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Conflict of Laws—Policy of the Forum as Basis of Conflicts Rules

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CONFLICT OF LAWS

Policy of the Forum as Basis of Conflicts Rules. In *Richards v. United States*,[1] the United States Supreme Court faced a conflict of laws problem arising under the Federal Tort Claims Act.[2]

The plaintiff's decedents were killed when an airplane flying east from Tulsa, Oklahoma, crashed in Missouri, as a result of negligence committed by a Federal officer in Oklahoma. The Missouri wrongful death act[3] limits a single recovery to $15,000. (The third-party defendant, American Airlines, owner-operator of the plane, had either paid or tendered payment in this amount to each of the plaintiffs.) The Oklahoma wrongful death act[4] does not limit the amount of a single recovery.

The Federal Aviation Act[5] charges the administrator of the Federal Aviation Agency with the responsibility of enforcing rules and regulations controlling maintenance of equipment used in air transportation. The plaintiffs alleged that the United States, through the administrator, was negligent in failing to enforce the rules and regulations applicable to American Airlines, thus causing the injury to the plaintiffs. The plaintiffs sued under the Federal Tort Claims Act,[6] which provides that,

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, *would be liable to the claimant in accordance with the law of the place where the act or omission occurred.* (Emphasis added.)[7]

The Oklahoma conflict of law rule would refer the question of amount of recovery to Missouri law—the law of the place where the

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[1] 369 U.S. 1 (1962).

[2] Title IV, The Legislative Reorganization Act (The Federal Tort Claims Act), 60 Stat. 842 (1946), 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1948).

[3] MO. REV. STAT. § 537.090 (1949).

[4] OKLA. STAT. tit. 12, §§ 1051-1054 (1951).

[5] Title VI, The Federal Aviation Act (Public Law 85-726, Safety Regulation of Civil Aeronautics), § 605 (b), 72 Stat. 778 (1958), 49 U.S.C. § 1425 (1958).

[6] Title IV, The Legislative Reorganization Act (The Federal Tort Claims Act), 60 stat. 842 (1946), 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1948).

[7] Title IV, The Legislative Reorganization Act (The Federal Tort Claims Act), 28 U.S.C. § 1346(b) (1948).

negligence had its operative effect.[8] Had this been an action against the third-party defendant, American Airlines, the result would clearly have been governed by the Oklahoma conflict rule. Because the action was against the United States, it was necessary for the Court to determine the meaning of "law of the place" as used in the Federal Tort Claims Act.[9] The Court granted certiorari[10] to resolve a three-way conflict in the circuit court decisions.[11]

Since Congress did not specifically consider the problem of conflicts in drafting the Federal Tort Claims Act,[12] the court was forced to turn elsewhere for a solution to the problem. The act refers to "the place where the act or omission took place," which is clearly distinguishable from the place where the negligent act has its operative effect. So the Court began by rejecting the result reached by the ninth circuit in *United States v. Marshall*,[13] which applied the law of the jurisdiction where the injury occurred.

The Court thus limited the issue to whether "law of the place" refers to the entire law of the place, including conflicts law, or only to internal negligence law. The Supreme Court concluded that the phrase should include conflicts law, reasoning that no intention was expressed to make only part of the "law of the place" applicable—so Congress must have intended all of the "law of the place" to apply. The Court thus applied the Oklahoma conflicts rule, referring to the Missouri

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[8] Gochenour v. St. Louis-San Francisco R. Co., 205 Okla. 594, 239 P.2d 769 (1952).

[9] Title IV, The Legislative Reorganization Act (The Federal Tort Claims Act), 60 Stat. 842 (1946), 28 U.S.C. § 1346(b) (1948).

[10] 366 U.S. 916 (1961).

[11] The District of Columbia Circuit, in Eastern Airlines v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955); the Seventh Circuit, in Voytas v. United States, 256 F.2d 786 (7th Cir. 1958); and the lower court dissent in this case, Richards v. United States, 285 F.2d 521, 526 (10th Cir. 1960) have all reached the conclusion that the language of the Federal Tort Claims Act quoted in the text means only the negligence law of the place where the acts actually took place, without regard to the conflict of law rules. In the *Richards* case, this conclusion would result in reference to the Oklahoma statute, which does not limit recovery, and thus in holding the defendant liable for the amount of all proven damages.

The Ninth Circuit, in United States v. Marshall, 230 F.2d 183 (9th Cir. 1956), has held that the language of the Federal Tort Claims Act means the place where the acts had their operative effect causing damage. In the *Richards* case, this rule would mean referring directly to Missouri law and limiting the plaintiff's recovery to $15,000.

The Second Circuit, in Landon v. United States, 197 F.2d 128 (2d Cir. 1952) and the Tenth Circuit, in Richards v. United States 285 F.2d 521 (10th Cir. 1960), have concluded that the Federal Tort Claims Act refers to all of the law of the place where the act causing injury took place, including the conflict of law rules. In the *Richards* case, this would entail application of Oklahoma law which would shift the measure of damages question to the Missouri statute. See Gochenour v. St. Louis-San Francisco R. Co., 205 Okla. 594, 239 P.2d 769 (1952).

[12] 369 U.S. at 8.

[13] 230 F.2d 183 (9th Cir. 1956). See note 11 *supra*.

rule limiting recovery to $15,000.[14] This result permits the lower courts to treat the United States as a private person for all purposes, making the Federal Tort Claims Act internally consistent.

More important in terms of the future effect of the *Richards* decision is the Court's analysis concerning another prospective advantage of the adopted rule:

> Recently there has been a tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation. We can see no compelling reason to saddle the Act with an interpretation that would prevent the federal courts from implementing this policy in choice-of-law rules where the State in which the negligence occurred has adopted it. Should the States continue this rejection of the older rule in those situations where its application might appear inappropriate or inequitable, the flexibility inherent in our interpretation will also be more in step with that judicial approach, as well as with the character of the legislation and with the purpose of the Act considered as a whole.[15]

The Court cited examples of departures from traditional rules by state jurisdictions and noted other possible conflict rules based on the policy of the forum.[16] In view of the language of the opinion, the conclusion is inescapable that the Court is lending its approval to departures from traditional rules.

One of the cases the Court cited was *Schmidt v. Driscoll Hotel, Inc.*,[17] where a Minnesota liquor dealer (the defendant) sold liquor in that state in violation of a Minnesota statute prohibiting the sale of alcoholic beverages to a person already intoxicated. The purchaser had an accident in Wisconsin subsequent to the defendant's violation of the statute. The plaintiff was injured and sued in the Minnesota courts on the theory that the defendant had been negligent in violating the statute. The court noted the traditional rule[18] that the tort occurred, if at all, at the time of the accident in Wisconsin, and under Wisconsin law the defendant's actions were not tortious. Nevertheless the court found the defendant liable, by applying the Minnesota statute and Minnesota negligence law. It held that since both parties were residents of Minnesota, and since the defendant was licensed under Minnesota law and was accused of violating a Minnesota

[14] MO. REV. STAT. § 537.090 (1949).
[15] 369 U.S. at 12, 13.
[16] 369 U.S. at 12, n.26.
[17] 249 Minn. 376, 82 N.W.2d 365 (1957).
[18] RESTATEMENT, CONFLICT OF LAWS §§ 377, 378 (1934).

statute, there were substantial contacts sufficient to make reasonable the application of Minnesota law. The court discerned in the statute of its own state a policy which the courts of Minnesota must enforce in reaching a result in conflicts cases.[19]

The authorities referred to by the Court in the *Richards* case suggest numerous possible rules enabling the courts to give effect to the policy of the jurisdiction having substantial contact with the cause of action.[20] As in the *Schmidt* case, a court might identify both local policy and the rules of law applicable under the traditional choice-of-law rules and apply the latter whenever the result does not conflict with local policy. Conversely, a court might follow local policy as law, resorting to traditional choice-of-law rules only when there is no local policy on the question presented.

One jurisdiction (New York) has adopted a new approach under which the court identifies the rule of law applicable under traditional conflicts rules and divides the rule into two segments—that part which conflicts with local policy and that part which does not. Then the court follows the compatible part and rejects the conflicting part. The cases giving rise to this new approach furnish an interesting background for consideration of new rules.

Kilberg v. Northeast Airlines, Inc.,[21] and *Pearson v. Northeast Airlines, Inc.*,[22] were wrongful death actions, involving the crash in Massachusetts of the defendant's airplane, during a flight which originated in New York City. A Massachusetts statute[23] limits recovery in an action by an administrator to $15,000. The New York constitution provides that, "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."[24]

[19] 82 N.W.2d at 368. This result is suggested by Justice Roger J. Traynor of the California Supreme Court. Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959).

[20] 369 U.S. at 12, n.26, citing: Vrooman v. Beach Aircraft Corp., 183 F.2d 479 (10th Cir. 1950); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944, 42 A.L.R.2d 1162 (1953); Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 Atl. 163, 61 A.L.R. 846 (1928); Caldwell v. Gore, 175 La. 501, 502, 143 So. 387 (1932); Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938); Haumschild v. Continental Cas. Co., 7 Wis.2d 130, 95 N.W.2d 814 (1959); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1959). Some other suggestions appear in sources not mentioned by the court: Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Stumberg, *"The Place of the Wrong"—Torts and the Conflict of Laws*, 34 WASH. L. REV. 388 (1959); Traynor, *Is This Conflict Really Necessary?* 37 TEXAS L. REV. 657 (1959).

[21] 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

[22] 199 F.Supp. 539 (S.D. N.Y. 1961).

[23] MASS. ACTS 1949, ch. 427, §§ 1-2.

[24] N.Y. CONST. art. I, § 16; N.Y. CONST. art. I, § 18 (1894).

The *Kilberg* action reached the New York Court of Appeals on demurrer to the plaintiff's cause of action.[25] After disposing of the issue on demurrer, the court considered the amount of damages which the plaintiff could recover on remand. This question was not argued on appeal and only four of the seven judges concurred in the majority opinion. (Three dissenters concurred in the result as to the principal issue but did not consider the damages issue.) The court accepted the defendant's argument that the law to be applied should be that of Massachusetts—the place where the negligence had its operative effect, but held that the New York constitutional provision established a clear New York policy against limiting recovery in wrongful death actions. Thus the court held that the provision of the Massachusetts statute limiting recovery to $15,000 would not be applied even though Massachusetts law was otherwise applicable.

In the *Pearson* case, the district court for the Southern District of New York cited *Kilberg* as authority for refusing to apply the provision of the Massachusetts law limiting recovery to $15,000.[26] In a departmental hearing, the Court of Appeals for the Second Circuit refused to follow the *Kilberg* rule, holding that that decision contravened the "full faith and credit" clause of the Constitution.[27] The Second Circuit said,

> Richards v. United States . . . cited by appellee as favorable to it, is favorable to appellant, if it has any relevance. No constitutional question was there presented; Missouri was the place of the death, and Oklahoma the place of the negligence. Missouri, like Masachusetts, had a $15,000 limitation on wrongful death damages, and Oklahoma, like New York, had a constitutional limitation against such limitation.[28]

The *Pearson* dissent[29] views the *Richards* case as giving Supreme Court approval to departures from the usual conflicts rules like the one made by the New York court in *Kilberg*.[30] This view has since been adopted in an en banc reversal (by the Court of Appeals for the Second Circuit) of the earlier panel decision.[31] The en banc decision holds that the *Kilberg* doctrine is a proper conflict of laws rule for a state court to adopt and that such a rule does not contravene the "full

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[25] 10 App. Div.2d 261, 198 N.Y.S.2d 679 (App. Div. 1960).
[26] 307 F.2d 131 (2d Cir. 1962).
[27] 307 F.2d at 133.
[28] 307 F.2d at 136.
[29] 307 F.2d 131, 136 (2d Cir. 1962) (dissent).
[30] 307 F.2d at 142, 144.
[31] U.S.L. WEEK 2256 (2d Cir. Nov. 8, 1962).

faith and credit" clause of the constitution. Pointing out that the Supreme Court in the *Richards case*[32] had approved Kilberg, the court said,

> We do hold, however, that a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law. If, indeed, those connections are wholly lacking or at best tenuous, then it may be proper to conclude that the state has exceeded its constitutional power in applying its local law.[33]

The earlier *Pearson* decision is thus removed as an impediment to the development of new choice-of-law rules. The later *Pearson* decision, in conjunction with the dicta in *Richards,* appears to clear the way for state courts to take a new approach in the conflict of law area, giving such force as may seem reasonable to public policy of the forum jurisdiction.

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CONSTITUTIONAL LAW

Federal Recess Appointments. Allocco, who had been convicted of a narcotics violation by a jury,[1] petitioned a United States District Court to grant his motion for release under 28 U.S.C. § 2255, alleging that his conviction should be set aside because the judge who sat at his trial was not properly appointed to his office so as to be able to exercise the judicial power conferred by U.S. CONST. art. III. The district court denied his motion and the court of appeals affirmed.[2] This was the first federal decision in recent times to deal directly with the recess appointment power and the first ever to approve the long-established practice of making recess appointments to the federal bench without regard to when the vacancy first occurred.

The judge who presided at petitioner's trial had been appointed by the President to fill a vacancy that had first occurred while the Senate was in session.[3] On the appeal of the denial of his motion, the petitioner attacked the mode of appointment on two main grounds. Preliminarily, he argued that it is not constitutional to appoint a judge to a court

[32] 369 U.S. at 12, n.26.

[33] U.S.L. WEEK at 2257. The court is apparently leaving open the question of what constitutes "substantial contacts."

[1] United States v. Allocco, 234 F.2d 955 (2d cir. 1956), *cert. denied,* 352 U.S. 931 (1957).

[2] United States v. Allocco, 200 F. Supp. 868 (S.D.N.Y. 1961), *aff'd.* 305 F.2d 704 (2d cir. 1962).

[3] "First occurred," when used in this note to describe when a vacancy occurred, means the point of time at which the position ceased to be filled.