Conflict of Laws--*lex loci* or *lex fori* to Govern Damages

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will was not executed within the contemplation of the Wills Act when
the testator could not have seen the subscribing witnesses while they
were attaching their signatures in an adjoining room, or when the
testatrix could not, because of her condition, and some intervening
curtains, have turned and observed the attestation of her will, though
it was completed in the same room with her.25 Is it not quite as im-
portant that, in order to prevent fraud, the destruction of a will should
be executed with the same care and precaution? It is apparent that
the law regards with suspicion and jealousy any act having effect on
the will of a testator, when such an act does not take place either
within his plain view, or where he might easily have seen the act.
This is easily evidenced by the large number of states that require
the act to be in the presence of the testator.

It is submitted that the court was in error in holding that the
destruction need not be in the presence of the testatrix, and, as this
was the sole point decided, the case must be wrong.

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CONFLICT OF LAWS—LEX LOCI OR LEX FORI TO GOVERN
DAMAGES.

"The measure of damages for a tort is governed by the law of
the place where the tort was committed", says Professor Beale in his
work on Conflict of Laws.1 Beale, supported by the majority of cases,2
holds that where the right of action was created, there also the mea-
sure of damages was settled. In short, Beale and, seemingly, the
majority of courts think that the measure of damages is part of the
right and not the remedy; that it is part of substantive and not of
procedural law; for if the measure of damages were a matter of pro-
cedure, then lex fori would apply instead of lex loci.

Upon an analysis of the theories upon which the differentiation
between substantive and procedural law is based, it would seem to be
more logical to say that the measure of damages is a part of the
remedial side of the question—totally disconnected from the right. It
is almost a waste of time to point out that in many cases there exists
a well-defined and recognized cause of action, which because of exemp-
tion statutes or the Bankruptcy Act, the plaintiff is unable to carry into
execution profitably to himself. Here we have a valid cause of action
which, if prosecuted, will result in a judgment for the plaintiff; but

1 Goods of Colman, 3 Curt. Eccl. 118 (1842); Norton v. Bazett,
D. & W. 259 (1856).
2 Tribe v. Tribe, 1 Rob. Eccl. 775 (1845).
3 2 Beale, Conflict of Laws (1935) Sec. 412.2.
4 American R. E. Co. v. Davis, 152 Ark. 258, 238 S. W. 50 (1922); Commonwealth Fuel Co. v. McNeil, 103 Conn. 390, 130 Atl. 794 (1925);
because of these statutes, limiting or completely eliminating the possibility of compensation being awarded the plaintiff in fact, we have a cause of action without a remedy. Is it going too far to say that an exemption statute or the Bankruptcy Act is, in reality, a statute fixing the measure of damages in certain cases? The writer believes that if we refuse so to regard such statutes, then we are disregarding vivid practicality in favor of obscure technicality. Having advanced thus far in our analysis, we ask ourselves if we can possibly associate such statutes as the above so closely with a plaintiff's substantive right of action as to be justified in calling them part and parcel of the right. The answer must be negative. The plaintiff could not possibly be said to have suffered the tort to be committed upon himself, having at the time the knowledge that his right to recover would be limited by any such statute of which he had knowledge. How, then, can we reasonably form the conception that such a statute is an integral part of the right?

There are a few cases which bear out the above contention. In a comparatively recent Iowa case the court said, "The right to sue for a tort, the liability of the perpetrator, and the defenses available to him are in general governed by the law of the place of the wrong; but, except where the remedy has been created by statute with, and as a part of, the right, the remedy, including the item of damage that may be recovered, is to be determined by the law of the place of suit". A recent Colorado case presented a situation in which the plaintiff had lent money to the defendant in state 1, and sued in state 2 to have her damages measured by the rate of interest which was legal in state 2. The court held that, interest being allowed, not under the contract but as damages, the rate is determined according to the law of the place where suit is brought; in other words, the rate is governed according to the lex fori, and not by the lex loci. An Indiana case, when analyzed, is also authority for the opinion held by the writer. In this case a physician's services had been contracted for and rendered in state 1. In the agreement no interest had been contracted for, nor had a place been fixed for the payment of the debt. The weight of authority is that where no place of performance is named, the contract is presumed to be performable at the place of making. Massachusetts goes even farther and says that even though a place of performance outside the state is named in the contract, yet the validity of the obligation will be subject to the law of the place

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4 Hays v. Arbuckle, 72 Colo. 328, 211 Pac. 101 (1922).
6 Hoskins v. Hoskins, 231 Ky. 5, 20 S. W. (2d) 1029 (1929); Supreme Tent v. Dupriest, 235 Ky. 46, 29 S. W. (2d) 599 (1930); Vidal v. Thompson, 11 Mart. 23 (La. 1822); Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687 (1888).
Then in this case it is certain that the law of state 1 governs the contract both as to validity and performance. Breach may be presumed to have occurred in state 1, since performance was presumed to have been contemplated in state 1. Yet in this case the law of Indiana (the law of our hypothetical state 2) was applied as to the allowance of interest in the damages given. Massachusetts is in accord with this view. These jurisdictions go in direct opposition to the general rule stated by Beale that, when the measure of damages for wrong is interest, it will, as in the case of damages generally, be governed as to the rate at which it is measured, by the law of the place of the wrong. This rule, of course, contemplates both damages for the breach of a contract and damages for a tort.

The only conceivable argument which might be urged in favor of the majority rule is that it would be unjust to the tort-feasor or contract-breaker to subject him to the law of the place other than the one in which he committed the wrong. Can anyone seriously say that consideration of so delicate a nature should be given one who has deliberately or negligently perpetrated a wrong upon another? Can it be said that, by committing a wrong in one state, the wrongdoer has impliedly designated the state by whose laws he wishes the ensuing law suit to be governed, and that such designation must be respected by the plaintiff? Obviously the answer is in the negative in regard to both questions.

It is too well known to admit of argument that interest on a judgment either in tort or contract is regarded as part of the damages. The general rule is that where interest is allowed for breach of contract, the rate which governs is usually that of the place of performance, which, if in a foreign country, must be proved like any other fact. But Professor Beale says that the best rule is that the law of the place of making the agreement governs the nature and validity of the contract. He is ably supported in this by Justice Learned Hand, and Justice Kellogg, the latter saying that the obligation of a contract is certainly governed by the law of the place of making. Why should interest be governed by the law of the place of performance, if damages themselves are to be governed by the law of the place of making? This, believes the writer, shows a decided weakness in regard to the general rule and shows that there is no logical basis for it. Among the older-cases in Massachusetts is found a peculiar situation. (1) Where interest is given as damages for the

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{Powers v. Lynch, 3 Mass. 77 (1807); Millard v. Brayton, 177 Mass. 533, 59 N. E. 436 (1901).}
{Grimshaw v. Bender, 6 Mass. 77 (1809); Ayer v. Tilden, 15 Gray 178, 77 A. D. 355 (Mass. 1860).}
{2 Beale, op. cit. supra, note 1, Sec. 418.1.}
{Eastfield S. S. Co. v. McKeon, 208 Fed. 580 (1913).}
{2 Beale, op. cit. supra, note 1, Sec. 322.4.}
{E. Gerl & Co. v. Cunard S. W. Co., 48 Fed. (2) 115 (1931).}
{Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529 (1819).}
breach of a contract, it must follow the rule in force within the jurisdiction where the judgment is recovered. (2) The law of the jurisdiction where the contract was made, however, governs where there was an express or implied agreement to pay interest. Of course, in the light of the admitted majority rule that the lex loci instead of the leo fori will govern as to damages, the latter statement [(2) above] is to be accepted. The former statement, however, tacitly admits that damages (interest here) shall be governed by the lex fori, as being procedural in nature.

It would seem, then, that in our majority rule we have another "anomaly in the law", and that any court, if it so desired, should feel justified in disregarding precedent, and holding the law of damages to be procedural and not substantive, for logic itself would be behind the action.

Howard H. Whitehead.

CRIMINAL NEGLIGENCE—REGULATION BY STATUTE.

In surveying the statute books of the several states of the United States, with the objective of ascertaining those statutes which either expressly define or apply the term, criminal negligence, it becomes obvious that to obtain some semblance of orderly treatment, a grouping is desirable. It can be said that statutes as a whole are either vague as to definitions, or narrow as to application of criminal negligence to injuries to the person or property whether resulting in death to the person or not.

The primary step in applying the theory of criminal negligence is illustrated by statutes providing, "In every crime or public offense, there must exist the union or joint operation of act and intent, or criminal negligence". Arizona, California, Idaho and Montana have this type of statute as a basic structure from which their statutes dealing with criminal negligence evolve.

It might be relevant to note at this time that those statute books containing chapters on "Words and Phrases", or chapters containing "Definitions of Terms", almost as an entirety define and name the test of negligence in terms of the tort standard, i.e. "want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns."

"Criminal negligence", as expressly defined by Georgia and South

1 Grimshaw v. Bender, 6 Mass. 77 (1809), cited note 8, supra; Barringer v. King, 71 Mass. (5 Gray) 9 (1855); Eaton v. Mellus, 73 Mass. (7 Gray) 566 (1856).
3 Rev. Code of Arizona (1923), Sec. 4486; Gen. Laws of California (1931), Sec. 20; Code of Idaho (1932), Ch. 17, Sec. 114; Rev. Code of Montana, Sec. 10726.
4 California Penal Code (1931), Sec. 7. (Typical of all such statutory definitions.)