northeast Airlines in Massachusetts instead of New York there is no reason to doubt that his recovery would have been limited to the Massachusetts $15,000 statutory limit. In \textit{Schwartz v. Schwartz},\textsuperscript{177} where the attorney saw fit to file suit in behalf of a New York wife against her husband in Arizona for injuries there suffered, he was lucky that the Arizona court broke precedent and applied domiciliary law, thus permitting recovery under New York law. Had the Arizona court dismissed the action under its own rule of interspousal immunity, the plaintiff's lawyer might have been a fit subject for a malpractice suit.

\textbf{B. Maintenance of interstate and international order:} As we have seen the Federal Constitution imposes but light compulsion on a state court in its choice of law to yield to the stronger interest of another state, at least when the first state itself has \textit{some} competing interest in the matter at issue.\textsuperscript{178} Nevertheless considerable comity may be exercised between the states. Thus in the \textit{Schwartz} case the Arizona court saw fit to apply New York law to the interspousal claim before it. It certainly was not compelled to do so by any constitutional mandate. In a \textit{Babcock} situation if a host from State \textit{A} picks up his neighbor in that state and drives into State \textit{B} where he has an accident, State \textit{A} has no reason to feel aggrieved if the State \textit{B} court allows the guest to recover damages for his injuries despite State \textit{A}'s host-guest immunity statute. Assuming \textit{A}'s statute is aimed at the prevention of fraud and collusion between the parties, State \textit{A} would not seem primarily concerned with such fraud and collusion in State \textit{B} litigation. This has become the business of State \textit{B}. On the other hand, suppose the State \textit{A} guest had been so ill advised as to file his suit against his host at their home in State \textit{A}. Here, if the State \textit{A} court had applied its own guest statute to deny recovery, it might be said to defeat State \textit{B}'s policy of permitting adequate damages for injuries caused by the negligent oper-

\textsuperscript{177} \textit{Supra} note 44.
\textsuperscript{178} \textit{Supra} notes 12-16.
ation of vehicles on its highway. It obstructs State B's police power in providing this civil sanction against careless drivers. Nevertheless, since both parties are residents of State A and the injured party brought his ill fortune on himself by choosing to sue in that state, it is not likely that State B will make a political issue of the decision.

On the other hand if the host and his guest had come from State B and had met with the accident in State A, State A could have no basis for complaint if the State B court had allowed the guest to recover in a suit filed there. The fact that State B had super-imposed this civil deterrent on careless driving in State A which State A itself would not have imposed would certainly not weaken State A's system of police regulation.

We have a different situation under the facts of Miller v. Miller and its following cases in New York. There the New York court ignored the Maine guest statute and allowed recovery against the Maine host on the basis of New York's single contact, i.e., the victim and his survivors were New York residents. As mentioned in our prior discussion of this case, the New York court did rely in part on extenuating circumstances of that case, but these circumstances did not exist in Tjepkema v. Kenney, nor in the analogous case of MacKendrick v. Newport News Shipbuilding & D.D. Co., where the trial judge announced: "Clearly, the public policy of our courts is to protect New York domiciliaries, wherever possible, from denial of recovery in another jurisdiction." If this group of New York cases does not violate the full faith and credit and due process clauses of the Federal Constitution, as construed by the United States Supreme Court, they do at least seem to constitute a breach in good interstate order by denying to the defendants substantive defenses prescribed by their states of domicile where the tortious acts occurred.

In similar situations where American citizens have been killed or injured in Brazilian accidents due to the negligence of Brazilian defendants, the federal courts have not hesitated in limiting recovery to the woefully inadequate damages permitted by Brazilian law. New

179. Supra note 74.
180. Supra note 76.
182. Id. at 1011, 302 N.Y.S.2d at 140.
183. Tramontana v. S.A. Empresa de Viamao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965); Ciprari v. Servicos Aereos Cruz-Mer, 24 F. Supp. 819 (S.D. N.Y., 1965). By way of contrast English authorities indicate a willingness of their courts to apply "the proper law of the tort" (i.e. English law) to a foreign occurrence and foreign nationals provided the occurrence is penal or otherwise wrongful by the law of the country where it occurred, e.g., Machado v. Fontes, 2 Q.B. 231 (1897), as modified by Chaplin v. Boys, 3 W.L.R. 322 (1969), aff'd 2 Q.B. 1 (1968).
factors come into play, of course, when the choice of law is between domestic law and that of a foreign nation, jealous of its territorial sovereignty. Here any arbitrary application of domestic law to a foreign occurrence working to the disadvantage of a foreign citizen, could be a cause for embarrassment to the United States government. The paramount interest of the federal government in foreign affairs may be expected to limit the freedom of a state court to extend the application of its law under such circumstances.\(^\text{184}\)

C. *Simplification of the judicial task:* There would be no more certain method of contributing to the simplification of the judicial task in tort cases than rigid adherence to the place of wrong rule or the adoption of other equally rigid mechanical rules dependent on domicile or situs. Clearly the modern trend is away from such mechanical rules and toward greater flexibility. Therefore we cannot consider this policy factor a controlling consideration. It is subordinate to the next two policy considerations.

D. *Advancement of the forum's governmental interests:* In the tort area the forum's governmental interests are usually derived from the local domicile of the parties involved or from the fact that the tortious act or acts were committed in whole or part within the forum's territory. The forum state itself may also be said to have an interest in doing justice between parties who are in its courts seeking an adjudication of their rights and liabilities. We have already made some brief comment under item B on the relative weight of the competing interests of a state of domicile and a state where the tortious act occurred. The extent to which a court may be guided in its choice of law by an evaluation of the relative justice or sociological merit of the alternative legal rules from which it has to choose is the subject of the next item, E.

E. *Application of the better rule of law:* Leflar's fifth choice-influencing consideration particularly had an immediate and emphatic impact on judicial reasoning and decisions. His article came out in the April 1966 issue of the *New York University Law Review.* In August of the same year, Judge Kenison of the New Hampshire Supreme Court relied on Leflar's five choice influencing considerations to support his majority opinion in *Clark v. Clark*\(^\text{185}\) which adopted the *Babcock* domiciliary rule choosing the law to govern the issue of host guest liability. This reversed the position that court had taken three years before on the same issue.\(^\text{186}\) After enumerating the five choice-

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influencing considerations, Judge Kenison concluded:

We have concluded that choice of law decisions ought to be based directly upon these relevant considerations, rather than upon any mechanical rule or technique of *ad hoc* characterization derived indirectly from such considerations.\(^\text{187}\)

With respect to the fifth consideration, Judge Kenison said:

We prefer to apply the better rule of law in conflicts cases just as is done in non conflicts, when the choice is open to us. If the law of some other state is outmoded, an unrepealed remnant of a bygone age, 'a drag on the coattails of civilization', . . . we will try to see our way clear to apply our own law instead. If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law. Courts have always done this in conflicts cases, but have usually covered up what they have done by employing manipulative techniques such as characterization and revoi.\(^\text{188}\)

This language causes us to suspect that the New Hampshire court today would overrule *Johnson v. Johnson* which we have already discussed in this paper.\(^\text{189}\) Judge Kenison had also written the court's opinion in that case, handed down only eight months earlier in January of 1966. He had there denied recovery to a Massachusetts wife in a suit against her husband for a New Hampshire tort, applying the domiciliary rule of interspousal immunity as a mechanical rule to determine the choice of law. The "better rule of law" principle would favor application of New Hampshire's rule of interspousal liability since few rules of tort law could more reasonably be described as "outmoded, an unrepealed remnant of a bygone age" than the interspousal immunity rule.\(^\text{190}\)

The Wisconsin Supreme Court quickly followed suit in a 1967 decision\(^\text{191}\) where the court adopted the *Babcock* rule. Here Justice Hefernan analyzed the problem on the basis of Leflar's five considerations and cited with approval Judge Kenison's opinion in the *Clark* case. Addressing himself to the "better rule of law" principle he said: "'Guest laws' are not consistent with the present day conditions in the field of motor vehicle control and automobile accident law."\(^\text{192}\) Again in 1968 the Wisconsin court used the Leflar approach in *Conklin v. Horner*\(^\text{193}\) (where the facts paralleled those in *Johnson v. Johnson* mentioned in the last paragraph) and reached a result which effectively overruled its

\(^{187}\) Id. at 2013.
\(^{188}\) Id. at 355, 222 A.2d at 209.
\(^{189}\) Supra note 41.
\(^{190}\) See W. PROSSER, LAW OF TORTS (3rd ed. 1964).
\(^{191}\) Heath v. Zellner, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).
\(^{192}\) Id. at 603, 151 N.W.2d at 676.
\(^{193}\) 38 Wis. 2d 468, 157 N.W.2d 579 (1968).
contrary 1962 decision in *Haynie v. Hanson*.\textsuperscript{194} With respect to the "better rule of law" principle the court said that the Illinois guest statute prescribing "wilful and wanton" negligence as a prerequisite for recovery "is bad law" and "we see only legal retrogression in extending the pernicious effects of such a law to Wisconsin."\textsuperscript{195}

Likewise the Rhode Island Supreme Court has praised Leflar's five points which it said "combine a 'workable brevity' with a 'reasoned analysis', leading this court to their application when faced with a conflicts of law situation."\textsuperscript{196} In its *Woodward* opinion, where it made the foregoing comments, it also decided that Rhode Island law should apply as to the host's duty of care to his passengers and the measure of damages, rather than Massachusetts' more restrictive laws. Again in *Brown v. Church of Holy Name*\textsuperscript{197} the court refused to apply the charitable immunity law of Massachusetts where the tort had occurred, saying:

We feel our policy to be the better rule. Although in most conflict circumstances it is difficult to say which is truly the better rule as between two conflicting policies, in the present situation even the Massachusetts Supreme Judicial Court has recognized the disfavor in which the charitable immunity doctrine is held.\textsuperscript{198}

The alacrity with which the foregoing courts have adopted and been influenced by Leflar's five considerations indicate the probability that those considerations will continue to exercise considerable influence in this field. They have been cited by a number of other courts as well. They are designed, of course, for all choice of law questions and not only for issues in tort to which this paper is limited. Leflar has been more successful than others in reducing policy principles to a manageable number of categories which courts are more apt to accept as a working basis. The five considerations certainly do not lead to certainty or uniformity of result but their flexibility is one of their virtues. A court can utilize them to reach decisions which it truly believes both best serves the interests and policies of its state in relation to other states and does justice to the parties. We believe that the five points provide the most practical approach to choice of law questions which has yet been offered. They may help to channel the "new trends" in the future.

\textsuperscript{194} 16 Wis. 2d 299, 114 N.W.2d 443 (1962). See notes 41-44, supra.
\textsuperscript{195} 38 Wis. 2d at 484, 157 N.W.2d at 587.
\textsuperscript{197} Brown v. Church of Holy Name, 252 A.2d 176 (R.I. 1969).
\textsuperscript{198} Id. at 181.