

# GUEST STATUTES IN THE CONFLICT OF LAWS—TOWARDS A THEORY OF ENTERPRISE LIABILITY UNDER "FORESEEABLE AND INSURABLE LAWS": I\*

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THE Restaters would have it that recovery in tort depends on whether "a cause of action in tort is created at the place of wrong,"<sup>1</sup> *i.e.*, "where the last event necessary to make an actor liable for an alleged tort takes place."<sup>2</sup> This rule is circuitous and therefore meaningless: neither the existence of a "wrong" nor the "last event" can be ascertained without reference to the applicable law. This rule has, therefore, been paraphrased by the author of the *Restatement* himself to refer to "the place where the person or thing harmed is situated at the time of the wrong."<sup>3</sup> The *Restatement* rule thus restated, while more meaningful, lacks a rationale and is incorrect in its generality. Based on the long discarded postulate of vested rights,<sup>4</sup> it ignores the relevance of the law of the place of defendant's conduct in cases of admonitory liability,<sup>5</sup> and the impact of insurance in others.<sup>6</sup>

It is my basic contention that all through the field of choice of law the *lex fori* must remain the starting point with some or most of our traditional conflicts rules functioning as exceptions.<sup>7</sup> In the present series of articles, I shall

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1. RESTATEMENT, CONFLICT OF LAWS § 384 (1934).

2. *Id.* § 377.

3. 2 BEALE, CONFLICT OF LAWS § 377.2, at 1287 (1935).

4. See EHRENZWEIG, CONFLICT OF LAWS 8-13 (1959); Carswell, *The Doctrine of Vested Rights in Private International Law*, 8 INT'L & COMP. L.Q. 268 (1959).

5. Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1 (1951). See also 2 HARPER & JAMES, TORTS 1704 (1956); Ehrenzweig, *Alienation of Affections in the Conflict of Laws* (article to be published in the *Cornell Law Quarterly* for Spring 1960).

6. Ehrenzweig, *Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement*, 23 U. CHI. L. REV. 474, 477-78 (1956); Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 U. PITT. L. REV. 397, 422 (1954). See also Ehrenzweig, *Alternative Actionability in the Conflict of Laws of Enterprise Liability*, 63 JURID. REV. 39 (1951); Note, 57 MICH. L. REV. 901 (1959).

7. See Ehrenzweig, *The Lex Fori—The Basic Rule in the Conflict of Laws* (article to be published in the *Michigan Law Review* for March 1960). For a preliminary summary, see Ehrenzweig, *Lex Fori—Exception or Rule?*, 32 ROCKY MT. L. REV. 13 (1959). Perhaps the most important exception from the application of the *lex fori* is the "Rule of Validation" which prevails in the conflicts law of contracts. See Ehrenzweig, *The Real Estate Broker and the Conflict of Laws*, 59 COLUM. L. REV. 303 (1959); Ehrenzweig, *The Statute of Frauds in the Conflict of Laws*, 59 COLUM. L. REV. 874 (1959); Ehrenzweig, *Contracts in*

examine whether, and if so, in what respect, the treatment of conflict of laws problems concerning the law of "enterprise liability,"<sup>8</sup> constitutes an exception to the *lex fori* principle. Problems involving automobile guest statutes, products liability, and vicarious liability have been chosen as a testing ground. A brief historical survey designed to establish the background for the rejection of "official" dogma will precede the discussion.

If the law of contracts is the oldest subject of the law of conflict of laws, the law of torts is its youngest. There was no room for it in the scheme of either the statutists or of Dutch comity. Damages for delicts were apparently a matter of remedy, subject to the law of the forum, and injustice was avoided by the forum's refusal to take jurisdiction where its own law was not properly applicable to a foreign wrong. In England, torts did not become an independent subject of conflicts law until the middle of the nineteenth century.<sup>9</sup> To be sure, earlier civil suits against officers of the British Crown relating to their colonial administration had raised the question whether such officers should be permitted to justify themselves by invoking colonial law.<sup>10</sup> But this question had been raised and answered in close analogy to the questions of criminal responsibility which had been discussed ever since Bartolus' *Commentaries*.<sup>11</sup> Wächter was probably the first scholar to deal with the conflicts law of torts on a general scale,<sup>12</sup> and it was he who apparently inspired Willes, J., in his now famous opinion in *Phillips v. Eyre*.<sup>13</sup> To both Wächter and

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*the Conflict of Laws—Part One: Validity*, 59 COLUM. L. REV. 973 (1959); Ehrenzweig, *Contracts in the Conflict of Laws—Part Two: Performance* (article to be published in the *Columbia Law Review* for December 1959); Ehrenzweig, *Contractual Capacity of Married Women and Infants in the Conflict of Laws*, 43 MINN. L. REV. 899 (1959); Ehrenzweig, *Releases of Concurrent Tortfeasors in the Conflict of Laws* (article to be published in the *Virginia Law Review* for May 1960); Ehrenzweig, *Book Review*, 12 J. LEGAL ED. 137 (1959). See also Williams, *Land Contracts in the Conflict of Laws—Lex Situs: Rule or Exception*, 11 HASTINGS L.J. 159 (1959). This proposition is limited to bargained contracts between equal partners. See Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072 (1953).

8. See generally EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951).

9. Smith, *Torts and the Conflict of Laws*, 20 MOD. L. REV. 447, 450-52 (1957). For a comprehensive analysis, see Binder, *Zur Auflockerung des Deliktsstatuts*, 20 RABELS Z. 401 (1955). A more traditional view of the development of English law is taken by HANCOCK, *TORTS IN THE CONFLICT OF LAWS* 1-20 (1942).

10. *E.g.*, *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774).

11. For a later illustration of this persistent connection, see *CODIX MAXIMILIANEUS BAVARICUS CIVILIS* 1.2.17 (1756), which deals with the problem of "different laws, statutes and customs prevailing in loco Judicii, Delicti, Rei Sitae, Contractus and Domicilii," and clearly equates "delict" with a crime whose "punishment" is subject to the "laws of the place where it was committed." Cf. 4.16 of the Codex which, among "penal actions," includes tort actions under the *lex Aquilia* (4.16.6) and *de effuso vel dejecto* (4.16.8). See generally BATIFFOL, *DRIT INTERNATIONAL PRIVÉ* 610-14 (3d ed. 1959).

12. Wächter, *Über die Collision der Privatrechtsgesetze verschiedener Staaten*, 24 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 230 (1841), 25 *id.* at 1 (1842), claiming the authority of a long line of later statutists who began their investigations with the *lex fori* as the basic law. For other foreign laws, see 2 RABEL, *CONFLICT OF LAWS* 237 (1947).

13. [1870] 6 Q.B. 1.

Justice Willes the foreign law came into play only as a defense and the *lex fori* continued to govern as the sole affirmative basis of liability.<sup>14</sup> In fact even this defensive function of foreign law is said to have been limited to its use "as an authority or ratification in the particular case, and on the peripheral question of vicarious liability."<sup>15</sup> In any event, English law has to this day preserved the *lex fori* as the sole source for liability in tort and has carefully avoided the nightmare of "an obligation springing to birth out of the soil at the possibly unsuspecting actor's feet and hanging itself round his neck like an albatross."<sup>16</sup> Yet it is this nightmare, a travesty of the doctrine of vested rights, which the American Law Institute has bestowed upon us in its restatement of the conflict of laws—without compelling authority in the history of American law.<sup>17</sup>

For Story, as it had been for his continental ancestors, tort law was but a branch of the law of remedies.<sup>18</sup> Since it was thus clearly subject to the law of the forum, conflicts problems did not arise and Story's first edition of 1834 does not even have a reference to torts in its index.<sup>19</sup> This general approach was little changed by the inclusion in the second and third editions of torts committed on the high seas, since Story's only conclusion was that "it is not easy to say in such cases, what laws ought to govern," and that "the most, that can with any probability be stated is, that in the absence of any general doctrine to the contrary, either each nation would . . . follow its own laws, or would apply the rule of reciprocity . . ."<sup>20</sup> Bennett, in his fourth and fifth editions of Story's treatise in effect supports what seems to have been the original approach by apparently urging nonapplicability of foreign tort laws, characterizing them as penal in character.<sup>21</sup> Not until Redfield's sixth and seventh editions were transitory actions *ex delicto* for the first time dealt with in their own right.<sup>22</sup> But being based exclusively on an English case which

14. *But cf.* Yntema, Book Review, 27 CAN. B. REV. 116, 121 (1949).

15. Smith, *supra* note 9, at 453.

On this ground the much criticized decision in *Machado v. Fontes*, [1872] 2 Q.B. 231, in which liability for a Brazilian libel was found under English law, was entirely proper. See FALCONBRIDGE, *ESSAYS ON THE CONFLICT OF LAWS* 820 (2d ed. 1954) (approving result on other grounds). Only one with a vested rights approach such as that taken in *Pollock*, unsigned note, 13 L.Q. REV. 233 (1897), could doubt the "logical" accuracy of this decision.

16. Smith, *supra* note 9, at 457.

17. I have traced this development elsewhere. See Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason versus the Restatement*, 36 MINN. L. REV. 1, 6-14 (1951).

18. STORY, *CONFLICT OF LAWS* 444-45 (1st ed. 1834).

19. All eight editions of Story's work limited the *Conflict of Laws* to "Contracts, Rights and Remedies" in their subtitles.

20. STORY, *CONFLICT OF LAWS* 357 (2d ed. 1841); STORY, *CONFLICT OF LAWS* 706-07 (3d ed. 1846).

21. STORY, *CONFLICT OF LAWS* 1015-16 (4th ed. 1852); STORY, *CONFLICT OF LAWS* 938-89 (5th ed. 1857).

22. STORY, *CONFLICT OF LAWS* 403 (6th ed. 1865); STORY, *CONFLICT OF LAWS* 370 (7th ed. 1872).

applied the *lex fori* to a foreign tort,<sup>23</sup> this treatment remained inconclusive and unrelated to the so-called "rule" of the *Restatement*. This latter rule appeared first in Redfield's eighth edition of 1883. An elaborate footnote in the chapter on crimes, based on a dictum of the United States Supreme Court in *Dennick v. Railroad Co.*,<sup>24</sup> became the basis of the fateful proposition that "The true doctrine . . . proceeds upon the broad ground of the right of action given by the law of the foreign state . . . ."<sup>25</sup>

Any attempt at stating a conflicts rule applicable to torts must discard the conceptualistic superstructure and history of the *Restatement* and analyze the actual holdings of the courts in each typical fact situation. In this analysis it is essential to distinguish between two types of tort liabilities, namely those for moral fault which continue primarily to serve a wrongdoer's admonition, and the much more important liabilities for what I have called "negligence without fault,"<sup>26</sup> *i.e.*, liabilities which, though still phrased in terms of fault, have come primarily to serve to distribute the losses inevitably caused by modern enterprise.

It was for the first type, the classic liabilities for moral fault, that the law of conflict of laws, for the defendant's protection, developed the reference to the law of the place of wrong. That this reference has become inappropriate, and indeed meaningless, in those cases in which the liability has ceased to presuppose a "wrong," should be obvious. Particularly as to the so-called negligence liability of motorists,<sup>27</sup> the place-of-wrong formula could produce intolerable results, as for instance where it would change family (interspousal and parental) immunities "as members of a family cross state boundaries during temporary absences from their home."<sup>28</sup> To escape some of these results, several courageous courts have in effect replaced this formula by a regime of the law of the parties' common domicile.<sup>29</sup> One conclusion seems obvious:

23. *Scott v. Lord Seymour*, 1 H. & C. 219, 158 Eng. Rep. 865 (Ex. 1862).

24. 103 U.S. 11, 18 (1880).

25. STORY, *CONFLICT OF LAWS* 845 n. (8th ed. 1883).

Only a few years earlier application of the *lex fori* to foreign torts had been called a rule "almost too familiar . . . for discussion or authority." *Anderson v. Milwaukee & St. P. Ry.*, 37 Wis. 321, 322 (1875).

26. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951). For approval of my terminology, see, *e.g.*, James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 927 (1957).

27. See Kelso, *Automobile Accidents and Indiana Conflict of Laws: Current Dilemmas*, 33 IND. L.J. 297 (1958); Page, *Conflict of Laws Problems in Automobile Accidents*, 1943 WIS. L. REV. 145; *cf.* Risjord, *Conflict of Laws Applicable to the Standard Automobile Liability Policy*, 1957 WIS. L. REV. 586. See also HANCOCK, *TORTS IN THE CONFLICT OF LAWS* 104-05 (1942).

28. The quotation is from *Emery v. Emery*, 45 Cal. 2d 421, 428, 289 P.2d 218, 223 (1955) (rejecting *lex loci* formula).

29. *Emery v. Emery*, *supra* note 28; *accord*, *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 11-12, 141 A.2d 34, 40 (1958) (rejecting the *lex loci* rule as to interspousal immunity, on the grounds that the rule would "interfere seriously with a status and a policy which the state of residence is primarily interested in maintaining"); *Haumschild v. Continental*

a court which has refused to apply the place-of-wrong "rule" where it would establish a family immunity unknown to the forum will hesitate to apply that rule to other foreign limitations on liabilities existing under its own law. In this context, those statutes which limit the liability of the motorist to his guest invite discussion of the policies underlying enterprise liability as such and the impact of these policies on the conflicts law in this field.

At the present time twenty-nine states have either enacted such "guest statutes" or reached a similar position in their common law.<sup>30</sup> The rationale underlying these statutes, of course, bears decisively on their applicability in other jurisdictions. At the outset we may discount a rationale related to the standard of care. The motorist who has invited a guest, should not and will not drive more or less carefully according to whether he, or his liability insurer, will be held liable merely for his gross negligence or for whatever the jury may find to have been negligence, with or without moral fault. Thus it would clearly be improper to justify subjection of this liability to the law of the place of wrong on the ground that it is admonitory in character.

Nor can guest statutes be rationalized as obviating "the proverbial ingratitude of the dog that bites the hand that feeds him."<sup>31</sup> This rationale would fail completely in the vast majority of cases where the host carries liability insurance, and will become totally meaningless with the achievement of the goal of general or near-general insurance which, with or without compulsion, is sought by both the public and the insurance industry.<sup>32</sup> Even in the absence of insurance, where this rationale could realistically be invoked, it could not justify a conflicts rule referring to the law of the place of the accident, since such a rationale could hardly be adequately served by discouraging a guest from being "ungrateful" only in half of the states which he might traverse. There remains then the usual argument that guest statutes are designed to put a barrier in the way of vexatious litigation which would result from collusion between guest and host against the latter's liability insurer.<sup>33</sup> It has been doubted whether collusion is less likely if the scope of liability is reduced.<sup>34</sup> But even if there were substance to this argument, it could not justify

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Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); see Comment, *Functional Application of Conflict of Law Rules in Tort Cases*, 44 YALE L.J. 1233 (1935).

30. Twenty-seven states have guest statutes. For collection, see Note, 34 IND. L.J. 338 n.2 (1959). In addition, Georgia is sometimes classified as a guest statute state. See, e.g., Comment, 54 NW. U.L. REV. 263, 264 n.3 (1959). The Georgia statute, although not strictly speaking a guest statute, has been so construed by the courts. See GA. CODE ANN. § 68-301 & annot. (1957). Massachusetts holds the host liable to his guest only for gross negligence as the result of a common-law development. See *Massaletti v. Fitzroy*, 228 Mass. 487, 118 N.E. 168 (1917); Comment, 35 MICH. L. REV. 804, 805-12 (1937).

31. *Chaplowe v. Powsner*, 119 Conn. 188, 190-91, 175 Atl. 470, 471 (1934), quoting from *Crawford v. Foster*, 110 Cal. App. 81, 87, 293 Pac. 841, 843 (Dist. Ct. App. 1930).

32. See EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM—A VOLUNTARY COMPENSATION PLAN (1954); GREEN, TRAFFIC VICTIMS (1958); Ehrenzweig, Book Review, 11 STAN. L. REV. 400 (1959).

33. Cf. *Silver v. Silver*, 280 U.S. 117, 123 (1929).

34. 2 HARPER & JAMES, TORTS 961 (1956). See also Comment, 54 NW. U.L. REV. 263 (1959).

a rule which would defeat the insurer's statutory protection whenever the insured car is driven into a state denying such protection.

Notwithstanding the obvious inadequacy of the place-of-wrong rule in the application of guest statutes, the courts' language in the seventy-odd conflicts cases which have invoked such statutes points to a virtually unanimous adoption of the rule. This is understandable, though misleading, in view of the fact that these statutes were the product of the period of the preparation and promulgation of the *Restatement*. But fortunately judicial language in this field does not correctly reflect living law. Nearly one half of the cases, while phrased in terms of the place of wrong rule, may, and indeed must, be ignored in testing the actual validity of this rule. In many of them the law of the forum was the same, or virtually the same, as that of the place of the accident, and would therefore have produced the same result.<sup>35</sup> In others the court found liability under a foreign guest statute which a fortiori would have been found under the common law of the forum,<sup>36</sup> or nonliability under a foreign common law which a fortiori would have been found under the guest statute of the forum.<sup>37</sup> And there are cases in which the decision rested on grounds other than a choice between common law and a guest statute.<sup>38</sup>

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35. Only inconclusive cases of this type have so far been decided in Illinois, South Carolina, and Texas. See *Kechn v. Braubach*, 307 Ill. App. 339, 30 N.E.2d 156 (1940); *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939); *Hill v. Cheek*, 230 F.2d 104 (5th Cir. 1956) (Texas). For inconclusive cases of this kind from jurisdictions otherwise committed to the Restatement formula, see note 39 *infra*; cf. *Passer v. Schimmel*, 6 Misc. 2d 629, 158 N.Y.S.2d 694 (Sup. Ct. 1956) (applying New Jersey law concerning liability to licensees while stating that New York law "similar").

36. *Minnesota*: *Thieman v. Johnson*, 257 F.2d 129 (8th Cir. 1958); *Ressmeyer v. Jones*, 210 Minn. 423, 298 N.W. 709 (1941); *Missouri*: *Wilcox v. Swenson*, 324 S.W.2d 664 (Mo. 1959); *Barnes v. Lackey*, 319 S.W.2d 638 (Mo. 1959); *Taylor v. Laderman*, 349 Mo. 415, 161 S.W.2d 253 (1942); *New Hampshire*: *McAllister v. Maltais*, 154 A.2d 456 (N.H. 1959); *Desrosiers v. Cloutier*, 92 N.H. 100, 25 A.2d 123 (1942); *Laplante v. Rousseau*, 91 N.H. 330, 18 A.2d 777 (1941); *New Jersey*: *Harber v. Graham*, 105 N.J.L. 213, 143 Atl. 340 (Ct. Err. & App. 1928); *Crothers v. Caroselli*, 125 N.J.L. 403, 16 A.2d 341 (Sup. Ct. 1940); *Turk v. Turk*, 9 N.J. Super. 55, 74 A.2d 900 (App. Div. 1950); *New York*: *Selles v. Smith*, 4 N.Y.2d 412, 151 N.E.2d 838, 176 N.Y.S.2d 267 (1958); *Pennsylvania*: *Katz v. Ross*, 117 F. Supp. 523 (W.D. Pa. 1953); *Rodney v. Staman*, 371 Pa. 1, 89 A.2d 313 (1952); *Julian v. Tornabene*, 171 Pa. Super. 333, 90 A.2d 346 (1952); *O'Hagan v. Byron*, 153 Pa. Super. 372, 33 A.2d 779 (1943); *Rhode Island*: *Powers v. Goodwin*, 58 R.I. 372, 192 Atl. 767 (1937); *Tennessee*: *Lucas v. Phillips*, 326 S.W.2d 905 (Tenn. 1957); *McMahan v. McMahan*, 38 Tenn. App. 498, 276 S.W.2d 738 (1954); *Hamilton v. Peoples*, 38 Tenn. App. 385, 274 S.W.2d 630 (1954); *West Virginia*: *Dodrill v. Young*, 102 S.E.2d 724 (W. Va. 1958).

37. *Sutton v. Bland*, 166 Va. 132, 184 S.E. 231 (1936); cf. *Slaton v. Hall*, 168 Ga. 710, 148 S.E. 741 (1929) (nonliability under forum interpretation of foreign common law).

38. In *Gratton v. Harwood*, 53 R.I. 94, 164 Atl. 192 (1933), the statute of limitations of the *lex loci* was decisive. In *Freas v. Sullivan*, 130 Ohio St. 486, 200 N.E. 639 (1936) it was held that under the law of the place of wrong, the guest's contributory negligence precluded recovery regardless of host's possible gross negligence, and in *Kelly v. Simoutis*, 90 N.H. 87, 4 A.2d 868 (1939), and *Smith v. Klute*, 277 N.Y. 407, 14 N.E.2d 455 (1938), plaintiff's status as a "guest" was denied. *Naphtali v. Lafazan*, 8 App. Div. 2d 22, 186

About twenty jurisdictions remain which seem committed to the rule, since they have chosen to apply either the common law<sup>30</sup> or the guest statute<sup>40</sup> of the place of accident notwithstanding a different law prevailing in the

N.Y.S.2d 1010 (1959), involved an owner and his wife who were injured in an Ohio accident while passengers in their own car. Although the *lex loci* guest statute was applied against the wife, it was construed strictly in the husband's favor, resulting in a holding that he was not a guest and was therefore entitled to recover not only for his own injuries but for loss of his wife's services and her medical expenses. The latter claim was allowed on the grounds that under the law of Ohio the cause of action belonged to the husband in his own right. In *Jones v. Avco Mfg. Corp.*, 218 F.2d 406, 408 (8th Cir. 1955), the court applied "general rules of agency," rather than one of the "varying state guest statutes." In *Scholle v. Home Mut. Cas. Co.*, 273 Wis. 387, 78 N.W.2d 902 (1950), the primary basis of the decision was interspousal immunity. *Pando v. Jasper*, 133 Colo. 321, 295 P.2d 229 (1956), turned upon a question of pleading.

39. *California*: *Loranger v. Nadeau*, 215 Cal. 362, 10 P.2d 63 (1932) (both parties related, forum citizens); *Victor v. Sperry*, 163 Cal. App. 2d 518, 329 P.2d 729 (Dist. Ct. App. 1958) (limited recovery under Mexican law); *Iowa*: *Redfern v. Redfern*, 212 Iowa 454, 236 N.W. 399 (1931); *Kansas*: *Pool v. Day*, 141 Kan. 195, 40 P.2d 396 (1935); *Michigan*: *Eskovitz v. Berger*, 276 Mich. 536, 268 N.W. 883 (1936); *Massachusetts*: *Hall v. Hamel*, 244 Mass. 464, 138 N.E. 925 (1923); *Nebraska*: *Whitney v. Penrod*, 149 Neb. 636, 32 N.W.2d 131 (1948); *Nevada*: *Campbell v. Baskin*, 69 Nev. 108, 242 P.2d 290 (1952); *Ohio*: *Collins v. McClure*, 143 Ohio St. 569, 56 N.E.2d 171 (1944).

It is unrealistic to argue as the lower court did in the last cited case that the forum may require "its citizens while sojourning in another state to govern their conduct toward one another according to the law of that state." *Collins v. McClure*, 49 N.E.2d 181, 184 (Ohio Ct. App. 1942), *aff'd*, 143 Ohio St. 569, 56 N.E.2d 171 (1944).

The following decisions of the same jurisdictions, which apply foreign guest statutes, are inconclusive since similar statutes of the forum would presumably have led to the same result. *Provost v. Worrall*, 142 Cal. App. 2d 367, 298 P.2d 726 (Dist. Ct. App. 1956); *Greiner v. Hicks*, 231 Iowa 141, 300 N.W. 727 (1941); *Kingery v. Donnell*, 222 Iowa 241, 268 N.W. 617 (1936); *Kokenge v. Holthaus*, 165 Kan. 300, 194 P.2d 482 (1948); *Koster v. Matson*, 139 Kan. 124, 30 P.2d 107 (1934); *Bushouse v. Brom*, 297 Mich. 616, 298 N.W. 303 (1941); *McCown v. Schram*, 139 Neb. 738, 298 N.W. 681 (1941); *Mitrovich v. Pavlovich*, 61 Nev. 62, 114 P.2d 1084 (1941); *Witdock v. Gyselbracht*, 67 Ohio App. 120, 36 N.E.2d 40 (1940); *De Shetler v. Kordt*, 43 Ohio App. 236, 183 N.E. 85 (1931).

40. *Kentucky*: *Coulter v. Coulter*, 219 F.2d 778 (6th Cir. 1955); *Huguenot v. Scaff*, 294 S.W.2d 547 (Ky. 1956); *Ansback v. Greenberg*, 256 S.W.2d 1 (Ky. 1952); *Minnesota*: *Phelps v. Benson*, 252 Minn. 457, 90 N.W.2d 533 (1958); *Mississippi*: *Covington v. Carley*, 197 Miss. 535, 19 So. 2d 817 (1944); *Missouri*: *Allen v. Keck*, 212 F.2d 425 (8th Cir. 1954); *New Hampshire*: *Lee v. Chamberlain*, 84 N.H. 182, 148 Atl. 466 (1929); *New York*: *Metcalf v. Reynolds*, 267 N.Y. 52, 195 N.E. 681 (1935); *Naphtali v. Lafazan*, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (1959); *Ritchey v. Crudelle*, 255 App. Div. 886, 7 N.Y.S.2d 909 (1938); *North Carolina*: *Desch v. Reeves*, 163 F. Supp. 213 (M.D.N.C. 1958); *Hale v. Hale*, 219 N.C. 191, 13 S.E.2d 221 (1941); *Brumsey v. Mathias*, 216 N.C. 743, 6 S.E.2d 495 (1940); *Farfour v. Fahad*, 214 N.C. 281, 199 S.E. 521 (1938); *Wright v. Pettus*, 209 N.C. 732, 184 S.E. 494 (1936); *Oklahoma*: *Gill v. Hayes*, 188 Okla. 343, 103 P.2d 117 (1940); *Pennsylvania*: *Randall v. Stager*, 355 Pa. 352, 49 A.2d 689 (1946); *Mackey v. Robertson*, 328 Pa. 504, 195 Atl. 870 (1938); *Mike v. Lian*, 322 Pa. 353, 185 Atl. 775 (1936); *Tennessee*: *Hoover v. Harris*, 177 Tenn. 467, 151 S.W.2d 152 (1941); *West Virginia*: *White v. Hall*, 118 W. Va. 85, 188 S.E. 768 (1936); *Wood v. Shrewsbury*, 117 W. Va. 589, 186 S.E. 294 (1936); *Wisconsin*: *Urban v. Chars*, 1 Wis. 2d 582, 85 N.W.2d 386 (1957).

forum state. But courts which have so far limited themselves to the application of foreign common law may well have been motivated by distrust of a legislative enactment which they viewed as primarily brought about by powerful lobbies, rather than by adherence to general precepts. Only twelve jurisdictions have applied the foreign guest statute in preference to the common law of the forum. In the absence of reasoned decisions, it must be assumed that the results in these jurisdictions were determined by an unconditional acceptance of the vested rights theory of the *Restatement*.<sup>41</sup> But it may be hoped that these jurisdictions, as well as all others, will ultimately follow the lead which the highest courts of at least four states<sup>42</sup> have taken in similar contexts and discard the *Restatement* "rule" "in conformity with principles of equity and justice,"<sup>43</sup> at least where the protection of citizens of the forum state so requires. They will then cease to deprive passengers in fully insured cars of their claims against the insurers of their hosts by virtue of a totally unwarranted reference to the law of a fortuitous place of accident.<sup>44</sup>

In the vast majority of cases, the forum in guest-host litigation is the state of the plaintiff's and defendant's common domicile. Here, as all through the law of torts, the *lex fori* is the law properly applicable, and the English conflicts rule under which the *lex loci* comes into play only as a defense on certain limited issues<sup>45</sup> would supply a rational decision.<sup>46</sup> But this rule fails not

41. *But cf.* *Smoot v. Fisher*, 248 S.W.2d 38 (Mo. Ct. App. 1952) (arrives at applying the common law of the forum by a peculiar theory of a "concurrent jurisdiction" of the states of forum and accident over an accident occurring on a bridge over the Mississippi); *Gridley v. Cardenas*, 3 Wis. 2d 623, 89 N.W.2d 286 (1958) (refusing to apply a guest statute of the place of accident to an aircraft).

42. *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (rejecting *lex loci* rule of parental immunity); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957) (dramshop act); *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958) (interspousal immunity); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (same); see *Stumberg, "The Place of the Wrong": Torts and the Conflict of Laws*, 34 WASH. L. REV. 388, 391 (1959).

43. *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 380, 82 N.W.2d 365, 368 (1957).

44. For a case demonstrating the fortuitous character of the place-of-harm rule in relation to other facets of the host-guest relation, see *Flynn v. Little*, 141 N.E.2d 182 (Ohio Ct. App. 1957) (Ohio parties subjected to guest's duty to protest under Pennsylvania law). See also *Stotzheim v. Djos*, 98 N.W.2d 129 (Minn. 1959) (guest's assumption of risk, laws probably identical).

45. Note 15 *supra* and accompanying text.

46. See *McLean v. Pettigrew*, [1945] Can. Sup. Ct. 62, [1945] 2 D.L.R. 65 (1944) (negligence liability under Quebec law for Ontario accident of Quebec citizens notwithstanding Ontario guest statute which was interpreted as not "justifying" the defendant's conduct). See also *Heighington, Conflict of Laws in Automobile Negligence Cases*, 14 CAN. B. REV. 389, 396-97 (1936); *Palmer, Torts in the Inter-Provincial Conflict of Laws*, 17 U. TOR. FACULTY L. REV. 1 (1959); *Richardson, Problems in Conflict of Laws Relating to Automobiles*, 13 CAN. B. REV. 200, 203 (1935); *Spence, Conflict of Laws in Automobile Negligence Cases*, 27 CAN. B. REV. 661, 674 (1949).

The only state to reach this result in this country, though with a different reasoning, seems to be Georgia. *Slaton v. Hall*, 168 Ga. 710, 148 S.E. 741 (1929). *But see Hamby v. Hamby*, 110 S.E.2d 133 (Ga. Ct. App. 1959).

only in cases in which the parties are domiciled in different states but also in certain other situations which are prompted by an unsatisfactory law of jurisdiction. Thus there is no reason why a defendant "caught" in a common-law jurisdiction, or his insurer, should be fully liable although his own law would have limited the claim to one for gross negligence. Until reform of our law of jurisdiction, now in progress, will have enabled the defendant in such cases to obtain dismissal by the inconvenient forum,<sup>47</sup> the remedy must be provided by a choice-of-law rule. And such a rule will continue to be required when the parties are domiciled in different states.

Among the primary interests in this choice are the interests of the host in procuring liability insurance adequate under the applicable law, and the interests of his insurer in reasonable calculability of the premium. These interests are not properly served by reference to either the law of the fortuitous place of accident or the law of a possibly equally fortuitous forum or by a usually inconclusive reference to the law "preferable" on grounds of policy. I submit that those decisions have pointed the way which, as to other "immunities," have subjected automobile accidents to the law of the place of the parties' common domicile.<sup>48</sup> They have pointed the way but not traveled it. For, to refer to the law of domicile as such simply stresses another fortuitous contact. To be sure, this reference will usually reach satisfactory results. But it will do so because the common domicile usually coincides with the place where the insured car is permanently kept. It is the law of that place whose application may be anticipated and insured against by both host and guest. And it is the application of this law alone which will be justified where the common-domicile rule would fail, as for instance, where either party's domicile was acquired after the issuance of the policy or in those rare cases in which the parties' domiciles have remained in different states.

To be sure, the host's liability and the guest's recovery will then continue to vary from state to state, but these variations, in contrast to those following the law of the place of accident, will be of a kind which both host and guest can take into account in arranging their own insurance programs. If, on the one hand, the car is kept in a common-law jurisdiction, the prospective host will, or could, secure insurance to protect himself against liability for his ordinary negligence wherever it may result in injury, and his insurer will or could calculate his premium accordingly. If, on the other hand, the car is permanently kept in a state which has enacted a guest statute, the host will or could arrange his protection with a view to that statute without fear of being subjected to a broader liability in a common-law state. His insurer will or could calculate his premium accordingly. And the prospective guest, aware of his limited protection, will or could be expected to purchase his own

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47. See generally EHRENZWEIG, *CONFLICT OF LAWS* 72-80, 119-37 (1959).

48. Cases cited note 29 *supra*; *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953). See also COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 250 (1942); Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958); writings cited note 6 *supra*.

accident insurance. Since, in the great majority of jurisdictions, the case law is still open to this interpretation, it may be hoped that courts will find it possible to adopt the rule here proposed—to which there is no barrier except the *Restatement of the Law of Conflict of Laws*, that dogmatic deviation of recent origin. Reasonable insurability “under the foreseeable law” could thus become the rationale of both the Rule of, and an exception from, the *lex fori*. Applicability of this rationale to two other important types of enterprise liability will be discussed in later Articles of this series.

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