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Conflict of Laws--Torts--Suit in a Foreign Court on an Obligation Created by the Law of the Place of Tort

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not, it will be declared non-existent.[19] A declaratory judgment was refused in *Riverbank Improvement Co.* v. *Chadwick*,[19] as taking "private property for private use" contrary to the Bill of Rights,[20] and in *Strong* v. *Shatto*,[21] on the ground that a change in neighborhood did not relieve from the contractual obligation imposed by the restriction. When, however, the restriction is no longer of practical benefit, the better view seems to be that equity will remove it as a cloud on the plaintiff's title.[22] As it clearly appeared in the instant case that the purpose for which the restriction was imposed had been defeated, the court reaches the proper result.

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CONFLICT OF LAWS—TORTS—SUIT IN A FOREIGN COURT ON AN OBLIGATION CREATED BY THE LAW OF THE PLACE OF TORT

Defendant and his wife were citizens of New York. While the wife was vacationing in Florida without her husband she assaulted the plaintiff. Suit was brought by the plaintiff in New York where she seeks to enforce liability against the defendant husband on the ground that in Florida, where the tort occurred, a husband is liable for his wife's torts.[1] Defendant moved that the complaint be dismissed because under the New York law a husband is not liable for the separate torts of his wife.[2] *Held*: Complaint dismissed. The law of New York was applied and the husband was not liable for the tort of his wife. *Siegman* v. *Meyer*, 100 F. (2d) 367 (1938).

In deciding the case Judge Hand announced his theory of the conflict of laws to be: "Strictly speaking, it is impossible for a court to enforce a liability except one created by the law of the state in which it sits. That state may take for its model a liability created by another

[18] Equity really can have little discretion in the *type* of remedy. See note 11, supra. If there is a binding restriction, it constitutes a property right which a court has no authority to take for private use. If there is no binding restriction, there is nothing. The only discretion left to the court lies in determining whether there exists a valid restriction.

[19] 228 Mass. 243, 117 N. E. 244 (1917).

[20] The Massachusetts statute allowing the removal of a covenant by the court where there had been a change in the neighborhood, and providing that the defendant be paid for any loss caused by the removal was held invalid.

[21] 45 Cal. App. 29, 187 Pac. 159 (1920).

[22] McArthur v. Hood Rubber Co., 221 Mass. 372, 109 N. E. 162 (1915); Burton v. Moline Properties, Inc., 121 Fla. 683, 164 So. 551 (1935). This view is in accord with that expressed by Pound that when the purpose of the restriction has failed of accomplishment there is "nothing left to protect by injunction." Supra, note 13 at 821.

[1] Meek v. Johnson, 85 Fla. 248, 95 So. 670 (1923); Greene v. Miller, 102 Fla. 767, 136 So. 532 (1931).

[2] N. Y. Domestic Relations Law sec. 57, Strubing v. Mahar, 46 App. Div. 409, 61 N. Y. Supp. 799 (1899); Tanzer v. Read, 160 App. Div. 584, 145 N. Y. Supp. 708 (1914).

state, merely because the other state creates it . . . but the liability enforced is the creature of its own will: its law of the conflict of laws alone will determine when it will fashion a liability after the foreign liability."[3] This theory, which finds support with some writers,[4] is based on the territorial theory of Judge Story and reasons that each state is a sovereign within itself and that the laws of one state can have no effect in any other state. The writers argue that in each case the ultimate power of choice as to what law it shall apply lies with the court invoked for the enforcement of the alleged right, and that as long as sovereign states exist, with no superior court to enforce the rules of the conflict of laws, this must necessarily be the rule.

The rule of conflict of laws generally adopted is that the law of the place of the tort shall determine whether there is any liability on the part of the defendant.[5] Justice Cardozo sets the theory of this rule out in *Loucks* v. *Standard Oil of N. Y.*[6] where he says, "a tort committed in one state creates a right of action which may be sued upon in another state unless public policy forbids. . . . The sovereign may in its discretion refuse its aid to the foreign right. From this it has been an easy step to the conclusion that a like freedom of choice has been confided to the courts. But that, of course, is a false view. The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit their individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted conception of the common weal".[7] This conception of the conflict of laws, called the "vested rights"[8] theory, is based on the idea

[3] 100 F. (2d) 367 (1938). For earlier cases in which Judge Hand states the same theory as in the principle case see Guinness v. Miller, 291 Fed. 769 (1923); The James McGee, 300 Fed. 93 (1924); Direction Der Disconto-Gesellschaft v. United Steel Corp., 300 Fed. 741 (1924).

[4] Cook, The Logical and Legal Basis of the Conflict of Laws (1924) 33 Y. L. J. 457; Lorenzen, Tort Liability and the Conflict of Laws (1931) 47 L. Q. R. 483. (Lorenzen believes that as a practical matter this is the only view to take.)

[5] Northern Pac. R. R. Co. v. Babcock, 154 U. S. 190 (1894); Stewart v. B. and O. R. Co., 168 U. S. 445 (1897); Slater v. Mexican National R. R., 194 U. S. 120 (1904); A. & T. and Sante Fe R. Co. v. Sowers, 213 U. S. 55 (1909); Cuba R. R. v. Crosby, 222 U. S. 473 (1911); Walsh v. N. Y. and N. E. R. Co, 160 Mass. 571, 36 N. E. 584 (1894); Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918); Buckeye v. Buckeye, 203 Wis. 248, 234 N. W. 242 (1931); Beale, Treatise on Conflict of Laws (1935) sec. 378.2; Restatement; Conflict of Laws (1934) sec. 379.

[6] 224 N. Y. 99, 120 N. E. 198 (1918).

[7] And see Judge Holmes in Cuba R. R. v. Crosby, 222 U. S. 473 (1911), where he says, "But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation which has been created by a different law. The law of the forum is material only in setting a limit of policy beyond which such obligations are not enforced there."

[8] Stumberg, Conflict of Laws: Foreign Created Rights (1930) 8 Tex. L. R. 173 at 179.

that the law of the place of the tort gives a vested right to the wronged person to have his wrong redressed; and that this right creates a corresponding obligation against the person liable for the wrong which follows him and may be enforced wherever he can be found. The most serious defect in this rule is that if the court of suit refuses to enforce a tort liability created in the state where the tort happened nothing can be done to correct this.[9]

It is submitted that Cardozo's conception of the conflict of laws is the one most desirable in the United States. The state has ceased to be an entity in the United States in our modern social and business lives. This is a result of the increased speed and ease with which we are able to move from one state to another by rail, automobile or airplane. Therefore, the people of one state are often found doing business in a second state, or, as in the principle case, in the second state for pleasure; and this in turn gives rise to more and more situations in which the law of one state is sought to be enforced in another. Since the above is true the courts should realize that people are likely to come before them seeking to enforce a right created by another state, and they should be ready and willing to enforce those rights as a matter of expediency. Also, since the states are becoming more of a unity in business matters, as a logical corollary, the laws of one state should be easily enforceable in the others. Thirdly, it is submitted that since the court of suit can not create an obligation when none exists in the state where the acts complained of took place,[10] it should not be permitted to refuse to enforce an obligation created in the state where the tort arose.

Despite the fact that Judge Hand may have adopted the wrong theory of the conflict of laws in the principle case the decision can be sustained on other well recognized principles of conflicts. First, it can be argued that in this particular case the defendant was never in the state of Florida, and therefore the laws of Florida should not apply to him. This reasoning does not violate the theory of the conflict of laws just sanctioned because it is fundamental as a part of that theory that the state where the tort occurred must have personal jurisdiction over the person charged with the commission of the tort.[11] Since the defendant was never in Florida he should be subject only to the laws of the state of New York.

In Florida when a wife commits a tort her husband is joined in the

[9] It has been urged that if the liability sought to be enforced arose under the statute of the state in which the acts took place it would be in violation of the "full faith and credit" clause of the Constitution not to recognize the obligation so created. Note (1935) 44 Y. L. J. 158 at 160. It would not seem possible to urge this theory where the obligation sought to be enforced arose under the common law of the state where the acts complained of took place.

[10] American Banana Co. v. United Fruit Co., 213 U. S. 347 (1908); Salimoff and Co. v. Standard Oil Co. of N. Y., 262 N. Y. 220, 186 N. E. 679 (1933).

[11] Restatement, Conflict of Laws (1934) sec. 47, 65.

suit against her simply because in that state the common-law disabilities of a married woman still exist and she can not be sued alone. Therefore, the joinder of the husband with his wife in a suit for a tort committed by her is a procedural matter.[12] It is a well recognized rule of conflicts that as regards procedural matters, such as pleadings, parties and evidence, the law of the place of the suit governs.[13] In New York the procedural disabilities of a wife have been removed and she can be sued alone, so when the procedural law of New York is applied to the facts of the principal case it at once appears that it was proper to dismiss the complaint against the husband.

It might also be argued that since New York has a statute preventing the enforcement of such a liability as presented here it would be against the sound public policy of the state, as expressed by the statute, to enforce the liability created in Florida. New York has previously held that where the suit was based on a death statute of the state where the tort occurred and New York had a statute preventing such suits, it would violate the strong public policy of the state to enforce this type of liability created in another state.[14] The majority rule, however, is that even though there is a statute in the state preventing the liability sought to be enforced, the court will enforce the liability as created by the law of the other state unless to do so would shock the morals of the people and violate some established and important policy of the state.[15]

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[12] 20 A. L. R. 529; Prentis v. Paisley, 25 Fla. 927, 7 So. 56 (1889): "His (the husband's) liability for her tort is the result of the mere fact that by the common-law rules a suit cannot be maintained against the wife alone during coverture. If, before or pending the action, she died, the right of action against him fails"; Graham v. Tucker, 56 Fla. 307, 47 So. 563 (1908); Greene v. Miller, 102 Fla. 767, 136 So. 532 (1931). In an excellent note in 34 Y. L. J. 543 (1925) the historical background for compelling the husband to be joined in suits against his wife is given. The writer there shows that the original reasons for the rule are not applicable today, but he submitted that so long as a wife remains financially unable to pay judgments against her a substantive right of action should be had against the husband. This is the only reason advanced for saying that the liability of a husband in this type of case is any more than a holdover from the early days of procedure when a wife could not be sued alone. See also Note (1934) 83 U. of Pa. L. R. 66; Note (1936) 41 Dick. L. R. 55; Note (1932) 18 Iowa L. R. 30. Cf. Roberson v. Queen, 87 Tenn. 445, 11 S. W. 38 (1889).

[13] Prichard v. Norton, 106 U. S. 124 (1882); Central Vt. R. Co. v. White, 238 U. S. 507 (1915); Chase v. Ormsby, 65 F. (2d) 521 (1933); Perkins v. Great Central Transportation Corp., 262 Mich. 616, 247 N. W. 759 (1933).

[14] Herzog v. Stern, 148 Misc. 25, 265 N. Y. Supp. 72 (1933). See also Shore Acres Properties Inc. v. Morgan, 44 Ga. App. 128, 160 S. E. 705 (1931).

[15] Walworth v. Harris, 129 U. S. 355 (1888); Lauria v. Du Pont Co., 241 Fed. 678 (1917); Caine v. St. Louis and Sante Fe R. Co., 209 Ala. 181, 95 So. 876 (1923); Henning v. Hill, 80 Ind. App. 363, 141

It is submitted that Judge Hand reached a correct result in the principle case but that in doing so he adopted and sanctioned the incorrect theory of the conflict of laws. It would seem that the theory of Justice Cardozo would, if allowed, reach a more desirable result in the normal case involving conflict of laws. JAMES D. ALLEN

N. E. 66 (1923); Walsh v. N. Y. and N. E. R. Co., 160 Mass, 571, 36 N. E. 584 (1894); In re Miller's Estate, 239 Mich. 455, 214 N. W. 428 (1927); Mt. Ida School for Girls v. Rood, 253 Mich. 482, 235 N. W. 227 (1931); Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918).