CONFLICT OF LAWS—MEASURE OF DAMAGES IN WRONGFUL DEATH ACTION DETERMINED BY LAW OF STATE HAVING GREATEST INTEREST IN ISSUE OF DAMAGES, NOT BY LAW OF PLACE OF INJURY. *Reich v. Purcell* (Cal. 1967).

In this action arising out of an automobile collision in Missouri, plaintiffs, Lee Reich and his son Jeffry, sued for the wrongful death of Mrs. Reich and son Jay. At the time of the accident the plaintiffs and decedents were residents of Ohio, however, at the time of suit the plaintiffs had become residents of California. The decedents' estates were being administered in Ohio. Defendant Purcell, owner and operator of the other automobile involved, was at all times a resident of California. The sole issue on appeal was the amount recoverable for the wrongful death of Mrs. Reich. Neither California[1] nor Ohio[2] law limits the damages recoverable for wrongful death, however, Missouri law limits damages to $25,000.[3] The parties stipulated that judgment be entered for $25,000 or $55,000, depending on whether the Missouri limitation applied. The trial court ruled that the Missouri limitation applied, and the District Court of Appeal affirmed.[4] On appeal to the Supreme Court of California, *held*, reversed: The state where plaintiffs and decedents resided at the time of injury and where decedents' estates are being administered has a greater interest in the issue of damages recoverable in a wrongful death action than the forum or the state where the accident occurred, and the law of that state will be applied to determine the amount of damages. *Reich v. Purcell*, 67 Adv. Cal. 560, 432 P.2d 727, 64 Cal. Rptr. 31 (1967).

With this decision California departed from the traditional rule of lex loci delicti, which requires that an action in tort be governed by the law of the state where the tort was committed.[5] The theory

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1 CAL. CODE CIV. PROC. § 377 (West 1954).

2 OHIO CONST. art. I, § 19a. "The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect or default of another, shall not be limited by law."

3 MO. ANN. STAT. § 537.090 (1953), *as amended*, (Supp. 1967) (increasing the amount recoverable to $50,000).

4 Reich v. Purcell, 250 Adv. Cal. App. 207, 58 Cal. Rptr. 800 (1967).

5 *See, e.g.*, Slater v. Mex. Nat'l R.R., 194 U.S. 120 (1904); Loranger v. Nadeau, 215 Cal. 362, 10 P.2d 63 (1932); Victor v. Sperry, 163 Cal. App. 2d 518, 329 P.2d 63 (1958); Hanna v. Grand Trunk R.R., 41 Ill. App. 116 (1891); Petrusha v. Korinek, 237 Mich. 583, 213 N.W. 188 (1927); McCabe v. Duluth St. Ry., 175 Minn. 22, 220 N.W. 162 (1928); Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962). *See also* RESTATEMENT OF CONFLICT OF LAWS §§ 379, 391-97, 412 (1934).

supporting lex loci is that the place of the wrong has the sole power to create a right or an obligation, which follows the tortfeasor and may be enforced wherever he can be sued. The forum's function is to enforce the "vested right" or "obligation" created by the foreign law.[6]

Some years ago the "vested rights" theory was attacked by Professor Walter Wheeler Cook.[7] First he criticized the concept of "vested rights." Although he accepted Justice Holmes' definition of a legal right—the imaginary substance of a prediction that some public force will be brought to bear[8]—Cook argued that a mere prediction of the actions of public authorities is not something which "vests" or is "carried" about.

Examining the process by which most courts employed the laws of foreign jurisdictions, Cook also concluded that in fact "vested rights" were not being enforced. He noted that the courts did not consider what the foreign jurisdiction would do if the *same case* were adjudicated there, for they took no account of the whole law of the foreign jurisdiction, *i.e.*, the choice-of-law rules applicable to litigation involving foreign elements. The courts were considering only what the foreign jurisdiction would do when faced with similar facts involving only *domestic elements.* Therefore, the courts were not enforcing "vested rights" created by the law of a foreign jurisdiction, but rather the forum was looking to the foreign jurisdiction for a rule of decision to apply to the case at bar. If the forum was not enforcing foreign law it could only be enforcing its *own* law.[9]

This "local law" theory expounded by Professor Cook was recognized by Chief Justice Traynor in *Reich*:

> [C]omplex cases elucidate what the simpler cases obscured, namely, that the forum can only apply its own law. . . . When it purports to do otherwise it is not enforcing foreign rights but choosing a foreign rule of decision as the appropriate one to apply to the case before it.[10]

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[6] Slater v. Mex. Nat'l R.R., 194 U.S. 120 (1904).

[7] Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924).

[8] O.W. HOLMES, COLLECTED LEGAL PAPERS, 313 (1920). Note that Justice Holmes was the author of Slater v. Mex. Nat'l R.R., 194 U.S. 120 (1904), the source of the oft-quoted statement of vested rights theory.

[9] *See* note 7 *supra.* Judge Learned Hand, also an advocate of local law theory, reasoned that the forum creates a right modelled on the right created in the foreign jurisdiction. For a comparison of this view with Professor Cook's, see Cavers, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822 (1950).

[10] 67 Adv. Cal. at 562, 432 P.2d at 729, 63 Cal. Rptr. at 33 (citations omitted).

The "vested rights" theory has also been attacked because in a multi-state transaction it resulted in a mechanical rule which could defeat the legitimate interests of the litigants and the states involved.[11] This is particularly true in tort actions where the place of injury is fortuitous. For instance, if two California drivers collide in Nevada, the rejection of California law may deny the obvious interest that California has in governing rights and obligations between its citizens. Though Nevada has an interest in *conduct* within its borders, it has no interest, where non-residents are concerned, in such issues as the statute of limitations, prejudgment interest or limitation on liability. To give effect to Nevada law on these issues advances no interest of Nevada, while it sacrifices legitimate interests of California.

Although "local law" theory seemed to discredit "vested rights," many judges remained unconvinced. To overcome the lex loci rule and give effect to the interests of the parties and states, concerned judges resorted to devices such as "characterization." Two California cases illustrate. In *Grant v. McAuliffe*[12] the law of Arizona, where the automobile accident occurred, did not provide for survival of actions beyond the tortfeasor's death. In order to allow the California plaintiff recovery from the California administrator of the deceased tortfeasor's estate, the court characterized survival of actions as *procedural* and thus determined by the law of California. In *Emery v. Emery*[13] the court, which would have had to recognize parental immunity if lex loci had applied, characterized the issue of immunity as one of *family relationships*, and ruled that the law of the family domicile applied. Chief Justice Traynor, author of the two opinions, implied later that the device of characterization was employed to win the acceptance of his colleagues who were still imbued with "vested rights" thinking.[14]

Another means employed to circumvent lex loci is to hold the foreign law contrary to the public policy of the forum. In *Kilberg v. Northeast Airlines, Inc.*[15] plaintiff sued in New York for wrongful death resulting from an airplane accident which occurred in Massachusetts. The court held: "We will still require plaintiff to sue on the

11 *See generally* D. CAVERS, THE CHOICE-OF-LAW PROCESS 7-8 (1965); B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 5, 6 (1963); A. EHRENZWEIG, CONFLICT OF LAWS 548 (1962).

12 41 Cal. 2d 859, 264 P.2d 994 (1953).

13 45 Cal. 2d 421, 289 P.2d 218 (1955).

14 Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 670 n.35 (1959).

15 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

Massachusetts statute but we refuse on public policy grounds to enforce one of its provisions as to damages [$15,000 limitation]."[16]

Professor Brainard Currie advocated a forthright governmental-interest approach in which the forum examines the policies and objectives behind the conflicting laws under consideration.[17] From this examination the forum then determines which states have a legitimate interest in the application of their law to the particular issue under consideration. If only one state has a substantial interest, the law of that state is applied. If both the forum and another state have an interest, the law of the forum is applied. The first state court case[18] to openly employ a governmental-interest approach was *Babcock v. Jackson*.[19] All the parties to the action were residents of New York; the automobile accident occurred in Ontario. Plaintiff, defendant's guest, sued for personal injuries in a New York court. The court determined that Ontario, which has a guest statute, had no interest in the application of its law to the particular situation, while New York, which has no guest statute, clearly did have an interest, since the accident involved only New York residents.

The court stated it was applying a "center of gravity" or "grouping of contacts" approach, which gives effect to the law of the jurisdiction which, because of its *relationship* or *contact* with the occurrence, has the greatest interest in the issue under consideration.[20] The policies and objectives of the laws were analyzed to determine the importance of the contacts, clearly reflecting Professor Currie's thinking. Several decisions followed which adopted outright the Currie governmental-interest analysis for tort actions.[21]

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16 *Id.* at 40, 172 N.E.2d at 528, 211 N.Y.S.2d at 136. The *Kilberg* court also employed the device of characterization and ruled that damages were a procedural matter to be determined by the law of the forum. *Id.* at 41, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

17 B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183-84 (1963).

18 The case was preceded by the governmental-interest based decision in Pearson v. Northeast Airlines, Inc., 309 F.2d 553 (1962). However, this federal court decision was not applying New York conflict law as it truly was in 1962. It relied on *Kilberg*, which had not squarely adopted the governmental-interest approach for New York. For a discussion of the recent New York decisions see Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, also in B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 690 (1963).

19 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

20 *Id.* at 481-82, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

21 Crider v. Zurich Ins. Co., 380 U.S. 39 (1965); Tramontana v. S.A. Empressa de Viacao Aerea Rio Grandense, 350 F.2d 468 (D.C. Cir. 1965); Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Gore v. Northeast Airlines, Inc., 222 F. Supp. 50 (S.D.N.Y. 1963); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Fabricius v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Thompson v. Thompson,

With *Reich* California has joined the growing trend: "As the forum we must consider all of the foreign and domestic elements and interests involved in the case to determine the rule applicable."[22] Chief Justice Traynor pointed out that California had no governmental interest, in that plaintiff moved to California after the accident, and to choose the law according to events after the accident would encourage forum shopping. Moreover, since California had no limitation on damages for wrongful death, it had no interest in limiting the liability of defendant, a California resident.

Missouri likewise had no interest.[23] The purpose of Missouri's limitation on damages was to protect its residents from excessive judgments, not to protect travelers from states having no limitation. Finally, Chief Justice Traynor determined that Ohio had an interest in affording injured plaintiffs full recovery, expressed in a state constitutional provision[24] that damages for personal injury or death shall not be limited by law. Plaintiffs and decedents had resided in Ohio and decedents' estates were being administered there, so absent any real conflict with Missouri or California, Ohio's interest was given effect in awarding the plaintiff $55,000.[25]

Reich illustrates the situation where no real conflict existed between any states which had contact with the transaction, since neither California nor Missouri had any substantial interest in applying their law. Ohio law was chosen by a process of elimination, not by a resolution of conflict. A conflict may have been presented if the court had given greater recognition to the California domicile of plaintiffs, even though plaintiffs had moved to California *after* the accident. In a similar situation, *Gore v. Northeast Airlines, Inc.*,[26] the plaintiff had moved to Maryland from New York one month after the airplane crash from which the wrongful death action arose, yet the court held that Maryland law was applicable. The *Reich* court did not reach a similar result because it sought to prevent forum shopping. However, the *Reich* decision actually encourages forum shopping. Although the court stated that "[P]laintiffs receive no more than

105 N.H. 86, 193 A.2d 439 (1963); Long v. Pan American World Airways, Inc., 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965); Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

22 67 Adv. Cal. at 564, 432 P.2d at 730, 63 Cal. Rptr. at 34.

23 *Id.* at 565, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35.

24 OHIO CONST. art. I, § 19a.

25 67 Adv. Cal. at 566, 423 P.2d at 730, 63 Cal. Rptr. at 34.

26 222 F. Supp. 50 (S.D.N.Y. 1963).

they would had they been injured at home,"[27] it did not mention what would have happened if the plaintiffs had *brought their action* in Ohio. If the Reichs had brought their action in Ohio instead of California, an Ohio court, unless it chose the occasion to change its choice-of-law rule, would have applied Missouri law under lex loci.[28] Plaintiffs would then have recovered only $25,000, a result far different than the *Reich* judgment for $55,000. Thus, any plaintiffs injured by California drivers in states with limitations on damages are encouraged to sue in California whenever their own state would apply lex loci.

By not referring to the "whole law" of Ohio, *i.e.*, not employing *renvoi*, Chief Justice Traynor was being consistent with Currie's governmental-interest approach:

> Foreign law would be applied only when the court has determined that the foreign state has a legitimate interest in the application of its law and policy to the case at bar and the forum has none. Hence, there can be no question of applying anything other than the internal law of the foreign state.[29]

It is only through examination of the policies and objectives of a state's *internal* law concerning the particular issue that a forum can determine that a state has an interest. Moreover, the interest so determined is an interest in the application of the particular *internal* law.[30] Yet *renvoi* may still serve a useful purpose. If a court was bound by a conflict rule of lex loci, it could refer to the "whole law" of the place of the wrong, which might in turn lead the court to the law of another jurisdiction, which could be used to achieve the right result. California courts may never have any need for *renvoi*, but judges of other states may employ the doctrine to persuade colleagues, reluctant to depart from vested rights dogma, to accept a desired result.[31]

Of course, even California courts can refer to the choice-of-law rules of a foreign jurisdiction to test the strength of the latter's interest in the application of its internal laws. For instance, the Ohio

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[27] 67 Adv. Cal. at 565, 432 P.2d 731, 63 Cal. Rptr. at 35.

[28] *See* Goranson v. Capital Airlines, Inc., 345 F.2d 750 (6th Cir. 1965); Ellis v. Garwood, 168 Ohio St. 241, 152 N.E.2d 100 (1958).

[29] B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 184 (1963).

[30] For an apparent misapplication of *renvoi*, see Gore v. Northeast Airlines, Inc., 222 F. Supp. 50 (S.D.N.Y. 1963).

[31] *See* Richards v. United States, 369 U.S. 1 (1962). The court employed *renvoi* for the purpose of reconciling the lex loci rule of the Federal Tort Claims Act with what the court predicted was a trend toward governmental-interest analysis.

Constitution apparently expresses a strong policy against limitation of damages in wrongful death actions.[32] However, considering Ohio conflicts law, the policy does not appear nearly as strong. Since the Ohio choice-of-law rule is lex loci, it would ignore its own constitution and apply the Missouri limitation if an action was brought based on a tort occurring in Missouri.

With the *Reich* decision California has adopted an approach to choice-of-law problems but no *rules* of choice. Since the court had determined that no real conflict was involved, there was no opportunity to formulate a specific rule for resolving a true conflict between the legitimate interests of two or more states. In the true conflict situation Professor Currie has argued that the problem cannot be solved rationally by any conflict of laws method. Since any choice of law will subordinate the interest of one state, he urges that the forum not subordinate its own interests for the sake of interstate uniformity of law.[33] It seems that Chief Justice Traynor would agree: "The likelihood is that, freed of metaphysical rules of choice of law, the forum court will let the local interest prevail and sacrifice the interest of the other state."[34]

However, in *Bernkrant v. Fowler*[35] a true conflict occurred, and Chief Justice Traynor did not give effect to California's interest in the matter. The case involved an oral contract to make a will, which was unenforceable under California's Statute of Frauds, but enforceable under Nevada law. The contract was formed in Nevada; the promisor later died while a resident of California. Although California had an interest in protecting estates being probated in California from false claims based on alleged oral contracts to make wills, the court ruled that Nevada law applied, and the contract was held enforceable. The court actually avoided the conflict by stating that California had no interest in applying its own Statute of Frauds. Since the decedent had not been continuously domiciled in California, the parties were not expected to know that California law might apply to the contract. In the interest of preserving the parties' expectations that Nevada law would apply, the court denied California's interest. Thus it appears California cannot be relied upon to invoke a rule of forum-preference in true conflict situations; nor will it always take a

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32 OHIO CONST. art. I, § 19a.

33 B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183-84 (1963).

34 Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657, 674 (1959).

35 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 226 (1961).

restrained view of its own interest to the point of denying it in order to avoid a true conflict.[36]

Recognizing the possibility of *ad hoc* decisions in true conflict cases, Professor Cavers has attempted to engraft upon the governmental-interest approach some tentative rules that would give effect to strictly choice-of-law considerations, such as certainty of result, predictability, and the expectations of the parties.[37] These rules are no more than his predictions of what the case law will reflect after a number of decisions are rendered in similar fact situations. The *Reich* facts, if they had presented a true conflict, would fall under the following tort principle:

> If both plaintiff and defendant have their homes in a state or states other than the state of injury and if the measure of compensation under the law of the state of injury affords a lower degree of financial protection than that afforded by the law or laws of the parties' home state or states, the measure of compensation under the law of that home state which affords the lower degree of financial protection should be applied.[38]

Although California's approach to choice-of-law will give effect to the interests of the parties and states involved and make just results more likely, without rules for true conflict situations the results will be frequently unpredictable. "But the very purpose of this method is to avoid the pat answer which gives a bad result either to be accepted as a sacrifice on the altar of certainty or to be avoided by subterfuge."[39]

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[36] It seems that Professor Currie has modified his unconditional forum-preference position, for he said of *Bernkrant*:

> The restraint and moderation with which domestic interests are defined raise a standard to which the wise and honest can repair, and should be a reproach to those who feel that the method of governmental-interest analysis must necessarily produce egocentric or provincial results.

B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 688-89 n.236 (1963).

[37] *See* D. CAVERS, THE CHOICE-OF-LAW PROCESS 137-80 (1965).

[38] *Id.* at 157-58.

[39] Wilcox v. Wilcox, 26 Wis. 2d 617, 622, 133 N.W.2d 408, 417 (1965).