Conflicts notes Lect 6

A bit more about characterization

Caldwell v. Gore

* D erected dam on La property
* Obstructed flow of water upstream to P’s property in Ark
* La had servitude of lower land to higher to receive water flow freely
* Ark law allowed obstruction if reasonable etc.

Characterization – tort (nuisance) or property? If tort, then Ark law applies. If property, which property, the La or the Ark property? Court characterizes as La property case.

Characterization always has to be part of the analysis

Now – substance and procedure

Terms are used in different ways

an issue is “substantive” in the *content* sense if it is a question of what people should do independent of litigation activity  
- e.g. do you have an obligation to do what you rpomised

a law is “substantive” in the content sense if it answers such a question

* E.g contract law

an issue is “procedural” in the *content* sense if it is a question of what courts and litigants should do  
- e.g. how long can the plaintiff wait to sue or can this evidence be admitted?  
a law is “procedural” in the content sense if it answers such a question

it is sometimes said that remedies are procedural – so the substance procedure distinction is sometimes put as the right remedy distinction

* But a remedy can be substantive in the content sense
* Eg – if you have violated your obligation to keep your promise – what is you obligation to repair your wrong? – that is independent of courts

But sometimes a remedy means an enforcement of duties of repair through courts

an issue is “substantive” in the *conclusory* sense if the law of the sovereign that created the cause of action should be used  
an issue is “procedural” in the conclusory sense if the law of the forum should be used

this is just a conclusion, which can take into account many factors – not really helpful

a law is “substantive” in the *scope* sense if it is intended by the lawmaker to be used in other court systems  
  
a law is “procedural” in the scope sense if it is intended by the lawmaker to be used only in the lawmaker’s courts

we will generally use the term in the scope sense

a law that is procedural in the content sense can be substantive in the scope sense  
the sovereign creating an attorney-client privilege law may want it to apply in other court systems  
or  
the sovereign that creates a cause of action may want a burden of proof to follow the action into other court systems

to describe another jurisdiction’s law as substantive in the scope sense does not mean that the issue is substantive in the conclusory sense  
  
just because a jurisdiction wants its pleading rules to follow its cause of action into other court systems does not mean that the forum entertaining the action should use the other jurisdiction’s pleading rules

now substance/proc as an escape device

Grant v. McAuliffe

* 1. Collision in AZ
  2. Betw car in which Ps were riding (all were Californians) – and Pullen (also Californian)
  3. Pullen died
  4. Suit in Cal by Ps to recover from Pullen’s estate
  5. AZ law – no survivorship, Cal law there is

1st Rst clearly applies law of the place of the harm but the court calls the issue procedural to get the result suggested by interest analysis. Court also says the case is an estate question, which is domicile at time of death

Problem

* If it is really proc, then if the case had been litigated in Nev, Nev law would apply
* Remember, characterization has knock-on effects

More generally, how do you distinguish between substance and procedure?

1st Restatement tends to approach the matter formalistically

Procedural – service, evidence (Atty/client privilege is forum law)

But in certain cases it treats the matter as one of interpretation

Caps on damages, Statute of Limitations could be either

Parole evidence rule can follow a contract into the forum

OK – how do you deal with subst proc problems, not as an escape device?

Three general approaches, usually each is used to some extent

first approach – use content of issue to determine which law to use  
if the issue is procedural in the content sense, it is procedural in the conclusory sense (forum law is used)  
if the issue is substantive in the content sense, it is substantive in the conclusory sense

1st Rest does this to a large extent

second approach  
  
determine whether the laws are substantive or procedural in the scope sense and then resolve conflicts

* Modern approaches do this to a large extent

One problem with this approach

how to tell whether a rule is substantive or procedural (or both) in the scope sense?

Courts never have occasion to answer the question

The always talk about what they should do, not what the courts of other jurisdictions should do

third approach:  
  
rules of thumb  
  
use an easily applied rule that one thinks does an overall good job of balancing jurisdictional interests without considering the scope of individual laws

1st Rest approach to subst/proc

Largely firt approach

§ 592. Procedure In Court

The law of the forum governs all matters of pleading and the conduct of proceedings in court.

§ 594. Mode Of Trial

The law of the forum determines whether an issue of fact shall be tried by the court or by a jury.

§ 596. Witnesses

The law of the forum determines the competency and the credibility of witnesses.

§ 597. Evidence

The law of the forum determines the admissibility of a particular piece of evidence.

* 1. evidence/proof of facts
  2. service

problem – ignores state interest – other state may want its rule to be used by forum

general problem of 1st Rest – doesn’t actually consider other state’s view about scope of law – saw in other cases

1. How does 1st Rest approach this case?
   1. P ships goods in Mass using D as transport
   2. P received printed bill of lading which contains limitations on liability
   3. Under law of Mass, this bill is not sufficient to show that P assented to limitation
   4. Under law of NH, it is, though it is rebuttable
   5. P sues D in NH
   6. Should court assume that liab is limited?
   7. 1st Rest – Yes

§ 595. Proof Of Facts

(1) The law of the forum governs the proof in court of a fact alleged.

(2) The law of the forum governs presumptions and inferences to be drawn from evidence.

1. But this ignores the interest Mass would have in its rule applying

exceptions to 1st Rest. Formalism

parole evid rule – this is an irrebuttable presumption – is considered substantive

§ 599 Integrated Contracts  
When a contract is integrated in a writing by the law of the place of contracting, no variation of the writing can be shown in another state which could not be shown in a court in the place of contracting under the law of that state, whatever the law of the other state as to integrated contracts.

1. Burden of proof for contributory negligence
   1. P, in Arizona, is injured by the alleged negligence of D. P sues D in California. By the law of Arizona, a plaintiff has no cause of action until he has shown that his own negligence did not contribute to his injury. By the law of California, contributory negligence is an affirmative defense to be pleaded and proved by the defendant.
   2. Must P show freedom from contributory negligence?
      1. Comment to 595
      2. Thus, if a requirement concerning proof of freedom from fault exists in the law of the place of injury and if such condition is there interpreted as a condition of the cause of action itself, or as affecting the nature or amount of recovery, the court at the forum will apply the rule of the foreign state (see § 385). In such a case, the remedial and substantive portions of the foreign law are so bound together that the application of the usual procedural rule of the forum would seriously alter the effect of the operative facts under the law of the appropriate foreign state.
         1. most 1st Rest jurs take burden of proof to follow cause of action
2. What about limitation on damages?
   1. Keep in mind
   2. 1st Rest on torts – limitation of damages is generally considered substantive – law of place of harm

412 The measure of damages for a tort is determined by the law of the place of wrong.

Problem of a damage limitation at forum

But might be procedural – 1st Rest recognizes that this is possible

§ 606. Limitation Of Amount Recoverable

If a statute of the forum limits the amount which in any action of a certain class may be recovered in its courts, no greater amount can be recovered though under the law of the state which created the cause of action, a greater recovery would be justified or required.

*Comment:*

* + 1. *Interpretation of statutes.* Such a limitation is imposed only by a statute; and it is a question of interpretation whether the statute qualifies the cause of action, applying therefore only to a cause of action created by the statute, wherever sued on; or whether it is to be construed as limiting the amount of recovery in any action of the type described brought in the state, wherever the right was created; or whether (as in some instances) it has both effects.

Statute of frauds – 1st Rest assumes substantive but some courts have concluded it couldl be either

* 1. Marie v Garrison case
     1. Suit in NY re oral K entered into in Mo
     2. Both Mo and NY had a stat of frauds
     3. NY law said K’s “shall be void” is not in writing
        1. suggest subst or proc?
           1. Subst
        2. so does it apply here?
           1. NO
     4. Mo law said no K action “shall be brought” if oral
        1. suggest subst or proc?
           1. Proc
        2. so does it apply
           1. NO
     5. Is that crazy?
        1. Would not work in fully domestic case in either state’s ct

Is that a problem? Consider…

* + - 1. P enters into an oral K with D in Missouri
      2. No statute of frauds in Missouri
      3. But Missouri’s procedural statute of limitations on contract actions is two years
      4. P sues D on the contract in New York 3 years after breach
      5. New York has a statute of frauds (substantive) for New York contracts
      6. But its procedural statute of limitations is 4 years for contract actions

The case proceeds even though it would not proceed if it were all MO or all NY – and that isn’t a travesty

* + 1. Not like there is no law – what law is applied when oral K is entered into?
       1. MO
* MO law may have been misinterpreted in Marie, but the result is not incoherent

example of manipulation of subst/proc to get out of foreign law

* 1. Kilberg v NE Airlines
  2. Plane crash in Mass
  3. NY P, Mass D
  4. Bought ticket in NY
  5. Mass limitation on damages for wrongful death
  6. Suit in NY
  7. Applied NY law
  8. Two args by ct
     1. public policy exception – will talk about later
  9. 2nd – Mass limitation was procedural
  10. How about making it contractual… that is another escape device

1. what about direct action (sue directly against insurer)
   1. under 1st Rest – forum law 592 parties that may be sued

interest analysis suggests that state that created cause of action is interested

* allowing suits against insurers encourages juries to give excessive awards
* foreign state would not want that to happen on its causes of action in other ct systems

1. What about privileges
   1. In Alabama, a business man doing business in Alabama, gives certain information to an accountant, which is not privileged under Alabama local law. The information would, however, be privileged under the local law of Mississippi, the forum. Is the evid admissible?
   2. 1st Rest – no 597 – evid is procedural
   3. interest analysis – tends toward state where communication occurred
   4. 2nd Rest 139 – has a rule that makes it almost a requirement that it is privileged under both forum law and under law of most significant relationship

§ 139. Privileged Communications

(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.