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Alienation of Affections in the Conflict of Laws

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ALIENATION OF AFFECTIONS IN THE CONFLICT OF LAWS*

Towards the Lex Fori for Admonitory Torts

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"If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state."[1] This is the "rule" of the Restatement which, for the sake of "certainty," courts throughout the country during the last few decades have invoked in nearly every torts conflicts case—only to reach widely differing results by the haphazard and therefore unpredictable use of various other devices.[2] Arbitrary localization of the "place of wrong," arbitrary "characterizations" (*e.g.*, procedure, contract), arbitrary resort to public policy, and even occasional arbitrary flight into renvoi, that "puerile" concept "of violently prejudiced literature,"[3] are some of the devices which have been employed.

In a series of articles, I have tried to trace the origin of this conceptualistic deviation of the last few decades, and to reexamine conflicts cases involving contracts and torts with a view towards ascertaining the law actually applied by the courts.[4] In a separate study I hope to show that, in the absence of established common-sense exceptions, such as the *lex validitatis* for non-adhesion contracts, the *lex fori* has always been the starting point for all judicial reasoning,[5] and that this reasoning has been only temporarily disturbed by pseudo-internationalist illusions,

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* This article is the first in a series of two studies prepared by Professor Ehrenzweig for the Cornell Law Quarterly. The second, "Miscegenation in the Conflict of Laws," will appear in the Summer issue of this volume.

† See Contributors' Section, Masthead, p. 558, for biographical data.

1 Restatement, Conflict of Laws § 384 (1934).

2 See, e.g., Currie, "Survival of Actions: Adjudication versus Automation in the Conflict of Laws," 10 Stan. L. Rev. 205 (1958). And see the author's papers on "The Place of Acting in Intentional Multistate Torts: Law and Reason versus the Restatement," 36 Minn. L. Rev. 1 (1951); "Parental Immunity in the Conflict of Laws: Law and Reason versus the Restatement," 23 U. Chi. L. Rev. 474 (1956); "Guest Statutes in the Conflict of Laws," 69 Yale L.J. 595 (1960); "Products Liability in the Conflict of Laws," 69 Yale L.J. 794 (1960); "Vicarious Liability in the Conflict of Laws," 69 Yale L.J. — (1960).

3 Nussbaum, Principles of Private International Law 92 (1943). See also 1 Rabel, Conflict of Laws 75 (2d ed. 1958).

4 See the author's studies on "Adhesion Contracts in the Conflict of Laws," 53 Colum. L. Rev. 1072 (1953); "The Real Estate Broker and the Conflict of Laws," 59 Colum. L. Rev. 303 (1959); "The Statute of Frauds in the Conflict of Laws: The Basic Rule of Validation," 59 Colum. L. Rev. 874 (1959); "Contracts in the Conflict of Laws," 60 Colum. L. Rev. — (1960); "Contractual Capacity of Married Women and Infants in the Conflict of Laws," 43 Minn. L. Rev. 899 (1959); and articles cited supra note 2.

5 See Ehrenzweig, "Lex Fori, in the Conflicts of Law—Exception or Rule," 32 Rocky Mt. L. Rev. 13 (1959); Ehrenzweig, "The Lex Fori—The Basic Rule in the Conflict of Laws," 58 Mich. L. Rev. — (1960).

aided in this country by a largely obsolete law of jurisdiction which has forced courts to look for a way to avoid application of their own law when their jurisdiction is invoked though lacking contact with the case.[6] The present study will offer an analysis of an area of torts law which, owing to a relatively unambiguous policy basis and a limited number of decided cases, is well qualified to serve as a touchstone for developing a rational conflicts rule. "To be sure, tort law also has a compensatory element. But that is of secondary consequence where, as in the tort of alienation of affections, the principal reason why the state stamps conduct as wrongful is that so many people regard it as sinful, so many regard it as offensive to public morals . . . ."[7] This view, set forth by Judge Wyzanski in what is probably the leading case in the field, may be considered the prevailing one, although isolated courts may occasionally stress the compensatory element even as to this tort.[8] Alienation of affections and related torts are, therefore, used in this article to develop the conflicts rules governing admonitory torts in contrast to those governing enterprise liabilities.[9]

A Texas citizen is sued in a Louisiana court for having alienated a New York wife's affections in Texas. The plaintiff relies on the law of Texas as the "place of wrong." But the court denies the claim as violating the public policy of the forum.[10]

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[6] See Ehrenzweig, "Guest Statutes in the Conflict of Laws," 69 Yale L.J. 595 (1960); and in general Smith, "Torts and the Conflict of Laws," 20 Modern L. Rev. 447 (1957).

[7] Gordon v. Parker, 83 F. Supp. 40, 42 (D. Mass.), aff'd sub nom. Parker v. Gordon, 178 F.2d 888 (1st Cir. 1949).

[8] See note 17, infra.

[9] See the author's studies, supra note 2. "Alienation of affections," for the purpose of this article, includes several related bases of tort actions, such as criminal conversation and enticement. See Prosser, Torts 686 (2d ed. 1955).

For analyses of the rules governing enterprise liability, see the author's studies, supra note 2.

[10] Gaines v. Poindexter, 155 F. Supp. 638 (W.D. La. 1957). To the same effect with regard to forum statutes, see Thome v. Macken, 58 Cal. App. 2d 76, 136 P.2d 116 (1943); Jacobsen v. Saner, 247 Ia. 191, 72 N.W.2d 900 (1955). For similar cases involving the breach of a promise to marry, see Calcin v. Milburn, 176 F. Supp. 946 (D. N.J. 1959); O'Connor v. Johnson, 74 F. Supp. 370 (W.D. N.Y. 1947); Fahy v. Lloyd, 57 F. Supp. 156 (D. Mass. 1944); A.B. v. C.D., 36 F. Supp. 85, 87 (E.D. Pa. 1940) (dictum). Concerning international problems in this field, see Weidenbaum, "Breach of Promise in Private International Law," 14 N.Y.U.L.Q. Rev. 451 (1937). Had plaintiff, in the Gaines case, supra, obtained jurisdiction in Texas, the favorable judgment of the Texas court would probably have been entitled to full faith and credit in Louisiana. Parker v. Hoefer, 2 N.Y.2d 612, 142 N.E.2d 194, cert. denied, 355 U.S. 833 (1957). This inconsistency between the fates of suits on judgments and those on the underlying facts could be removed only by a reform of our jurisdictional system which should enable the plaintiff to bring suit in the states of the matrimonial domicile and wrongful conduct. See note 16 infra. If the defendant were subjected to Texas jurisdiction in the absence of such contacts, merely by virtue of his having been "caught" in Texas, the Texas court would have to deny jurisdiction as an inconvenient forum. If it did assert jurisdiction, its judgment should not be entitled to recognition in other states. See Ehrenzweig, Conflict of Laws 200 n. 20 (1959). For an international case, see Neporany v. Kir, 5 App. Div. 2d 438, 173 N.Y.S.2d 146 (1958), appeal dismissed, 7 App. Div. 2d 836, 184 N.Y.S.2d 559 (1st Dep't 1959).

A Massachusetts citizen is sued in a Massachusetts court for having disturbed a Pennsylvania marriage in Massachusetts. The defendant invokes Pennsylvania law which has abolished such actions. But he is held liable under the law of the forum which is said to have a prevailing interest in the conduct of its citizens.[11]

A Georgia citizen is sued in a Georgia court for having alienated the affections of an Illinois wife in Illinois. He invokes an Illinois statute under which plaintiff's damages would be limited to those actually suffered. But the court permits the jury to assess pnnitive damages under the law of the forum.[12]

Notwithstanding purported reliance on the Restatement shiboleth, these cases can be harmonized only by recognizing that a court will first assume its own law to be properly applicable, and will deviate from this assumption only if compelled to do so by obvious reasons of justice and policy. No such reason existed for the Louisiana court to refuse applying its own rejection of heart balm suits, albeit the offense was committed elsewhere. No such reason existed for the Massachusetts court to neglect its own interest in preventing adulterous conduct, and to accommodate a defendant who had chosen a Pennsylvania woman for his exploits. And no such reason existed for the Georgia court to refrain from applying its own standard of damages, even though the alleged conduct had occurred in another state. A court will not easily be persuaded by either a defendant who pleads that he had arranged the adultery in reliance on a more lenient law, or by a plaintiff who asserts that he had chosen the place of his marital domicile with a view towards the greater legal protection afforded this marriage under the law of that place.

Only one situation might, at least for the time being, require the recognition of an exception to the Basic Rule of the *Lex Fori*. The catch-as-catch-can rule of personal jurisdiction permits the plaintiff to catch the defendant wherever service of process can be effected, without regard to any contacts of the state with the case. Under this rule a defendant might accidentally be forced into a forum which adheres to the common law rule, although the laws of the other interested jurisdictions, including those of the parties' domicile and the defendant's conduct, have abolished actions for the alienation of affections. To be sure, the doctrine of *forum non conveniens* will enable, and should compel, the court in such a

11 Gordon v. Parker, 83 F. Supp. 40, 42 (D. Mass.), per Wyzanski, J., aff'd sub nom., Parker v. Gordon, 178 F.2d 888 (1st Cir. 1949). See Comment, 1 Stan. L. Rev. 759 (1949). But cf. Albert v. McGrath, 165 F. Supp. 461 (D.D.C. 1958), which reaches the opposite result by a different "weighing of interests."

12 Orr v. Sasseman, 239 F.2d 182 (5th Cir. 1956). See also Luick v. Arends, 21 N.D. 614, 132 N.W. 353 (1911), and in general Annots., 31 A.L.R.2d 713, 36 A.L.R.2d 548.

case to dismiss the suit.[13] But the courts of states in which this doctrine has not yet been recognized or employed for this purpose may have to resort to a choice of law in order to do justice. They can do so by admitting a defense allowed under the law of the place of conduct, thus adhering to earlier American law and the rule continuing to be recognized in all countries of the Commonwealth.[14] Under current American terminology, the interpretation, in cases involving admonitory torts, of the "place of wrong" formula as referring to the place of *conduct* rather than *harm* would support this solution.[15]

On the other hand, a defendant should hardly be heard with a defense based upon law other than that of the *lex fori* if the forum coincides with the place of his conduct. To be sure, in one case the District Court for the District of Columbia refused, under Maryland law, to entertain an action for the alienation of affections by a Maryland husband although the acts were alleged to have occurred in the District, a jurisdiction which continues to adhere to the common law rule.[16] But this decision probably results from a rather isolated, though entirely proper, compensatory characterization of this type of action.[17] It may, perhaps, also be explained by the court's distaste for this type of action which is often, though by no means always, used for extortion and vengeance, rather than for morally desirable ends.[18] In any event, the peculiar relation between the residual jurisdiction of the District and its surrounding states would seem to deprive this decision in other jurisdictions of any value as a precedent for the establishment of another exception to the Basic Rule.

Nor does such an exception seem warranted where the plaintiff, rather than the defendant, claims to have been forced into an unfavorable forum by that concomitant of the catch-as-catch-can rule which, despite a substantial contact, negates jurisdiction in the absence of intrastate service

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[13] See, in general, Ehrenzweig, Conflict of Laws 122 ff. (1959).

[14] Phillips v. Eyre, [1870] L.R. 6 Q.B. 1, 29. See, e.g., Falconbridge, Conflict of Laws 809 ff. (2d ed. 1954); Yntema, Book Review, 27 Can. B. Rev. 116 (1949).

[15] For a detailed analysis, see Ehrenzweig, "The Place of Acting in Multistate Intentional Torts," 36 Minn. L. Rev. 1 (1951). See also Burke v. New York, New Haven and Hartford R.R., 267 F.2d 894 (2d Cir. 1959) (malicious prosecution).

[16] Albert v. McGrath, 165 F. Supp. 461 (D.D.C. 1958). Since the forum law was not stated, the abduction case of Aberlin v. Zisman, 244 F.2d 620 (1st Cir.), cert. denied, 355 U.S. 857 (1957), in which a damage claim under New York law was denied solely on the facts, is inconclusive. See also International Film Distribution Establishment v. Paramount Pictures Corp., 14 Misc. 2d 203, 155 N.Y.S.2d 767 (Sup. Ct. N.Y. County, 1956), leaving open, but not conceding, a suit for malicious prosecution under Italian law. Cf. Pelella v. Pelella, 13 Misc. 2d 260, 176 N.Y.S.2d 862 (Sup. Ct. Kings County, 1958), denying a claim for malicious prosecution under the law of a sister state.

[17] Under this interpretation, rejected by most other courts and writers (supra note 7, note 18 infra), the plaintiff "evidently feels that, in some manner or measure, money will make him and his family whole again." Gaines v. Poindexter, supra note 10, at 639.

[18] See, in general, Prosser, Torts 685 ff. (2d ed. 1955). For a defense of the action, see Brown, "The Action for Alienation of Affections," 82 U. Pa. L. Rev. 472 (1934).

of process.[19] It might be argued that, in such a case, the plaintiff should be free to invoke a law more favorable to him than that of a purely accidental forum. But in only one case has a court, in this situation, applied the common law of alienation of affections, which was operative in the state of the plaintiff's domicile, instead of the forum's own statute.[20] Even this case must now be considered overruled[21] and discredited.[22] Moreover, it may be concluded that, because of current changes in the law of jurisdiction, this situation does not justify a second exception to the Rule. In view of the recent pronouncements of the Supreme Court,[23] a statute of the state of the "place of wrong" permitting suit for the alienation of affections upon constructive service would probably be upheld as constitutional whether that place be identified as the state of the matrimonial domicile or that of the conduct. If the state has not made use of this constitutional power, it may be assumed to lack interest in the extraterritorial common law protection of its citizens.

CONCLUSION

This brief analysis of a conspicuous example of a prevailing admonitory tort supports the conclusion that as to such torts, courts, far from being prepared to accept the mechanical "place of wrong" formula of the Restatement, have in fact adhered to the historical basic rule of the *lex fori*. This will be less surprising if we remember the historical affinity of all tort law with criminal law, and that courts in criminal cases have always and everywhere applied their own law even to acts committed abroad.[24]

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19 Ehrenzweig, Conflict of Laws 1 ff., 88 ff., 102 ff. (1959).

20 Wawrzin v. Rosenberg, 12 F. Supp. 548 (E.D.N.Y. 1935). The court permitted suit under New Jersey law even though New Jersey had, in the meantime, abolished such actions—a more than doubtful decision which a state court would hardly have supported.

21 The case was decided prior to Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), which compels federal district courts to follow the conflict rules of the state in which they sit.

22 Fahy v. Lloyd, 57 F. Supp. 156 (D. Mass. 1944) (suit for breach of a Bahama Island contract to marry, allegedly committed in Connecticut, dismissed under Massachusetts law and public policy). On the related problem of intertemporal conflicts law concerning facts which occurred prior to the enactment of heart balm statutes, see Magierowski v. Buckley, 39 N.J. Super. 534, 121 A.2d 749 (1956).

23 See, in general, Ehrenzweig, "Pennoyer is Dead—Long Live Pennoyer," 30 Rocky Mt. L. Rev. 285 (1958); Ehrenzweig, op. cit. supra note 19, at 96 ff.

24 Jurisdiction may be taken by a state over "a result happening within the state of an act done outside the state." Restatement, Conflict of Laws § 428, Comment b (1934). Whether this event is a crime is determined by the law of the forum. Restatement, Conflict of Laws § 428(1) (1934).