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Conflict of Laws--Erosion of Lex Loci Deliciti Theory

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been duly established. *West Virginia State Bar v. Earley, supra;* 81 A.B.A. REP. 490 (1956). The State Bar Constitution and By-Laws recognize the right of the West Virginia Supreme Court of Appeals to control the bench and bar. In light of the inherent power of the judiciary, along with the duties of the prosecuting attorney, his constitutional name, and the above mentioned statutes, it appears that West Virginia would follow the general rule that prosecuting attorneys must be attorneys at law.

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Conflict of Laws—Erosion of Lex Loci Delicti Theory

P, an automobile guest, brought this negligence action in New York against defendant, host motorist's executrix, for injuries received in an Ontario, Canada accident. The lower court dismissed the complaint on the ground that Ontario's guest statute barred recovery, and the guest appealed. *Held,* reversed. New York, as place where parties resided, guest-host relationship arose, and automobile trip began and was to end, rather than Ontario, as place of accident, had dominant contacts and superior claim for the application of its law upon question whether guest was barred merely because she was a guest. *Babcock v. Jackson,* 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963).

The principal case presents the interesting problem of whether the law of the place of the tort shall invariably govern the availability of relief, or whether the applicable choice of law rule should also reflect a consideration of other factors relevant to the purposes to be served by the enforcement or denial of the remedy? The instant decision provides a major breakthrough in the judicial struggle to abandon the strict place-of-the-wrong theory.

The traditional choice of law rule has been that the substantive rights and liabilities arising out of a tortious occurrence are determined by the law of the place of the tort. GOODRICH, CONFLICT OF LAWS § 92 (3rd ed. 1949); RESTATEMENT, CONFLICT OF LAWS § 378 (1934). This is the general rule prevailing throughout the various jurisdictions of this country. *Chicago, R. I. & P. Ry. v. Glascock,* 187 Ark. 343, 59 S.W.2d 602 (1933); *Ryan v. Scanlon,* 117 Conn. 428, 168 Atl. 17 (1933); *Norfolk & W. Ry. v. Barney,* 262 Ky. 228, 90 S.W.2d 14 (1936). The rule owes its theoretical foundation to

what has been termed the "vested rights doctrine." This theory holds that when suit is brought upon a foreign tort, the forum, instead of creating a right in accordance with its own Law, enforces a right created by the proper foreign law, which is the law of the place where the wrong occurred. That place, it is assumed, has jurisdiction or power to create the right which, as a vested right or as an obligation, follows the tort feasor and may be enforced wherever the tort feasor may be sued. *Slater v. Mexican Nat'l R.R.,* 194 U. S. 120 (1904); STUMBERG, CONFLICT OF LAWS 182, 184 (2d ed. 1951). As is readily apparent, such a rule provides the distinct advantages of certainty, ease of application and predictability.

In the principal case, however, the New York court refused to follow the traditional rule. The court reasoned that unjust and anomalous results could readily ensue from inflexible adherence to a theory that ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. The court further noted that the established theory had been strongly discredited in recent years with a judicial trend toward its abondonment or modification. *Richards v. United States,* 369 U. S. 1 (1962); *Kilberg v. Northeast Airlines, Inc.,* 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961). Similar judicial disposition is also reflected in a variety of other decisions relating to workmen's compensation, tortious occurrences arising out of a contract, issues affecting the survival of a tort right of action and intrafamilial immunity from tort. *Alaska Packers Assn. v. Industrial Acc. Comm.,* 294 U. S. 532 (1935); *Bowles v. Zimmer Mfg. Co.,* 277 F.2d 868 (7th Cir. 1960); *Grant v. McAuliffe,* 41 Cal. App. 2d 859, 264 P.2d 944 (1953); *Koplik v. C. P. Trucking Corp.,* 27 N.J. 1, 141 A.2d 34 (1958), respectively.

The New York court, in the instant case, following its earlier decision in *Kilberg v. Northeast Airlines, Inc., supra,* vindicated and extended that decision by embracing the "center of gravity" or "dominant contacts" doctrine as the appropriate approach for accomodating the competing interests in tort cases with multi-state contacts. The court said that 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. *Auten v. Auten,* 308 N.Y. 155, 161, 124 N.E.2d 99, 102 (1954). *Swift & Co. v. Bankers Trust Co.,*

280 N.Y. 135, 141, 19 N.E.2d 992, 995 (1939). The court further reasoned that New York, which garaged, licensed and undoubtedly insured the automobile, had a greater and more direct interest than Ontario, which was merely the fortuitous place of accident. Consequently, New York should be afforded paramount control for the application of its law.

West Virginia has long followed the traditional rule. For example, the right of substantive recovery for personal injuries is governed by the law, both prospective and retroactive, of the sovereignty where the accident took place. Stated another way, liability for a tort depends upon the law of the place of the accident. See *Goldstein v. Gilbert,* 125 W. Va. 250, 23 S.E.2d 606 (1942); *Grim v. Moore,* 121 W. Va. 299, 3 S.E.2d 448 (1939); *Clise v. Prunty,* 108 W. Va. 635, 152 S.E. 201 (1930); *Owen v. Appalachian Power Co.,* 78 W. Va. 596, 89 S.E. 262 (1916).

The West Virginia court encountered the problem presented by the instant case in *White v. Hall,* 118 W. Va. 85, 188 S.E. 768 (1936). In that case *P,* an automobile guest, was injured while riding through Indiana in *D* host's automobile. The parties apparently resided in West Virginia and were to return there after a brief trip to Illinois. Indiana had a guest statute which prevented recovery by a guest unless the accident was intentional on the part of the owner or operator or caused by his reckless disregard of the rights of others. IND. STAT. ANN. § 10142.1 (Burns Supp. 1929).

The West Virginia court held that as the accident causing the injury occurred in Indiana, the right of recovery was controlled by the automobile guest statute of that state. This decision would place West Virginia in a position contrary to that of the principal case and in line with the prevailing American view.

Admittedly, strict adherence to any mechanical formula of law opens the door to certain judicial inconsistencies. The ease of modern travel and communication has made it increasingly so. But, given a less auspicious factual situation than that presented in the principal case, it can well be argued that the New York rule would not simplify the problem but would confound it. For example, consider the difficulty in applying the above rule in an automobile negligence action which involved several passengers from several states traveling to several different destinations. Suppose that these various states had passenger statutes which required the showing of

gross negligence, or comparative negligence, or completely prohibited actions against the driver. What law should prevail? Clearly, such phrases as "center of gravity," "weighing of contacts," and "paramount control," seem inappropriate.

In conclusion then, it is submitted that the Liberal approach adopted by the New York court does not provide a cure-all. Its application should be restricted to situations closely analogous to that of the instant case.

George Charles Hughes, III

Criminal Law—Extension of Felony Murder Rule

One of three robbers was killed by their intended victim. For this death, the two surviving co-felons were charged with first degree murder under Michigan's felony-murder rule. The trial court quashed the charge and the state appealed. *Held,* affirmed. The killing of one robber by the intended victim is not murder, but rather justifiable homicide and does not render the surviving robbers guilty of first degree murder under the Michigan statute. *People v. Austin,* 120 N.W.2d 766 (Mich. 1963).

The principal case raises the problem of deciding where the line should be drawn in applying the felony-murder rule. Those who favor extending the doctrine feel that the felon should be held responsible for all the consequences of his criminal undertaking, regardless of who is killed or who actually did the killing. Those who would restrict the application of the rule argue that it would be an infringement upon legislative powers to extend the rule to situations like the principal case because the legislatures intended that the homicide must have been directly committed by the defendant-felon or an accomplice in furtherance of the common purpose in order to invoke the felony-murder statute.

The case of *Commonwealth v. Thomas,* 382 Pa. 639, 117 A.2d 204 (1955), presented the same facts as existed in the principal case. The Pennsylvania court held the surviving robber could be convicted of first degree murder, thus expanding decisions made in *Commonwealth v. Almeida,* 362 Pa. 596, 68 A.2d 595 (1949), and *Commonwealth v. Moyer,* 357 Pa. 181, 53 A.2d 736 (1947). In the *Moyer* case an innocent party was killed during a battle between