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Constitutional Power of State to Develop Its Own Conflict-of-Laws Doctrine

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it is entirely possible that the major companies will seek to integrate into retail marketing.⁷³ It is interesting to note the divergent views taken on this problem by the court of appeals and Supreme Court in the *Sun Oil* case. The court of appeals stated, "[T]he natural effect of the Commission's holding [affirmed by the Supreme Court] will be to push already highly-integrated majors into combining direct retailing with their other operations. . . ."⁷⁴ The Supreme Court, on the other hand, dismissed the problem with the curt statement: "[W]e see no evidence that such forward integration is inevitable or required as the only feasible alternative. It has not yet occurred and suppliers . . . have discerned sound and apparently persuasive reasons for heretofore rejecting direct ownership and operation of their stations; it is wholly reasonable to believe that such incentives persist."⁷⁵

John R. Johnson

Constitutional Power of State to Develop Its Own Conflict-of-Laws Doctrine

A New York citizen was killed when the defendant's airliner bound from New York crashed in Massachusetts. The decedent's administratrix sued the airline, a Massachusetts corporation, in a New York federal district court¹ on a cause of action for wrongful death created by a Massachusetts statute.² The trial court granted recovery,³ but refused to apply the maximum recovery limitation and

⁷³ "Some companies, including Sun, have indicated that if the good-faith defense is closed to them in situations similar to that Sun faced in Jacksonville . . . they would seriously consider changing marketing patterns. Such changes might involve a switch to operation of their own stations. . . ." *Oil & Gas Journal*, Jan. 21, 1963, p. 39.

⁷⁴ *Sun Oil Co. v. FTC*, 294 F.2d 465, 478 (5th Cir. 1961). See Notes approving this decision, 75 *Harv. L. Rev.* 429 (1961); 1962 *Duke L.J.* 300; 47 *Va. L. Rev.* 1229 (1961); 62 *Col. L. Rev.* 171 (1962).

⁷⁵ 371 U.S. at 528-29.

¹ Jurisdiction was based upon the parties' diverse citizenship. 28 U.S.C. § 1332 (1958). If the administrator suing on a statutory cause of action for wrongful death is the real party in interest, his citizenship ordinarily will determine whether diversity exists. *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957); *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931). In the instant case, both the administratrix and the decedent were citizens of New York.

² "If the proprietor of a common carrier of passengers . . . causes the death of a passenger, he . . . shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his . . . servants or agents. . . ." *Mass. Gen. Laws Ann. ch. 229, § 2* (1955). While the appeal in the instant case was pending, the Massachusetts statute was amended to raise the maximum recovery allowed thereunder to \$30,000. *Mass. Gen. Laws Ann. ch. 229, § 2* (Supp. 1962).

³ *Pearson v. Northeast Airlines, Inc.*, 201 F. Supp. 45 (S.D.N.Y. 1961).

the punitive standard for the measure of damages contained in the Massachusetts statute because those provisions were contrary to the public policy of New York.⁴ The court of appeals reversed,⁵ holding that the refusal to apply the limitation provision and the punitive standard constituted a violation of the full faith and credit clause.⁶ On rehearing en banc, *Held, reversed*: A state, in properly exercising its power to develop its conflict-of-laws doctrine, constitutionally may apply a foreign state's wrongful death statute without honoring the limitation on recovery and the standard for the measure of damages contained therein.⁷ *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

In a technical sense, "it is impossible for a court to enforce any liability [*i.e.*, a cause of action generally] except one created by the law of the state in which it sits."⁸ Therefore, a cause of action arising under the law of a foreign jurisdiction is enforceable in the forum only if that claim can be assimilated into the corpus of the law of

⁴ *Pearson v. Northeast Airlines, Inc.*, 199 F. Supp. 539 (S.D.N.Y. 1961). "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." N.Y. Const. art. I, § 16. For a discussion of the purpose of this provision, see Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526, 527-28 (1961) and Medinger v. Brooklyn Heights R.R., 6 App. Div. 42, 46, 39 N.Y.S. 613, 616 (Sup. Ct. 1896).

⁵ *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131 (2d Cir. 1962).

⁶ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1. Congress has enacted an implementing statute. 28 U.S.C. § 1738 (1958).

⁷ However, the court of appeals en banc affirmed the unanimous determination by the panel that the addition of prejudgment interest was to be controlled by Massachusetts law. *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131, 136 (2d Cir. 1962). The Massachusetts wrongful death statute provides that interest shall accumulate from "the date of the writ." Mass. Gen. Laws Ann. ch. 229, § 11 (1955). But, the New York wrongful death act provides for the computation of interest from the date of the decedent's death. N.Y. Deced. Est. Law § 132 (1949). On the basis of the reasoning of the New York Court of Appeals in Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 172 N.E.2d 526 (1961), see note 31 *infra*, the trial court concluded that prejudgment interest was to be awarded in accordance with the law of New York; it accordingly denied defendant's motion to strike out such interest. *Pearson v. Northeast Airlines, Inc.*, 201 F. Supp. 45 (S.D.N.Y. 1961). Thereafter, but prior to the appeal in the instant case, the New York supreme court held that the *lex loci delicti* governs the running of prejudgment interest in a wrongful death action based upon a foreign statute; prejudgment interest was characterized as a part of the damages which, under the New York conflict-of-laws rule, are determined by the *lex loci delicti*. *Davenport v. Webb*, 15 App. Div. 2d 42, 222 N.Y.S.2d 566 (Sup. Ct. 1961), *aff'd*, 11 N.Y.2d 392, 183 N.E.2d 902 (1962). The Kilberg decision, *supra*, was distinguished on the narrow ground that it merely expressed New York's strong public policy "with respect to limitations in wrongful death actions." *Id.* at 904. (Emphasis added.)

⁸ *Siegmann v. Meyer*, 100 F.2d 367 (2d Cir. 1938). See Cavers, *The Two "Local Law" Theories*, 63 Harv. L. Rev. 822 (1950).

the forum through the application of its conflict-of-laws rule.⁹ Generally, in a tort action, the procedural law of the forum¹⁰ and the substantive law of the place of injury, or *lex loci delicti*,¹¹ govern the cause of action. However, if the *lex loci delicti* contravenes the authoritatively declared public policy of the forum, the forum constitutionally may refuse to entertain the suit¹² or may apply its own substantive law to adjudicate the claim.¹³ Similarly, a civil claim of a penal nature which arises under the law of a foreign jurisdiction is not enforceable in the forum.¹⁴ In any situation, a federal court exercising diversity jurisdiction must apply the substantive law of

⁹ *Siegmann v. Meyer*, *supra* note 8, at 368; *Guinness v. Miller*, 291 Fed. 769 (S.D.N.Y. 1923), *aff'd*, 299 Fed. 538 (2d Cir. 1924), *aff'd sub nom.*, *Hicks v. Guinness*, 269 U.S. 71 (1925); Restatement, Conflict of Laws § 7 (1934).

¹⁰ Goodrich, Conflict of Laws §§ 80-81 (3d ed. 1949); Leflar, Conflict of Laws §§ 60-61, 118 (1959); Restatement, *op. cit. supra* note 9, at § 585; Stumberg, Conflict of Laws 134-68 (2d ed. 1951).

¹¹ Goodrich, *op. cit. supra* note 10, at §§ 93-94; Leflar, *op. cit. supra* note 10, at §§ 110, 113-14; Restatement, *op. cit. supra* note 9, at §§ 377-79, 384, 391; Stumberg, *op. cit. supra* note 10, at 182-87. Texas is one of the jurisdictions in which this rule has been enacted by statute. Tex. Rev. Civ. Stat. Ann. art. 4678 (1952). For a discussion of the Texas statute, see *Jones v. Louisiana W. Ry.*, 243 S.W. 976 (Tex. Comm. App. 1922).

¹² *Hudson v. Von Hamm*, 85 Cal. App. 323, 259 Pac. 374 (D. Ct. App. 1927) (liability of parent for tort of minor child); *Jacobsen v. Saner*, 247 Iowa 191, 72 N.W.2d 900 (1955) (alienation of affections suit by divorced spouse); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936) (interspousal tort action); *Continental Supply Co. v. Syndicate Trust Co.*, 52 N.D. 209, 202 N.W. 404 (1924) (contract stipulating for attorney's fees); *El Paso & Juarez Traction Co. v. Carruth*, 255 S.W. 159 (Tex. Comm. App. 1923) (tort law of foreign jurisdiction substantially different from that of forum). See Goodrich, *op. cit. supra* note 10, at § 97; Leflar, *op. cit. supra* note 10, at § 48; Restatement, *op. cit. supra* note 9, at § 612; Stumberg, *op. cit. supra* note 10, at 198-99. As to the unenforceability in Texas of a contract made in another state by a married woman domiciled in Texas, see *Union Trust Co. v. Grosman*, 245 U.S. 412 (1918) and *Bramwell v. Conquest*, 2 S.W.2d 995 (Tex. Civ. App. 1928). But the forum constitutionally cannot dismiss a foreign cause of action if there is in fact no genuine antagonism between the *lex loci delicti* or *lex loci contractu* and the public policy of the forum. *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951). See Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969, 972-80 (1956).

¹³ *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); *Gray v. Blight*, 112 F.2d 696 (10th Cir. 1940); *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959). See Paulsen & Sovern, *supra* note 12, at 992-94; Goodrich, *op. cit. supra* note 10, at § 97; Leflar, *op. cit. supra* note 10, at § 48; Restatement, *op. cit. supra* note 9, at § 612; Stumberg, *op. cit. supra* note 10, at 198-99. See also *King v. Bruce*, 145 Tex. 647, 201 S.W.2d 803, *cert. denied*, 332 U.S. 769, *rehearing denied*, 332 U.S. 820 (1947) and *Taylor v. Leonard*, 275 S.W. 134 (Tex. Civ. App. 1925) (application of forum's community property law to contracts entered into elsewhere by spouses domiciled in forum). As to Texas marital rights and the conflict of laws, see generally 1-2 Speer, *Marital Rights in Texas* §§ 35, 50, 100, 298, 535, 613, 751 (4th ed. 1961).

¹⁴ See *Huntington v. Attrill*, 146 U.S. 657 (1892); *Osborn v. Borchetta*, 20 Conn. Sup. 163, 129 A.2d 238 (Super. Ct. 1956); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918); *Clay v. Atchison, T. & S.F. Ry.*, 228 S.W. 907 (Tex. Comm. App. 1921). See Goodrich, *op. cit. supra* note 10, at § 97; Leflar, *op. cit. supra* note 10, at § 49; Restatement, *op. cit. supra* note 9, at § 611; Stumberg, *op. cit. supra* note 10, at 172-74.

the state in which it is sitting,¹⁵ including that state's conflict-of-laws rule.¹⁶

The application of the *lex loci delicti* in its entirety or else not at all is not an iron rule of constitutional law, even though most courts have analyzed and resolved their respective conflict-of-laws problems in accordance with the Restatement.¹⁷ The full faith and credit clause does not require in every instance the literal and complete application of the foreign substantive law after its recognition by the forum as the source of the claim. Generally, therefore, a state having substantial connections with a cause of action thereby acquires such a sufficient interest therein that it constitutionally may disregard, in whole or in part, the *lex loci delicti*¹⁸ and may apply its own substantive law in adjudicating the claim.¹⁹ Thus, it has been held that a cause of action arising under the *lex loci delicti* may be qualified or limited by statutory defenses of the forum.²⁰ Similarly, the forum may impose reasonable conditions upon the enforcement of a contract entered into or to be performed elsewhere.²¹

Prior to the instant case, the New York Court of Appeals had concluded in *Kilberg v. Northeast Airlines, Inc.*,²² which arose out of the same airplane crash as did the instant case, that the adminis-

¹⁵ Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

¹⁶ Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

¹⁷ See notes 10-14 *supra* and accompanying text.

¹⁸ But probably not in matters of fraternal society insurance. See Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947), holding that the law of the domicile of the fraternal society is controlling. See Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205, 238 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 52 (1958).

¹⁹ Carroll v. Lanza, 349 U.S. 408, 412-13 (1955); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935); see also Richards v. United States, 369 U.S. 1, 15 (1962). But if the interest asserted by the forum is in fact nonexistent and there are no substantial connections with the cause of action, the forum's dismissal of the claim or application of its own law to the adjudication thereof constitutes a violation of the due process clause of the fourteenth amendment (*Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), *New York Life Ins. Co. v. Head*, 234 U.S. 149 (1914)) and/or the full faith and credit clause. *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951).

²⁰ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953); *Bournias v. Atlantic Maritime Co.*, 220 F.2d 152 (2d Cir. 1955).

²¹ *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954); see *McDowell v. National Sur. Corp.*, 68 So. 2d 189, 193 (La. Ct. App. 1953), *appeal denied*, 347 U.S. 995 (1954); *Griffin v. McCoach*, 313 U.S. 498 (1941). There is much confusion in the conflict of laws as to what law determines the validity of a contract. See Goodrich, *op. cit. supra* note 10, at § 110; Leflar, *op. cit. supra* note 10, at §§ 123, 125; Restatement, *op. cit. supra* note 9, at §§ 332, 358; Stumberg, *op. cit. supra* note 10, at 225-40. But a significantly different approach has been advocated recently. See Restatement (Second), Conflict of Laws § 332 (Tent. Draft No. 6, 1960).

²² *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961).

trator of an estate must base his claim upon the Massachusetts wrongful death act.²³ The court held that under New York law recovery for wrongful death could be granted only in tort and that the New York wrongful death act²⁴ has no extraterritorial application.²⁵ However, the New York court further stated that in future actions it would refuse to apply the 15,000 dollar limitation contained in the Massachusetts statute²⁶ because such provision was contrary to the public policy of the forum,²⁷ as expressed in the New York Constitution.²⁸ Moreover, the New York court, with respect to its conflict-of-laws rule, characterized the measure of damages in a wrongful death action as procedural in nature;²⁹ therefore, in future actions of this type based on a foreign statute, New York courts would apply New York's compensatory standard instead of those standards prevailing in other jurisdictions inconsistent therewith, such as the punitive standard of Massachusetts.³⁰ The court of

²³ *Id.* at 529. Although the plaintiff in *Kilberg* was in effect advised to amend his cause of action to conform with the court's decree, he declined to do so and instead discontinued his action. *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131, 132 n.3 (2d Cir. 1962).

²⁴ N.Y. Deced. Est. Law §§ 130-34 (1949). Consistent with the state constitution, see note 4 *supra*, New York's wrongful death act provides that damages are to be awarded without any limitation as "fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought." *Id.* at § 132. Compare the provisions of the Massachusetts wrongful death statute, note 2 *supra*, with the New York statute.

²⁵ See note 51 *infra*.

²⁶ See note 2 *supra*. At present, a general policy of limiting recovery of damages in a wrongful death action is expressed in the statutes of thirteen states. Colorado: Col. Rev. Stat. Ann. § 41-1-3 (Supp. 1960) (\$25,000); Illinois: Ill. Ann. Stat. ch. 70, § 2 (Smith-Hurd 1959) (\$30,000); Kansas: Kan. Gen. Stat. Ann. § 60-3203 (Supp. 1961) (\$25,000); Maine: Me. Rev. Stat. Ann. ch. 165, § 10 (Supp. 1961) (\$30,000 plus reasonable expenses incurred for medical treatment, hospitalization, and burial of decedent); Massachusetts: Mass. Gen. Laws Ann. ch. 229, § 2 (Supp. 1962) (\$30,000); Minnesota: Minn. Stat. Ann. § 573.02 (Supp. 1962) (\$25,000); Missouri: Mo. Ann. Stat. § 537.090 (Supp. 1962) (\$25,000); New Hampshire: N.H. Rev. Stat. Ann. § 556:13 (Supp. 1961) (\$10,000, but \$25,000 if decedent is survived by parent, spouse, or minor child); Oregon: Ore. Rev. Stat. § 30.020 (1961) (\$25,000); South Dakota: S.D. Sess. Laws 1963, ch. 235, § 37.2203 (\$30,000); Virginia: Va. Code Ann. § 8-636 (Supp. 1962) (\$35,000); West Virginia: W. Va. Code Ann. § 5475 (1961) (\$25,000); Wisconsin: Wis. Stat. Ann. § 331.04 (Supp. 1963) (\$22,500 plus maximum of \$3,000 for loss of companionship and additional maximum of \$10,000 if decedent leaves minor children). In two other states, damages are limited only in certain prescribed instances. Indiana: Ind. Ann. Stat. § 2-404 (Supp. 1962) (cases in which decedent leaves no surviving parent, spouse, children, or next of kin); South Carolina: S.C. Code §§ 14-401, 33-229, 33-926 (1962) (certain specified situations in which wrongful death action is prosecuted against governmental body).

²⁷ *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 528 (1961).

²⁸ See note 4 *supra*.

²⁹ *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 529 (1961). The forum itself normally determines in accordance with its own conflict-of-laws doctrine whether a given rule of law is procedural or substantive. Goodrich, *op. cit. supra* note 10, at § 81; Leffler, *op. cit. supra* note 10, at §§ 58-60; Restatement, *op. cit. supra* note 9, at § 584. Although the forum may exercise considerable discretion for this purpose, a clearly outrageous characterization constitutes a denial of full faith and credit and a violation of due process. *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

³⁰ Under the Massachusetts wrongful death act, the carrier "shall be liable in dam-

appeals in the instant case relied heavily upon these statements of the New York court in the *Kilberg* case.³¹

In the instant case, the analysis of the majority³² centered upon New York's substantial connections with the cause of action and that state's interest in its outcome.³³ The majority first ascertained

ages . . . to be assessed with reference to the *degree of culpability* of the defendant or of his . . . servants or agents. . . ." Mass. Gen. Laws Ann. ch. 229, § 2 (1955). (Emphasis added.)

³¹ There is a disagreement whether those statements in *Kilberg* which were controlling in the instant case constitute dictum or a holding. One federal court has referred to that part of the *Kilberg* opinion dealing with the Massachusetts wrongful death statute as "sweeping dictum." *St. Clair v. Eastern Air Lines, Inc.*, 194 F. Supp. 623, 624 (S.D.N.Y. 1961). Several writers have reached the same conclusion: Keeffe, *Piercing Pearson*, 29 J. Air L. & Com. 95 (1963); Comment, 36 N.Y.U.L. Rev. 723 (1961); Note, 25 Albany L. Rev. 313 (1961); Note, 30 U. Cin. L. Rev. 511 (1961); Note, 15 Vand. L. Rev. 271 (1961). However, others have arrived at the opposite conclusion: Comment, 61 Colum. L. Rev. 1497 (1961); Note, 27 Brooklyn L. Rev. 336 (1961); Note, 49 Calif. L. Rev. 187 (1961). Indeed, even in the instant case, the opinions of the trial court, *Pearson v. Northeast Airlines, Inc.*, 201 F. Supp. at 46, 199 F. Supp. at 540 (S.D.N.Y. 1961), and the panel majority opinion, 307 F.2d 131, 132-36, dismiss the relevant parts of the *Kilberg* decision as dictum. But the panel dissent, 307 F.2d at 136-47, the en banc dissent, 309 F.2d at 564-69, and the en banc majority opinion, 309 F.2d at 555-64, regard these statements as a rule or holding. The *precise* issue before the New York court in the *Kilberg* case was whether, under circumstances identical to those of the instant case, recovery could be had under New York law on the theory of a breach by the defendant of an implied contract for the safe carriage of plaintiff's decedent to his destination. After summarily resolving that question in the negative, the New York court, over the protests of three of its members, proceeded to reach further conclusions which the court in the instant case accepted as the established law of New York.

In any event, the proper technical classification of the pertinent statements in the *Kilberg* case is of little practical significance in the instant case. If the law of a state is not settled, a federal court, if necessary for the adjudication of a claim before it, must attempt to forecast what rule that state would adopt under identical circumstances. See, e.g., *Hartness v. Aldens, Inc.*, 301 F.2d 228, 229 (7th Cir. 1962); *Hablas v. Armour & Co.*, 270 F.2d 71, 75-76 (8th Cir. 1959); *Yost v. Morrow*, 262 F.2d 826, 828 (9th Cir. 1959). Therefore, even assuming that the statements of the New York Court of Appeals in *Kilberg* constituted dictum, the court's reliance thereon in the instant case would seem to have been justified on the ground that the *Kilberg* decision imparted the element of uncertainty to New York's conflict-of-laws rule with respect to wrongful death actions.

³² Fundamentally, the four opinions (*i.e.*, panel majority, panel dissent, en banc majority, and en banc dissent) rendered by the court of appeals in the instant case present only two sharply conflicting analyses of the issue at hand. Judge Kaufman, who wrote the majority opinion for the court en banc, dissented from the judgment of the panel, *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131, 136-47 (2d Cir. 1962); his dissenting opinion was adopted as a part of the en banc majority opinion, 309 F.2d at 556. Similarly, the reasoning of Judge Swan's panel majority opinion does not differ significantly from that of the en banc dissenting opinion written by Judge Friendly.

³³ The method of analysis followed by the majority has the support of eminent authorities. See Cavers, *A Critique of the Choice of Law Problem*, 47 Harv. L. Rev. 173 (1933); Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 Yale L.J. 457 (1924); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958); Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9 (1958); Ehrenzweiz, *The Lex Fori — Basic Rule in the Conflict of Laws*, 58 Mich. L. Rev. 637 (1960); Freund, *Chief Justice Stone and the Conflict of Laws*, 59 Harv. L. Rev. 1210 (1946); Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657 (1959). See also Re-statement (Second), Conflict of Laws § 379 (Tent. Draft No. 8, 1963).

the true character of the New York conflict-of-laws rule³⁴ as expressed in the *Kilberg* case.³⁵ The court then proceeded to justify the application of the *Kilberg* rule in terms of New York's "substantial ties" with the cause of action,³⁶ which gave that state a legitimate and substantial interest in its outcome.³⁷ In so doing, it emphasized that it was not concerned with the wisdom of the New York rule and that its sole concern was with the power of a state to declare such a rule.³⁸ Thereafter, the New York conflict-of-laws rule, as applied, was upheld against contentions of its unconstitutionality. Regarding the requirement of full faith and credit, the court noted that although the Massachusetts statute "should be honored fully and completely when the incident under litigation is a local one,"³⁹ a state has no "constitutionally protected claim to the unqualified application of its statute in cases with an overwhelming interstate flavor."⁴⁰ In response to the due process argument, the court merely observed that defendant could not be deprived of any property because it had no vested right in the application of the Massachusetts limitation on damages.⁴¹ The approach of the dissent was grounded in the traditional procedure-substance dichotomy.⁴² Although conceding that the cause of action constitutionally could have been based entirely upon the substantive law of New York, the dissent nevertheless concluded that the full faith and credit clause required the application of the Massachusetts statute in its

³⁴ "In effect, the Court of Appeals . . . of New York, in *Kilberg*, fashioned a rule of law allowing recovery of damages without arbitrary limit, modeled on the New York Wrongful Death Statute, although the Massachusetts statute still served as the foundation for plaintiff's cause of action for wrongful death." *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 556-57 (2d Cir. 1962).

³⁵ The en banc opinions regarded the applicable statements in *Kilberg* as a holding and accepted the case as the law of New York, unlike Judge Swan, who, in his panel opinion, considered those statements as dictum and consequently rejected them. See note 31 *supra*.

³⁶ New York's connections with the cause of action were by no means tenuous. First, plaintiff and plaintiff's decedent were citizens of New York. Second, plaintiff's decedent purchased his airplane ticket in New York and also boarded defendant's airplane in that state. Third, most of the ill-fated flight was conducted over New York. Fourth, defendant was lawfully doing business in the forum state, was promoting actively its business there with New York citizens, and generally was conducting extensive operations in that state. Fifth, as decedent's surviving wife, plaintiff conceivably could become a public charge of New York. Appellant's Petition for Rehearing en banc, p. 7; see also *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 557 (2d Cir. 1962).

³⁷ See note 19 *supra* and accompanying text.

³⁸ *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 562, 307 F.2d 141 n.12 (2d Cir. 1962).

³⁹ 309 F.2d at 561.

⁴⁰ *Ibid.*

⁴¹ 309 F.2d 553, 561-62, 307 F.2d 131, 140-42; *cf.* note 46 *infra*.

⁴² The dissent utilized the traditional, so-called "mechanical" method of analysis advanced by the Restatement and other less recent authorities. See notes 10, 11 *supra*; *cf.* Currie, *op. cit. supra*, note 33.

entirety or else not at all, so as not to interfere "with the proper freedom of action of the legislature of the sister state."⁴³ Alternatively, the dissent reasoned that the standard for the measure of damages embodied in the Massachusetts statute and the limitation on recovery contained therein were in fact matters of substance, and, therefore, that the Constitution dictated their recognition by the law of New York.⁴⁴ In so concluding, the dissenting judges apparently assumed that the Massachusetts legislature had a vested right in the application of all parts of its statute deemed "substantive."⁴⁵ In brief, the dissent merely presented the orthodox, traditional argument that the Constitution should require the complete application of the *lex loci delicti* after its recognition by the forum as the source of the claim.⁴⁶

The instant case strongly advances the modern proposition that a state constitutionally may develop and then apply its conflict-of-laws doctrine to those incidents of litigation in which it has a legitimate and substantial interest, without regard to the geographical origin of the cause of action. Prior to the instant case, it had been well established that statutory defenses of the forum may qualify or limit a cause of action based on the *lex loci delicti*⁴⁷ and that the forum may attach reasonable conditions to the enforcement of a contract made or to be performed in another jurisdiction.⁴⁸ However, although the Massachusetts statute was looked to for the source of the claim in the instant case, such integral provisions as its 15,000 dollar limitation on recovery and its punitive standard for the measure of damages were wholly ignored. In form, recovery was allowed under the law of Massachusetts, but in fact, New York

⁴³ *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 564-65 (2d Cir. 1962).

⁴⁴ *Id.* at 567-69; see notes 11, 29 *supra*.

⁴⁵ Although recognizing that considerable latitude is afforded the forum in characterizing various aspects of a cause of action as either procedural or substantive, the dissenting judges asserted that the limits of this permissible discretion had been greatly exceeded by the New York court in *Kilberg*: "[T]he transformation of a penal and limited statutory liability into a compensatory and unlimited one goes far beyond the widest concept of 'procedure' or 'remedy'." *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 568 (2d Cir. 1962). Thus, they concluded, since "merely labeling a difference from the foreign law as 'procedural' or 'remedial' rather than substantive will not defeat application of the Full Faith and Credit Clause," (*John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936)) the characterization made in *Kilberg* was clearly violative of the Constitution and should not be followed in the instant case. *Ibid.* See note 29 *supra*.

⁴⁶ *Pearson v. Northeast Airlines, Inc.*, 307 F.2d 131, 133-36 (2d Cir. 1962); *cf. supra* at 139-40 and 309 F.2d at 557. In essence, it would seem that the dissenting opinion reflects a partial adherence to the archaic "vested rights" theory of the conflict of laws based on the notion of territorial sovereignty. See *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1904); *Davis v. Mills*, 194 U.S. 451 (1904).

⁴⁷ See note 20 *supra*.

⁴⁸ See note 21 *supra*.

law was controlling in all essential respects. Few courts, if any, have gone so far.⁴⁹ Of course, to promote clarity and simplicity in the operation of a modern theory of the conflict of laws, the entire cause of action in the instant case should have been governed by New York law,⁵⁰ *i.e.*, recovery should have been granted either through an extraterritorial application of the New York wrongful death act or upon the theory of a breach of an implied contract for the safe carriage of plaintiff's decedent. However, neither cause of action could have been maintained successfully under existing New York law,⁵¹ which the court in the instant case was constrained to follow.⁵² Therefore, it is submitted that under the circumstances of the instant case,⁵³ necessity dictated the nominal application of the Massachusetts wrongful death statute in order to effect a just result.

In many conflict-of-laws situations such as the instant one, two competing legal interests emerge. Each possesses the highest legal attributes, and ideally a balance giving them equal weight should be struck, but as a practical matter that is impossible. On the one hand is the necessity of promoting stability, certainty, and uniformity in the law of a federal system. On the other hand is the objective of rendering complete justice to the respective litigants by adjudicating the controversy between them on all of its merits. In applying the *lex loci delicti* to remove this basic antagonism, the method of the Restatement amply advances the former consideration of certainty and stability in the law, sometimes at great expense to the latter objective because the actual merits of a claim can never be fully considered by a choice-of-law rule based on the purely fortuitous location of the place of injury. Conversely, fundamental fairness to

⁴⁹ *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953); *Schmidt v. Driscoll Hotel*, 249 Minn. 376, 82 N.W.2d 365 (1957); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

⁵⁰ That the law of New York constitutionally could have governed the entire cause of action is expressly conceded by the dissenting opinion. *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 564-66 (2d Cir. 1962). The majority opinion is impliedly in agreement with this proposition. *Id.* at 557-58.

⁵¹ As to the exclusively local application of the New York wrongful death act, see *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 42-43, 172 N.E.2d 529, 537-38 (1961); *Royal Indem. Co. v. Atchison, T. & S.F. Ry.*, 272 App. Div. 246, 250-51, 70 N.Y.S.2d 697, 700-01 (Sup. Ct. 1947), *aff'd*, 297 N.Y. 619, 75 N.E.2d 631 (1947); *Baldwin v. Powell*, 294 N.Y. 130, 132, 61 N.E.2d 412, 413 (1945). As to the unavailability of an action *ex contractu*, see *Kilberg v. Northeast Airlines, Inc.*, 172 N.E.2d at 531, 535-36; *Leonard v. Columbia Steam Nav. Co.*, 84 N.Y. 48, 53 (1881); *Crowly v. Panama R.R.*, 30 Barb. 99 (N.Y. 1859).

⁵² See notes 15, 16 *supra*.

⁵³ As a practical matter, the arbitrary Massachusetts limitation on recovery for wrongful death was, in effect, merely a legislatively created immunity operating in favor of common carriers to restrict their liability for negligently caused death. That \$15,000 is a highly unreasonable limitation on recovery for wrongful death is too obvious for argument.

the respective litigants is enhanced by the alternative method followed in the instant case, *i.e.*, applying the law of the state which has the most substantial contacts with and interest in the outcome of the litigation. To be sure, under this approach certainty and stability in the conflict of laws may be derogated, particularly if the instant case actually holds that "a single 'transaction' may contain within itself several distinct 'issues' legitimately made subject to the law of more than one state."⁵⁴ Moreover, the ideal of uniformity is jeopardized by the theory which the instant decision advances to the extent that it encourages forum shopping. Also, what in law constitutes a sufficiently substantial interest apparently can only be determined on a case by case basis. However, the price of progress is not always trivial, and progress in the underdeveloped area of the conflict of laws must necessarily be defined to include a consideration of factors more significant than the mere location of the place of injury in the choice of applicable law. For this reason, the instant case's belated giving of constitutional freedom to states to develop their own respective conflict-of-laws doctrines must be preferred over the mechanical method embodied in the Restatement. Moreover, if the "substantial connections and legitimate interest" theory were to be widely accepted and applied, perhaps the cherished elements of certainty and predictability—if they were to be lost temporarily—would be restored in time to the conflict of laws.

Wallace M. Swanson

⁵⁴ *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553, 560 (2d Cir. 1962).