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Babcock v. Jackson: The Transition from the *Lex Loci Delicti* Rule to the Dominant Contacts Approach

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COMMENTS

BABCOCK V. JACKSON: THE TRANSITION FROM THE *LEX LOCI DELICTI* RULE TO THE DOMINANT CONTACTS APPROACH

In the recent case of *Babcock v. Jackson*[1] the New York Court of Appeals refused to apply Ontario's guest statute,[2] which would have barred recovery, even though Ontario was the place where the automobile accident giving rise to the suit occurred. *Babcock* is the culmination of a judicial trend toward the abandonment of the traditional *lex loci delicti* principle of choice of tort law, under which the law of the place of injury determines a plaintiff's right of action in tort. Having finally repudiated the traditional *lex loci delicti* principle,[3] the court in *Babcock* adopted a new approach to choice of tort law, under which the law of the state having "dominant contacts" with the transaction governs the suit. This comment will examine the *lex loci delicti* rule and the judicial transition from it to the new "dominant contacts" approach enunciated in *Babcock*, with some attempt to consider unresolved difficulties in the newer approach to choice of tort law.

THE *Lex Loci Delicti* RULE

The traditional rule for choice of tort law has been that the *lex loci delicti*, the law of the place of the wrong, determines all questions of substantive law in tort suits,[4] unless that law is contrary to a strong public

1 12 N.Y.2d 473, 191 N.E.2d 279 (1963), 240 N.Y.S.2d 743, *reversing* 17 App. Div. 2d 694, 230 N.Y.S.2d 114 (1962) (which contained an excellent dissenting opinion by Judge Halpern); 12 BUFFALO L. REV. 359 (1963). See also Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 34-39.

2 ONTARIO REV. STAT. (1960) ch. 172, § 105(2): "[T]he owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in . . . the motor vehicle."

3 The *lex loci delicti* rule had come under increasing attack from the writers. See, *e.g.*, in chronological order, Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928); Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q. REV. 483 (1931); Cook, *Tort Liability and the Conflict of Laws*, 35 COLUM. L. REV. 202 (1935); Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 TUL. L. REV. 4, 165 (1944); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945); Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); Stumberg, *"The Place of the Wrong": Torts and the Conflict of Laws*, 34 WASH. L. REV. 388 (1959); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960); Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1.

4 RESTATEMENT, CONFLICT OF LAWS § 384 (1934): "(1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state." See generally LEFLAR, CONFLICT OF LAWS § 110 (1959); Goodrich, *Tort Obligations and the Conflict of Laws*, 73 U. PA. L. REV. 19 (1924).

policy of the forum.[5] The rule has been associated historically with the vested rights theory,[6] under which rights and obligations defined by the law of a particular jurisdiction vest in the parties and follow them into any other jurisdiction where suit may be brought.[7] The vested rights theory presupposes that there is a single jurisdiction in which rights vest, even though the important aspects of the transaction may have occurred in more than one jurisdiction.[8] The theory consequently requires a jurisdiction-selecting rule to determine which law defines the rights which have vested,[9] and the *lex loci delicti* principle has served as this jurisdiction-selecting rule in suits for torts. It selects the law of the place of injury to govern all issues that arise.[10]

The claimed advantages of the *lex loci delicti* rule are that it leads to uniform treatment of a cause of action in all jurisdictions where it might be litigated, and therefore discourages forum shopping, and also that the rule is easy to apply and lends predictability and certainty to the conflict of laws.[11] These advantages are not to be discounted, but neither should they be given undue weight. The *lex loci delicti* rule leads to uniform treatment of a cause of action only to the extent that none of the possible forums has a strong public policy which would require a different result.[12] Moreover, forum shopping is probably not such a major evil that a choice of law rule should find much justification in its prevention. The *lex loci delicti* rule is undoubtedly easy to apply in the great majority of cases, but there are also many situations where the rule does not dictate a clear result. In defamation cases, for example, where injury to the plaintiff's reputation may occur in several states as the result of publication in a single news-

5 RESTATEMENT, *op. cit. supra* note 4, § 612, "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum." See Mertz v. Mertz, 271 N.Y. 466, 472, 3 N.E.2d 597, 599 (1936) (public policy defined as "the law of the state, whether found in the Constitution, the statutes or judicial records"); see generally Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

6 See 2 BEALE, CONFLICT OF LAWS §§ 377-92 (1935); RESTATEMENT, *op. cit. supra* note 4, §§ 377-92; STUMBERG, CONFLICT OF LAWS 8 (3d ed. 1963).

7 Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904) (opinion by Mr. Justice Holmes). "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 be found." *Id.* at 126; Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918) (opinion by Cardozo, J.). "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained." *Id.* at 113, 120 N.E. at 202.

8 In 2 BEALE, *op. cit. supra* note 6, § 378.1, the reporter for the first *Restatement, Conflict of Laws* states that: "If, therefore, there was no cause of action created at the place where the person or thing took harm, or if no cause of action there is proved to the court, there can be no recovery for tort."

9 See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 198 (1933).

10 RESTATEMENT, *op. cit. supra* note 4, § 377: "The place of the wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

11 Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 969, 977 (1952); Comment, 61 COLUM. L. REV. 1497, 1508 (1961).

12 See note 5 *supra*.

paper, the law of each of the several states would seem to have equal claim to being the applicable law.[13] Furthermore, the *lex loci delicti* rule has not lent predictability and certainty to conflict of laws to the extent anticipated. There have been a number of notable instances in which courts have either attempted to avoid the effect of the rule by straining its exceptions, or have refused to apply the rule at all.[14] The rule causes unpredictability to the extent that it provokes such aberrant behavior on the part of courts seeking to avoid its results.

Perhaps the major vice of the *lex loci delicti* rule is that it takes no account of policy considerations, and therefore prefers an obvious to a just result. The courts that follow this rigid choice of law rule are prevented from deciding cases with a view to the social desirability of the outcome.[15] For example, the state of injury may have no connection with the occurrence other than being the situs of the injury, nor any interest in the outcome of suit. The forum, on the other hand, may have a legitimate desire to apply its own law, because of contacts with the occurrence which give the forum an interest in giving effect to its particular policies. Thus, if a man in state *X* writes a letter to an old friend in state *Y* which contains certain defamatory remarks about the former's wife, publication and therefore injury to the wife's reputation occur in state *Y*. Suppose the law of state *X* does not permit a wife to sue her husband in tort, but state *Y* has no such prohibition. Under the *lex loci delicti* rule, the wife could sue her husband in accord with the law of *Y*,[16] even though no relevant policy consideration would favor this result. State *Y*'s policy, if any, relates only to spouses residing within state *Y*,[17] and yet state *X*'s policy, which is directly concerned with the parties in the case,[18] is considered to have no importance. Strangely enough, if the old friend omits to open the letter until he sets foot in state *X*, the law of *X* governs instead because state *X* rather than *Y* is the *lex loci delicti*. In this situation, however, the choice of the law of state *X* as the governing law is made regardless of whether state *X* has an

13 See Dale System v. Time, 116 F. Supp. 527, 530 (D. Conn. 1953).

14 See the cases discussed in text accompanying notes 19-57 *infra*.

15 Yntema, *supra* note 3, at 482-83. "The vice of the vested rights theory is that it affects to decide concrete cases upon generalities which do not state the practical considerations involved and so it must perforce obscure the issue." *Id.* at 482-83.

16 RESTATEMENT, *op. cit. supra* note 4, § 377, Rule 5, at 457 concludes that in speaking of harm to reputation, the place of the wrong is where the defamatory statement is communicated.

17 It should also be noted that certain additional problems exist, the first being whether the absence of a law in state *Y* providing for interspousal immunity implies the existence of any affirmative policy on the question. Second, there is a problem whether the policy, if any, favoring recovery is intended to benefit all plaintiffs suing in state *Y* or only plaintiffs residing in state *Y*. See note 81 *infra*. In the interspousal immunity context, however, there is no reason to suppose that state *Y* would have any particular concern one way or another whether nonresident plaintiffs could sue their spouses.

18 Whether the policy of state *X* to grant interspousal immunity is designed to prevent disruptions in the marital relationship, or to prevent collusion against insurers, that policy is relevant to the case because the parties, and probably their insurers, have their domicils in state *X*. See note 80 *infra*.

actual interest in giving effect to its policy of interspousal immunity. It is clear that the results of such a mechanical rule can be capricious indeed.

DOCTRINE IN TRANSITION

Faced with the occasionally inequitable results of the *lex loci delicti* rule, courts in recent years have not always applied the rule in a purely mechanical way. On the contrary, certain recent opinions have demonstrated an increasing dissatisfaction with the rule, which amounts to a gradual recognition of a need for change in the law. These cases, which may have seemed mere aberrations at the time of their decision, now appear to stand together as a trend toward the outright rejection of the rule, which finally occurred in *Babcock v. Jackson.*

In *Gordon v. Parker*[19] Massachusetts applied its own law to permit an action for alienation of affections against a Massachusetts domiciliary even though Pennsylvania, the state of matrimonial domicil and therefore presumably also the state of injury, had abolished civil actions for alienation of affections. Judge Wyzanski referred in passing to the first *Restatement*'s rule that the forum "generally applies the law of the state where an alleged wrong has occurred in deciding whether a person has sustained a legal injury."[20] He proceeded almost immediately, however, to analyze the relative interests of Massachusetts and Pennsylvania in the suit, and concluded that Massachusetts' interest in limiting misconduct within her own borders was superior to any interest Pennsylvania might have had in refusing to give a remedy. Implicit in the decision was a rejection of the notions that a tort occurs where injury finally results, and that the law of the place of injury must necessarily govern the suit. However, the holding was carefully restricted to the facts of the case; there was no direct criticism of the *lex loci delicti* rule, but only an intimation that it was not relevant in the particular situation.[21]

In *Dale System v. Time*,[22] a federal district court in Connecticut concluded that the law of the place of plaintiff's domicil should apply to a libel action where publication had occurred in numerous states.[23] This holding relieved the court of having to locate a particular state of injury whose law would govern the suit, a problem under the *lex loci delicti* rule which, in this sort of situation, would have inevitably proved embarrassing. The court insisted that its holding was consistent with the *lex loci delicti* concept, although the effect of the holding was clearly to allow the forum to apply its own law where, as the domicil of the plaintiff, it had a sig-

19 83 F. Supp. 40 (D. Mass. 1949), 62 HARV. L. REV. 1065 (1949).

20 83 F. Supp. at 41.

21 *Id.* at 42. A further advantage of the court's approach in *Gordon* was that it avoided the problem raised by the *lex loci delicti* rule of having to decide where the injury occurred.

22 116 F. Supp. 527 (D. Conn. 1953), 102 U. PA. L. REV. 801 (1954).

23 116 F. Supp. at 530.

nificant contact with the case and therefore an interest in promoting recovery. In a situation where the *lex loci delicti* rule could not dictate a clear result because of the plurality of states of injury, the court adopted a rule based on contacts rather than caprice.

In *Grant v. McAuliffe*[24] the Supreme Court of California concluded that California law should govern the question of survival of a tort action where Arizona, the place of the injury, did not permit tort actions to be brought after the defendant's death. All parties in the case were residents of California, and the estate of the deceased tort-feasor was also being administered in California. Justice Traynor acknowledged that *lex loci delicti* should govern unless the question of survival was procedural. He nonetheless refused to apply the *lex loci delicti* rule on the grounds that (1) survival of causes of action is a procedural question to be governed by the law of the forum[25] and (2) the survival of causes of action is a question of the administration of decedent's estates, and thus to be governed by the law of the defendant's domicil.[26] Both rationales pointed to application of California law in the *Grant* case. Justice Traynor was apparently so impressed by the contacts of California with the case that he sought justifications for applying California law. He probably would not have wished Arizona law to govern the question if Arizona had been the forum, even though this would have been the effect of his holding that survival of a cause of action is a procedural matter to be governed by the law of the forum. Moreover, in order to characterize the question as procedural, Justice Traynor was required to rely upon cases decided before the 1934 endorsement of the *lex loci delicti* rule by the first *Restatement*, instead of looking to the more recent cases which had characterized the issue as substantive.[27] His characterization of the question as procedural appears to have been a concession to the *lex loci delicti* rule, the effect of which the court was trying to avoid in a case where the forum had the most significant contacts with the matter at issue.[28] The fact that the court also felt the need to characterize the question as one of administration of decedent's estates, rather than one of tort liability, indicates that the court may have been dissatisfied with its characterization of the issue as procedural. It is probable that the motive for both characterizations was to reach a preferred result in the particular case without directly challenging the general rule of *lex loci delicti*.[29]

24 41 Cal. 2d 859, 264 P.2d 944 (1953); see Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958).

25 41 Cal. 2d at 866, 264 P.2d at 949.

26 *Ibid.*

27 *Id.* at 863, 264 P.2d at 947.

28 See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 185-86 (1933), where the author included the procedural exception in his list of avenues of escape for courts wishing to do justice rather than to follow mechanical choice-of-law rules.

29 This conclusion finds support in a later law review article in which Judge Traynor commented on his own opinion in the *Grant v. McAuliffe* case. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 670 n.35 (1959): "It may not be amiss

Further dissatisfaction with the *lex loci delicti* rule and a preference for a choice of law rule based on contacts was expressed in dictum in *Walton v. Arabian American Oil Co.*[30] Judge Frank remarked that *lex loci delicti* should not apply where a tort is committed in an uncivilized country or in one having no law that civilized countries would recognize as adequate. In such cases, the courts should apply the substantive law of the country which is most closely connected with the parties and their conduct.[31] Invocation of the public policy exception to the *lex loci delicti* rule would also have prevented application of a barbarous law without departing from the framework of the *lex loci delicti* rule. In this kind of situation, however, Judge Frank apparently preferred a choice of law methodology based on contacts.

In *Schmidt v. Driscoll Hotel*[32] a Minnesota court demonstrated a much stronger impatience with the *lex loci delicti* rule, and openly refused to apply it at all in a case where Wisconsin, as the place of the tort, had had no connection with the occurrence other than being the situs of the injury, and no particular interest in the outcome of suit. Both parties were residents of Minnesota, and the defendant had violated the Minnesota dramshop statute by selling liquor to an intoxicated Minnesota resident whose driving later injured the plaintiff in Wisconsin. The court recognized that Minnesota's interests "in admonishing a liquor dealer whose violation of its statutes was a cause of such injuries; and in providing for the injured party a remedy therefor" would become ineffective if Wisconsin law were applied.[33] The court concluded that the *lex loci delicti* rule "should not be held applicable in fact situations such as the present to bring about the result described and that a determination to the opposite effect would be more in conformity with the principles of equity and justice."[34] It is noteworthy that there was no attempt in *Schmidt* to rationalize objection to the *lex loci delicti* rule under the public policy exception. Moreover, the court did not limit its objection to the operation of the rule in the particular case. The implication was rather that the *lex loci delicti* rule should not be applied *in any case* where the result would not be in conformity with principles of equity and justice; the rule was only to be followed if a judicial weighing of interests suggested that application of the *lex loci delicti* would lead to a just result.[35] Thus the court openly rejected the very idea of a mechanical rule for choice of law. Actual selection of

to add that although the opinion 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."

30 233 F.2d 541 (2d Cir. 1956).
31 *Id.* at 545.
32 249 Minn. 376, 82 N.W.2d 365 (1957), 71 HARV. L. REV. 1351 (1958).
33 249 Minn. at 380, 82 N.W.2d at 368.
34 *Ibid.*
35 *Ibid.*

law was to be made by a weighing of interests, and the only function of the *lex loci delicti* rule was to rationalize the result in cases where the place of injury also had the strongest interest in the suit. Retained in such an emasculated form, the rule might better have been rejected altogether.

In *Haumschild v. Continental Cas. Co.*[36] the court expressed a different sort of dissatisfaction with the operation of the *lex loci delicti* rule in a situation involving interspousal immunity from tort liability. Without hearing argument by counsel on the point, the court chose on its own motion to overrule previous cases which had held that the law of the place of the wrong determines whether spouses could sue each other in tort.[37] The Wisconsin court held that, where the spouses resided in Wisconsin, a wife was permitted under Wisconsin law to sue her husband for injuries resulting from an accident in California. The rationale of the holding was that the question of interspousal immunity was one of family law to be governed by the law of the domicil of the parties, and not a question of tort law to be governed by the *lex loci delicti.*[38] The court clearly rejected the *lex loci delicti* rule in the particular type of case, with the further comment that "it must be recognized that, in the field of conflict of laws, absolutes should not be made the goal at the sacrifice of progress in furtherance of sound public policy."[39] The concurrence suggested an alternative method by which the same result could have been reached in the particular case without expressly overruling cases adhering to the *lex loci delicti* rule.[40] However, the court in *Haumschild,* like the court in *Grant v. McAuliffe,* preferred to reclassify the problem rather than permit the *lex loci delicti* rule to continue to control the kind of case in issue. In *Haumschild,* as in *Schmidt,* the court was no longer content to avoid the effect of the *lex loci delicti* rule in a particular case, but was also willing to challenge the applicability of the rule itself to a whole category of cases. Moreover, the distinct implication of both opinions was that the *lex loci delicti* rule was generally unsatisfactory because it failed to take account of relevant policy considerations.

In the famous case of *Kilberg v. Northeast Airlines*[41] the New York Court of Appeals made a special effort to undermine the *lex loci delicti* rule, although without condemning it directly. The administrator of a

36 7 Wis. 2d 130, 95 N.W.2d 814 (1959), 73 HARV. L. REV. 785 (1960). See Ford, *Interspousal Immunity for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement,* 15 U. PITT. L. REV. 397 (1954).

37 *E.g.,* Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931).

38 Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 137, 95 N.W.2d 814, 818 (1959).

39 *Id.* at 138, 95 N.W.2d at 818.

40 *Id.* at 143, 95 N.W.2d at 821. The dissent would have applied California law, which classifies immunity as a matter of status to be determined by the law of the domicil of the parties.

41 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). This case has been noted in many law reviews, including 61 COLUM. L. REV. 1497 (1961); 46 CORNELL L.Q. 637 (1961); 49 GEO. L.J. 768 (1961); 74 HARV. L. REV. 1652 (1961); 15 RUTGERS L. REV. 620 (1961); 28 U. CHI. L. REV. 733 (1961); 47 VA. L. REV. 692 (1961). See also Currie, *supra* note 1, at 1-22.

New York decedent brought an action in New York against a common carrier under the Massachusetts wrongful death statute, which limited recovery to 15,000 dollars. Massachusetts was the place of the plane crash which killed Mr. Kilberg, and also the state of the defendant's incorporation. It was held that the plaintiff could recover damages under the Massachusetts wrongful death statute without regard to the 15,000-dollar limit on recovery. Like the court in the *Haumschild* case, the court in *Kilberg* was in no way required to take a position challenging the traditional operation of the *lex loci delicti* rule, for the question of the applicability of the Massachusetts damage limitation had not even been argued on appeal.[42] Nevertheless, the court considered the question sua sponte and rationalized its decision that the damage limitation did not apply by resorting to the procedural and public policy exceptions to the rule.[43] It is notable that the court was willing to fly in the face of authority that the measure of damages was a question of substantive law,[44] without even being asked to do so. Moreover, the court practically confessed that its classification of the question as procedural was merely a device to protect the interests of New York citizens, "without doing violence to the accepted pattern of conflict of laws rules."[45] In this regard the position of the court in *Kilberg* is most closely comparable to the opinion in *Grant v. McAuliffe*. In both cases, the courts invoked the procedural exception to avoid the normal effect of the *lex loci delicti* rule in situations where that law would fail to give adequate compensation to citizens of the forum.

The procedural exception was inappropriately invoked in *Kilberg*. The implicit assumption underlying the procedural exception would seem to be that merely procedural rules will not affect the substantive rights which vest in the plaintiff, and that, for the sake of convenience, the court may therefore apply forum law to questions of procedure rather than bothering to familiarize itself with the law of another jurisdiction.[46] However, in *Kilberg* the holding that a damage limitation was procedural clearly expanded the plaintiff's right to recovery, and the court would hardly have

42 9 N.Y.2d at 37, 172 N.E.2d at 526, 211 N.Y.S.2d at 134 (1961).

43 *Id.* at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137. It should be noted that if the *lex loci delicti* rule is stated by saying that the law of the place of injury governs only all questions of *substantive* law in tort suits, then the so-called procedural exception is not really an exception but merely a corollary.

44 Western Union Tel. Co. v. Brown, 234 U.S. 542 (1914); Northern Pac. R.R. v. Babcock, 154 U.S. 190 (1894); LEFLAR, *op. cit. supra* note 4, § 65.

45 9 N.Y.2d at 39, 172 N.E.2d at 528, 211 N.Y.S.2d at 135.

46 The customary explanation of the procedural exception speaks principally in terms of inconvenience to the forum. For example, in RESTATEMENT, *op. cit. supra* note 4, at 701 it is said that:

> "Such [procedural] limitation excludes those phases of the case which make administration of foreign law by the local tribunal impractical, inconvenient, or violative of local policy. In these instances, the local rules at the forum are applied and are classified as matters of procedure."

The implicit assumption that procedural determinations do not affect substantive rights is clearly erroneous, as the result in *Kilberg* indicates.

been inconvenienced by limiting recovery. The justifications for invoking the procedural exception were therefore not present. The court chose, however, not to follow Supreme Court cases which had classified the question of damage limitations as a substantive matter.[47] Moreover, the court's holding that damage limitations are procedural was misdirected if the real desire of the court was merely to compensate New York citizens. If suit were to be brought in Massachusetts by a New York plaintiff on the basis of the New York wrongful death statute, the Massachusetts court, if it chose to follow the *Kilberg* rationale, would *limit* the recovery available to the New York citizen because the measure of damages would be a procedural matter to be governed by the law of Massachusetts. The court itself appeared to recognize the ineptness of its holding, and therefore chose to "treat the measure of damages *in this case* as being a procedural or remedial question."[48] The court's willingness to call a question procedural because the interests of citizens of the forum might thereby be promoted indicated an unashamedly manipulative attitude toward the *lex loci delicti* rule which is not in keeping with the rule's objectives of uniformity and predictability of result.

The dominant rationale for the holding in *Kilberg* was that the damage limitation of the Massachusetts statute should not be enforced because it was contrary to the strong public policy of the forum, which favored unlimited recovery.[49] This rationale was also too broad if the motive of the court was only to compensate New York citizens, for a New York court would be obliged under this rationale to give unlimited recovery to nonresident plaintiffs as well. The court, however, was apparently willing to give effect to this public policy only when New York had an interest in the application of that policy. This interest arose in *Kilberg* through the contact of New York with the case, as the state where the plaintiff's intestate resided. Thus the court stated, "For our courts to be limited by this damage ceiling (*at least as to our own domiciliaries*) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law."[50] It thus seems clear that the New York court was using the public policy exception as a device to allow the forum to apply its own law where its contacts with the parties gave the forum a substantial interest.[51]

The difficulties in *Kilberg* could be said to stem from the fact that the court did not go far enough in rejecting the *lex loci delicti* rule. For example, if the court had frankly admitted that it preferred to apply the

47 Slater v. Mexican Nat'l R.R., 194 U.S. 120, 126 (1904); Northern Pac. R.R. v. Babcock, 154 U.S. 190 (1894).

48 9 N.Y.2d at 42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137. (Emphasis added.) The procedural characterization was subsequently withdrawn in Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

49 9 N.Y.2d at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136.

50 *Ibid.* (Emphasis added.)

51 See Paulsen & Sovern, *supra* note 5, at 1016.

forum law where the forum's contacts with the case seemed more significant, then the court might have applied the entire New York wrongful death statute,[52] and the court would not have had to strain exceptions to the *lex loci delicti* rule to reach the desired result.[53] All the features of the *Kilberg* opinion which seem objectionable from the point of view of vested rights thinkers should rather be seen as symptoms of a profound dissatisfaction with the "accepted pattern of conflict of laws rules."

In *Pearson v. Northeast Airlines*[54] the Court of Appeals for the Second Circuit stated that the result in *Kilberg* did not violate the full faith and credit clause of the Constitution because "a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law."[55] The court was of the opinion that "by weighing the contacts of various states with the transaction, New York may, without interfering with the Constitution, shape its rules controlling the litigation."[56] Thus, if the New York court was able reasonably to find that its contacts with the dispute were substantial, the court was constitutionally free to apply its own state law whether or not it justified its decision in terms of the public policy exception to the *lex loci delicti* rule. Moreover, the court in *Pearson* specifically rejected the notion that adherence to the *lex loci delicti* rule was a test of the constitutionality of a state's choice of law.[57] The opinion thereby left the door open for outright rejection of the rule in the subsequent case of *Babcock v. Jackson.*

In sum, the cases from *Gordon* to *Pearson* represent an increasing impatience with the *lex loci delicti* rule, a dissatisfaction which showed itself in a variety of ways. The *Dale System* and *Grant* cases strained to make their conclusions seem consistent with the *lex loci delicti* rule. The later *Schmidt* opinion, on the other hand, openly declared that its resolution

52 N.Y. DECED. EST. LAW § 130. In order to apply the New York wrongful death statute in the *Kilberg* situation, however, the court would have had to overrule authority holding that the statute applies only to a wrongful death occurring in New York. Cooper v. American Airlines, 149 F.2d 355 (2d Cir. 1945).

53 A further difficulty in *Kilberg* arose from the court's willingness to enforce a foreign statutory right of action without giving effect to a damage limitation which was arguably part of that very right. In Western Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914), Mr. Justice Holmes concluded that a statute which creates a cause of action for death by a wrongful act may set a limit to the amount which may be recovered; such a limitation is part of the right and is governed by the *lex loci delicti. Contra,* Wooden v. Western N.Y. & P.R.R., 126 N.Y. 10, 26 N.E. 1050 (1891). In any event, if the court had chosen to apply the New York wrongful death statute, the problem of whether a damage limitation was part of the definition of the right of recovery would have been avoided, because New York's statute has no damage limitation. N.Y. DECED. EST. LAW § 130.

54 309 F.2d 553 (2d Cir. 1962), 63 COLUM. L. REV. 133 (1963).

55 309 F.2d 553, 559 (2d Cir. 1962). In Richards v. United States, 369 U.S. 1, 15 (1962), it was said that: "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." See Currie, *The Constitution and Choice of Law: Governmental Interests and Judicial Function,* 26 U. CHI L. REV. 9 (1958).

56 Pearson v. Northeast Airlines, 309 F.2d 553, 561 (2d Cir. 1962).

57 *Id.* at 557.

was based entirely on considerations the rule ignored. While *Gordon v. Parker* refused to find that the rule had any relevance to its own particular case, the court in *Schmidt* and *Haumschild* concluded that the rule had no relevance to whole categories of cases. The *Grant* and *Kilberg* cases relied on very weak authority to invoke the procedural exception to the rule, and *Haumschild* overruled previous decisions which held that the rule applied. While *Gordon* and *Dale System* admitted no dissatisfaction with the workings of the rule, *Haumschild* and *Kilberg* called the rule in question without even being asked to do so. *Schmidt* simply refused to apply the rule to the case, while *Dale, Grant,* and *Haumschild* formulated specific new choice of law rules which were at least major qualifications of, if not exceptions to, the *lex loci delicti* rule. And, in *Kilberg,* the court confessed openly that it was rationalizing in order to avoid the normal effect of the rule. In all the cases the courts demonstrated a desire not to be bound by a mechanical rule which failed to accommodate the equities of the parties to relevant policies of the states. The courts apparently preferred to rely on contacts as a basis for choosing the applicable law.

THE NEW APPROACH AND ITS IMPLICATIONS

In *Babcock v. Jackson*[58] the New York Court of Appeals became the first court to repudiate completely both the old vested rights doctrine and the *lex loci delicti* rule for choice of tort law.[59] The court conceded that the traditional *lex loci delicti* choice of law rule could claim the advantages of certainty, predictability, and ease of application.[60] The court nevertheless discarded the rule because it "ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues"[61] and therefore leads to "unjust and anomalous results."[62] In justifying its refusal to apply the *lex loci delicti* rule, the court contended that "it is New York, the place where the parties resided, where their guest-host relationship arose and where the trip began and was to end, rather than Ontario, the place of the fortuitous occurrence of the accident, which has the dominant contacts and superior claim for application of its law."[63] The court concluded that disposition of a particular issue in a tort suit must turn on the law of the jurisdiction which has the strongest interest in the resolution of that issue.[64]

58 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). The *Babcock* case has been noted in numerous law reviews, including 28 ALBANY L. REV. 128 (1964); 13 AM. U.L. REV. 158 (1963); 30 BROOKLYN L. REV. 107 (1963); 32 FORDHAM L. REV. 158 (1963); 77 HARV. L. REV. 355 (1963); 79 L.Q. REV. 484 (1963); 47 MARQ. L. REV. 255 (1963); 15 SYRACUSE L. REV. 202 (1963); 49 VA. L. REV. 1362 (1963). See *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212 (1963).

59 See *id.* at 1229.

60 Babcock v. Jackson, 12 N.Y.2d 473, 478, 191 N.E.2d 279, 281, 240 N.Y.S.2d 743, 746-47 (1963).

61 *Ibid.*

62 *Id.* at 479, 191 N.E.2d at 282, 240 N.Y.S.2d at 747.

63 *Id.* at 483, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 751.

64 *Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

The new dominant contacts approach in *Babcock* differs from the old *lex loci delicti* rule in two major respects. The *Babcock* approach looks to more than the single contact of injury in selecting the governing law and, further, the *Babcock* approach may look to more than one jurisdiction to supply the governing law. The new dominant contacts choice of law principle is not a jurisdiction-selecting rule designed to designate the law of a single state to govern all aspects of a tort claim. Instead, the law which will govern each issue arising out of the claim is determined by deciding which state has the dominant contacts with the case relevant to that particular issue. Thus, while the court in *Babcock* was willing to let Ontario law govern the issue of standard of care, because the accident occurred on an Ontario highway, the court felt that New York law should govern the issue of a host's liability to his guest, since the dominant contacts of the parties and their trip were with New York. The dominant contacts choice of law principle in *Babcock* is in effect a jurisdiction-selecting rule for each issue in the case, which considers more than the single contact of injury in choosing the governing law for each issue. In concluding that different issues in a case may be governed by the laws of different jurisdictions, *Babcock* is the first case to endorse the actual result in the previous *Kilberg* decision, which established wrongful death liability under Massachusetts law and unlimited recovery under the law of New York.

In announcing the new approach, the court in *Babcock* noted with approval[65] the most recent draft of the *Restatement (Second), Conflict of Laws*,[66] which reads, "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort."[67] The new *Restatement* suggests in section 379 that in determining the state with the most significant relationship the courts are to consider four contacts: the place of injury, the place of conduct, the place of domicil of the parties, and the place of the relationships, if any, between the parties. The *Babcock* dominant contacts approach and the *Restatement* significant relationship principle are similar in that both look to more than one contact in selecting the governing law. However, the two approaches differ in that the principle advocated by the second *Restatement*, like the old *lex loci delicti* rule of the first *Restatement*,[68] serves as a jurisdiction-selecting rule to choose the law of one state to govern all aspects of the case. Under the view of the second *Restatement*, a court faced with the *Babcock* fact situation would have to

[65] *Id.* at 482, 191 N.E.2d at 283-84, 240 N.Y.S.2d at 749.

[66] RESTATEMENT (SECOND), CONFLICT OF LAWS (Tent. Draft No. 8, 1963).

[67] *Id.* at § 379. See Comment, 51 CAL. L. REV. 762, 772 (1963). This comment suggests that the significant relationship test of the *Restatement (Second)* is unworkable because it fails to evaluate criteria by which significance is to be determined, and offers no assistance to a court faced with two competing rules based on diametrically opposed policies.

[68] See note 4 *supra*. See also Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933).

apply the law of one jurisdiction to both the issues of standard of care and host's liability to his guest, on the assumption that the law of the state with the "most significant relationship" to the case as a whole is also the most appropriate law to govern each issue in the case. The *Babcock* approach does not make this assumption, and therefore does not have to find a reasonable basis for selecting the law of one state to govern an entire case. The court in *Babcock* is probably correct in saying that "there is no reason why all issues arising out of a tort claim must be resolved by reference to the law of the same jurisdiction,"[69] and, if so, the *Babcock* approach avoids an assumption which makes choice of law under the second *Restatement* view unnecessarily difficult. The *Babcock* approach does not require determination of which state has "the most significant relationship with the occurrence *and* with the parties" when one issue concerns the occurrence alone, and another issue the parties alone.

A further advantage of the *Babcock* approach is that it permits courts not wishing to apply the law of one jurisdiction to every issue to avoid reclassifying certain problems simply to escape the usual rule for choice of tort law. For example, in the *Haumschild* fact situation a court adopting the *Babcock* approach would not have to reclassify the question of interspousal immunity as one of family law rather than tort law in order to apply the law of the parties' domicil. The new approach would allow the court to say that the law of the parties' domicil should govern the question of interspousal immunity because the place of domicil has the dominant contacts with this particular issue in the case. The desired result would thereby be reached within the framework of a choice of tort law rule, and not by avoiding such a rule. Similarly, in the *Grant v. McAuliffe* situation the law of the place of the administration of the decedent's estate would be said to govern the question of survival of a tort action because that jurisdiction has the dominant contacts with the issue of survival. In this fashion, the *Babcock* approach would have provided a more satisfactory rationale for the decisions of most of the pre-*Babcock* cases discussed above.

Despite the fact that the *Babcock* approach has clear advantages over the views of both *Restatements*, it nevertheless raises difficult problems. If *Babcock* merely stands for the proposition that the law of the state having dominant contacts with the particular issue will govern that issue, it gives little direction to courts which must decide what contacts are dominant in a particular case. The ambiguity in the notion of dominant contacts can be at least partially clarified, however, by assuming that apparent contacts of a state with the matter in issue become significant at all only insofar as they give that state an interest in the application of its own policies to the dispute.[70] Under this analysis, a contact is significant only to the extent

[69] Babcock v. Jackson, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 752 (1963).

[70] See Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178: "2. When it is suggested that the rule of a foreign state should furnish

that it makes some state policy relevant to the resolution of the issue. For example, in *Babcock,* New York had a policy of requiring the driver of an automobile to compensate his guest for injuries caused by the driver's negligence,[71] and this policy was made relevant to the liability issue in *Babcock* by the fact that New York was the state of domicil of both parties and also the state where their guest-host relationship arose.[72] The policy of compensating the guest made these contacts significant because the contacts made the policy relevant. On the other hand, Ontario's policy concerning the host's liability was not relevant to the issue because Ontario had no connection with the parties or their relationship.[73] The policy behind the Ontario guest statute was to protect Ontario insurers against collusion,[74] but this policy was irrelevant to the dispute, because the host did not have an Ontario insurer. The absence of any Ontario contact with this issue in the case meant that Ontario had no interest in applying its own policy, and that therefore the New York policy should govern.

If signifiant contacts give a state an interest in applying its own policies to a dispute, then the state with dominant contacts will have the strongest interest in resolving the issue in its own way. However, the question remains as to what makes contacts dominant in situations where more than one state has significant contacts and therefore conflicting interests arise. For example, in the *Kilberg* situation, Massachusetts as the domicil of the defendant had an interest in applying its policy of limiting recovery, but New York as the domicil of the plaintiff's intestate had an interest in applying its policy of unlimited recovery.[75] Likewise, in *Babcock,* if the host had had an Ontario insurer, both Ontario and New York would have had significant contacts with the issue of guest-host liability. It is not immediately obvious why the contacts of one state should be considered to predominate over those of another. Any answer to this question will depend upon whether courts adopt a quantitative or a qualitative approach, that is, whether courts will merely count contacts or will evaluate them according to their individual significance.

the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. . . . 3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy."

71 Babcock v. Jackson, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

72 *Id.* at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 751.

73 On the other hand, it could be argued that the question in *Babcock* of whether to apply Ontario's guest statute was a question of the standard of care to be demanded of the host. Under this analysis, a policy of Ontario would be made relevant to the dispute by Ontario's contact with the case as the scene of the accident, since even the court in *Babcock* admitted that the issue of standard of care should be governed by Ontario law. *Id.* at 483, 191 N.E.2d at 285, 240 N.Y.S.2d at 750-51.

74 *Survey of Canadian Legislation,* 1 U. TORONTO L.J. 358, 366 (1936).

75 Currie, *Conflict, Crisis and Confusion in New York,* 1963 DUKE L.J. 1, 16.

If courts adopt a quantitative approach, then the law of the state with the greatest number of significant contacts with the issue will govern. However, a "dominant contacts" test based on the mere number of significant contacts does not solve the problems of conflicting interests which arise when two or more states each have an equal number of significant contacts. In such cases, courts would be tempted to find other contacts of one of the states, and count them as significant without a careful evaluation of their individual importance, in order to reach or rationalize a result. For example, the court in *Babcock* listed the circumstances that the trip during which the injury occurred began and was to end in New York as significant contacts of New York with the dispute,[76] although these contacts would seem to have in themselves no special relevance to New York's compensatory and admonitory polices underlying the host's liability to his guest. Moreover, the court counted the occurrence of the tort in Ontario as only one contact,[77] although strictly speaking Ontario was both the place of the defendant's wrongful conduct and the place of the resulting harm. The court apparently wanted to be sure that New York's contacts would outnumber those of Ontario. Implicit in the listing of contacts in *Babcock* is the suggestion, whether consciously intended or not, that the state with dominant contacts is merely the state with the greatest number of contacts. A quantitative approach of this sort would seem to encourage excessive concern with a mere listing of contacts, without corresponding analysis of their relative significance to the matter in issue.[78] As a result, a quantitative approach would probably not give the courts sufficient guidance in coming to a conclusion in cases where two or more states each have significant contacts with the matter in dispute. The courts in these cases would most likely count contacts so as to rationalize a result already determined in some other way

A qualitative approach, however, would probably give the courts no further guidance where two or more states each had significant contacts with a matter in dispute. The underlying policy conflicts would still require the courts to make a choice and rationalize it by saying that the state whose law was chosen had the most significant contact with the matter in dispute. For example, in *Kilberg*, a conclusion that New York had the more significant contacts because it was the domicil of the plaintiff's intestate, would not have been a basis for decision but only a justification for the choice of law. The same preference for New York's compensatory policy which would have led the court to choose New York law would also have been the motive for calling New York's contacts more significant than those of Massachusetts.

[76] Babcock v. Jackson, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 751 (1963).

[77] *Ibid.*

[78] See *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1248 (1963) (comment by Professor Leflar rejects quantitative approach).

The dominant contacts test enables courts to find significant contacts as the basis for choosing applicable law. However, the test becomes merely a rationalization once it has been determined that more than one state has significant contacts with the dispute. When a choice must be made as to which state has the dominant contacts, the courts are left with no satisfactory means of determining which contacts are more significant than others, regardless of whether the courts adopt a quantitative or qualitative approach. The concern of the courts at this point must be not with contacts themselves but rather with the policies which made these contacts significant in the first place. A preference for one policy over another in situations like *Kilberg* must be determined in some other way than evaluation of contacts, since contacts can only make policies relevant, but not controlling. This is not to say that a contacts test can never itself dictate a result. In cases where only one state has significant contacts, the dominant contacts test would naturally select the law of that state to govern the issue. But where two jurisdictions both have an unquestioned interest based on contacts in giving effect to their own policies, the choice of law must depend on the court's own decision as to which policy it prefers, with no help from the dominant contacts choice of law principle.

Before a court can resolve a policy conflict, however, it must discover what policies underlie the potentially applicable laws, and also define the scope of those policies. In many instances, laws may be merely arbitrary rules for solving problems, without any particular policy justification behind them.[79] Furthermore, even if a law in question is intended to effectuate a policy, its legislative history will often be so inconclusive and judicial interpretations so sparse or diverse that the underlying policy can not be articulated clearly.[80] Moreover, it may not be clear whether a policy, once discovered, is intended to be unlimited in its application or restricted to the domiciliaries of the particular state.[81] The *Babcock* approach forces courts to consider these problems in situations where several states apparently have significant contacts with the dispute.

In fact, the dominant contacts principle of the *Babcock* case is not really a choice of law rule at all, but rather an approach to the problem which has neither the advantages nor disadvantages of a rule. The new approach permits the courts to consider the contacts of states with an issue, as a prelude to deciding which relevant policies should be given effect. The results are not dictated, and the decision may be difficult. Therefore the advan-

[79] Professor Max Rheinstein of the University of Chicago Law School made this point during a critique of the Cooley Lectures held at The University of Michigan Law School on Jan. 29, 1964.

[80] For example, in regard to statutes granting interspousal immunity from tort suits, the policy may be to prevent a disruption of the marriage relationship, to prevent collusion by the spouses against their insurer, or to prevent unwitting participation by the court in possible fraud.

[81] For example, in *Kilberg*, it is uncertain whether the policy of the New York Constitution allowing unlimited recovery for wrongful death is intended to benefit all plaintiffs suing in New York courts, or only those plaintiffs who happen to reside in New York.

tages of certainty, predictability, and ease of application which a general rule would afford are undoubtedly lost. The new approach, however, provides a framework for decision in which the equities of the parties and the policies of the states are sure to be considered. The language of the new approach may prove in true conflict situations to be no more than a means by which to rationalize decisions, rather than the actual grounds of decision. But at least the courts, before reaching their results, will have had to examine many relevant considerations necessarily ignored by a mechanical rule. The new approach in effect places choice of tort law in the judge's discretion in complex cases where several states have a legitimate interest, based on contacts, in giving effect to their policies.[82] The new approach therefore allows courts to avoid the unsatisfying results which sometimes occurred under the old *lex loci delicti* rule. However, the new approach will prove itself preferable to the old rule only if the courts are willing to demonstrate the judicial sophistication, precision, and impartiality it requires.

Cases of true policy conflict will probably be rare.[83] Most cases can probably be resolved by a recognition that the policy of one jurisdiction is not relevant to the particular issue. For example, in *Gordon v. Parker* Pennsylvania as the place of the matrimonial domicil probably had no policy in favor of preventing recovery for alienation of affections outside of Pennsylvania. In cases of true conflict, a court might choose one policy over another on the basis of the relative strength with which the policy is asserted in the law of each state. For example, the court in *Kilberg* might have been justified in preferring the New York policy of unlimited recovery for wrongful death because this policy was articulated in the New York Constitution, whereas the Massachusetts policy of limited recovery was merely found in a statute. Likewise, if one competing policy finds support in a long line of precedent, it might well be preferred over another policy which is enunciated in only a handful of cases. In true conflict cases where the relative strength of policy assertion is about equal, a court might look to the expectations of the parties as to which law would govern. It is true that the parties' expectations are not so great a factor in tort as in contract law, because the parties probably did not anticipate that a tort would occur. Nevertheless, if there had been a true conflict of policy in *Babcock*, for example, the court might have been justified in applying New York rather than Ontario law because this was the law the parties

82 See *Comments on Babcock v. Jackson*, *supra* note 78, at 1251. Professor Leflar feels the *Babcock* approach leaves room for discretion in choice of law. Similarly, RESTATEMENT (SECOND), CONFLICT OF LAWS, § 379a, comment *e*, 18, 19 (Tent. Draft No. 8, 1963), allows judicial discretion in choice of tort law by permitting application of "the local law of a state which is not the place of conduct and injury in a situation where application of the local law of the state of conduct and injury would lead to a result which the court believes to be unjust."

83 This will be true in part because laws often are merely arbitrary rules for handling problems, without any basis in particular policies. See note 79 *supra*.

would probably have expected to govern their guest-host relation if they had considered the matter at all.

Since the *Babcock* dominant contacts approach does not itself resolve cases of true policy conflict, courts facing such conflicts may need guidelines for the exercise of discretion such as those suggested above in order to arrive at decisions to be rationalized in terms of dominant contacts.[84] Professor Cavers of Harvard has suggested in his recent Cooley Lectures given at Michigan Law School that there is a need for "principles of preference" to help judges faced with true policy conflicts.[85] Perhaps such principles, if there is truly a need for them, would best be formulated by the judges themselves, who have been enabled by the new *Babcock* approach to announce more candidly than before the actual reasons for their decisions.

Arthur M. Sherwood

84 Alternative guidelines have been proposed by Professors Currie and Ehrenzweig. See Currie, *supra* note 70, at 178: "If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest." Compare Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 644 (1960): "[P]ropositions as to a priori 'applicable' or 'governing' law, such as the lex loci delicti or situs . . . should be preserved, but only where, and insofar as, they have sufficiently crystallized in certain specific situations so as to be tenable as other exceptions from a basic lex fori."

85 Cavers, Thomas M. Cooley Lecture No. 3, "Principles of Preference in Resolving True Conflicts," delivered Jan. 24, 1964, at the University of Michigan Law School.