Lect 2

More on the traditional theory’s view about exclusive territorial spheres of legislative and adjudicative jurisdiction

what happens if a lawmaker with exclusive power fails to exercise it?

* For Beale it had to be exercised
* There could be no legal voids
* If there was no law saying it was forbidden, necessarily it was permitted etc.
* “choice” of law really just involved identifying the lawmaker that had sole power over the matter

What would be the result if we moved to a theory of concurrent lawmaking power?

Would not make sense to forbid legal voids – one jurisdiction might want to leave something legally unregulated (not forbidden nor permitted) so another jurisdiction can

So need to find out if a jurisdiction’s lawmaker wants its law to apply to certain interstate facts

If only one wants to – “false conflict” – that one jurisdiction’s law applies

If two are more want to – “true conflict” – forum will need to choose

If neither does – unprovided-for case – we will discuss later

Int’l Shoe is a concurrent theory of PJ – more than one jurisdiction can have in personam jurisdiction at the same time – not possible under Pennoyer

1. Playing with lex loci delicti (1st Rest law of the place of the harm approach)
2. What if P had fallen in Miss, felt OK, walked to La and there his harm manifested itself?
	1. Rule 1 sect 377 – Place where the harmful force takes effect on body is the place of the wrong
	2. Why? – some damages even then
		1. So first place where there was some damages under the common law
		2. That place determines the availability of all damages, even those that arise in other jurisdictions

§ 377. The Place Of Wrong

The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

Rule 1. *Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.*      Rule 2. *When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.
...*

1. What if poisoned in Ala, get sick in Miss, dies in state La
	* 1. Miss is the place of the wrong
		2. Specific rule – where the deleterious substance takes effect
		3. WHY? – this was the first place where the common law recognized a tort, so that is the place of the wrong that determines whether there is a tort
		4. A weird bootstrapping – using the common law to determine the place of the wrong which then determines which law applies
2. what if Carroll's wife, who lives with Carroll in Alabama, had sued for loss of consortium
	1. what law would apply?
	2. Might think that the harm – the absence of sexual services – is in Ala so Ala law would apply
	3. But would use Miss law
	4. Wrongful death? – same thing
3. D, in Mississippi, makes material misrepresentations by phone to P in Alabama. In reliance upon these representations, B sends goods from Alabama to D, in Mississippi. D keeps the goods. P sues D for fraud (a tort). Which law applies?
	1. Where the loss is sustained, not where the fraudulent misrepr is made
	2. Sustained where parted with goods
		1. Might make a difference whether you give up legal possession when you mail it or not (“free on board”)
		2. If you retain ownership until it gets to Miss, maybe Miss is the place of the wrong (Green is speculating here)
4. What if I fraudulently convince you not to sell shares of stock and they go down
	1. Place of wrong is place of omission
	2. Courts tend to punt to place of domicile
5. D, broadcasting in Alabama, slanders P. The broadcast is heard in Mississippi and Louisiana. P has a good reputation in both states, which is affected. Which state's or states' law applies?

 377 Rule 5. *Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated.*

 - MS and LA law?

 - BOTH – each a separate tort – but there is a tendency to use law of P’s domicile (greatest reputational loss)

1. Example of D’s dog straying from Mass to NH
	* 1. Mass follows the dangerous propensity (one free bite) approach (negl approach)
		2. NH, has strict liab
		3. which law applies
		4. strict liab
		5. LeForest v. Tolman
		6. Notice that this frustrates the expectations of the defendant
2. Sum up – determined by place of the wrong
	1. whether damages are recognized (eg psych harm, loss of consortium, wrongful death) – here place of orig wrong
	2. limitations on damages, exemplary (eg punitive) damages
	3. standard of care (negl, strict liab)
	4. whether contrib. negl or comp fault

 - even when act of contrib. negl occurs in another state

1. Now some problems – here there is tendency to fudge out of concern for the expectations of the parties
2. By the law of Mississippi, it is settled that non-negligence requires that every locomotive be **double** checked for defective links – because there is a safety statute saying that
	1. By the law of Alabama, there is no such requirement.
	2. The inspector for Alabama Great Southern RR checked for defects in Alabama once.
	3. The link broke in Mississippi and Carroll was injured there.
	4. Assume that rather than suing the Railroad, as in the Carroll case, Carroll sues the inspector in Alabama for negligent inspection (so Mississippi’s fellow servant rule is not relevant).
	5. Under the First Restatement, does Alabama or Mississippi law apply concerning the question of whether due care requires a double check for defective links?
	6. 380(2)
	7. **Where by the law of the place of wrong, the liability-creating character of the actor's conduct depends upon the** application **of a** standard **of** care**, and such standard has been defined in particular situations by statute or judicial decision of the law of the place of the actor's conduct, such application of the standard will be made by the forum.**
	8. **WHY??? – probably the expectations of the D**
	9. **If so then why not the standard itself?**
	10. **There is this evanescent distinction between a standard of care and an interpretation of the standard of care**
3. By the law of Alabama, a police officer has qualified immunity – liable for damages in course of duty only if reckless. No such immunity in MS. Officer D, acting in AL, negligently but not recklessly shoots P in the course of an arrest of X.
	1. Under the First Restatement, is D liable to P?
	2. **382 A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state**
	3. Why? – once again the expectations of the parties
	4. What is the difference between a privilege and a standard of care
	5. **Go back to LeForest**
	6. **one free bite in Mass, strict liab in NH**
		1. **why can’t you say that the D was privileged to act non-negligently by MA law**
		2. **too general**
		3. **privilege is an exception…?**
4. Derivative liab?
	1. 387 **When a person authorizes another to act for him in any state and the other does so act, whether he is liable for the tort of the other is determined by the law of the place of wrong.**
	2. In order that the law of the state of wrong may apply to create liability against the absentee defendant, he must in some way have submitted himself to the law of that state. It is sufficient if he has authorized or permitted another to act for him in the state in which the other's conduct occurs or where it takes effect.
5. What if there is no authorization to act in the state

 - Scheer v Rockne Motors Corp.

* 1. D in NY gave X car but did not authorize him to go to Ontario,
	2. X goes to Ontario
	3. law of Ontario created liab on D
	4. law of NY did not
	5. NY law applies
1. Why this exceptions
	* 1. Poor D conformed his expectations to the law where he was acting
	1. But if that’s so, why not true generally
		1. can’t always anticipate where harm will occur
		2. think of LeForest
2. some rules could be part of cause of action or be procedural
	1. example 412 (limitations on damages)

§ 412. Measure Of Damages For Tort

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

*Comment:*

*a. Rationale.* The right to damages in compensation or punishment for a tort is to be distinguished from the right of access to the courts and from the procedure provided to obtain the damages. The creation of a right to have damages necessarily involves the measurement of that right in so far as the law can measure it. While the actual finding of the amount of damages is a function of the jury or other fact-finding body at the forum, the law that creates the right determines what items of loss are to be included in the damages. Since the right is created by the law of the place of wrong, it is measured by that law.

*Illustration:*

1. B sues A in state X for a battery committed in state Y. By the law of X, damages in an action of battery may be recovered for mental suffering; by the law of Y they are not allowed. B cannot recover damages for mental suffering.

* 1. The right to damages in compensation or punishment for a tort is to be distinguished from the right of access to the courts and from the procedure provided to obtain the damages.
	2. evid rules might make difference to damages found, but that does not means place of wrong applies
	3. BUT assume that a rule says – no court of this state shall provide damages in tort in excess of X

 - is that subst or procedural

1. **Contracts**

Contracts

* Miliken v. Pratt
	+ FACTS: K (guaranty) between seller (Maine) and wife (Mass) of buyer (on behalf of husband). Signed by defendant and sent by husband in Mass. to the seller in Maine. Forum is Mass., but at the time of contracting Mass. did not allow married women to make such a K whereas Maine did.
	+ What law applies: Law of the place of contracting = Maine
		- Signed in Mass., mailed in Mass., but K in Maine?
			* Under the Mailbox Rule acceptance is consummated when mailed
			* In this case, the acceptance of the unilateral contract is by performance, thus, wife is offeror and the seller accepts the offer by mailing goods
	+ Complicated: law on validity of contract is determined by where K entered into, if there is a contract, which there may not be…
		- * Where acceptance occurred is itself a legal question
				+ Possible that Maine would determine that acceptance was in Mass. and wife was acceptor; Mass. may view as unilateral K with acceptance in Maine

By Maine lights, Mass law applies

By Mass lights, Maine law applies

* + - * + Triggering event (place of K) is itself legal, and therefore must know what law applies (at least concerning the place of acceptance) before you can determine what law applies?!

Situation is worse in contracts than in torts because there is much disagreement about the nature of contracts, what constitutes acceptance, etc.

The 1st Rest says 2 things – the forum determines the place of contracting and the general common law does

* The answer is probably that the general common law as interpreted by the forum does

assume that Milliken is litigated in Wisconsin court

 under Mass law and Maine law, the contract was consummated when acted upon by the Ps in Maine

but under Wisconsin law the contact was consummated in Mass when guarantee was sent

Wisc court would conclude that Mass law applies…

§ 332. Law Governing Validity of Contract

* The law of the place of contracting determines the validity and effect of a promise with respect to:
(a) capacity to make the contract;
(b) the necessary form, if any, in which the promise must be made;
(c) the mutual assent or consideration, if any, required to make a promise binding;
(d) any other requirements for making a promise binding;…
	+ All associated issue are determined by the law of the place of the K
* P and D contracted in Maine.
* P sues D for breach, but D argues that the contract is invalid because of a misrepresentation by P made in Massachusetts.
* under Maine law the misrepresentation does not invalidate the K
* under Mass law it does
* is the K invalid?

No

§ 347

* The law of the place of contracting determines whether a promise is void, or voidable for fraud, duress, illegality or mistake or other legal or equitable defense.
* X and D enter into an employment contract in Maine.
* Under the law of Maine, X cannot assign his interest in future wages.
* Under the law of Massachusetts, he may.
* In Massachusetts, X assigns his interest in future wages to P.
* Is the assignment valid?
	+ First thought: Yes; MA law applies because an assignment is a separate K made in MA
		- Two Ks: employment K and assignment K
	+ But actually, it’s ME law that applies…
		- Really, interpreting the nature of the employment K.
		- ME says w/ respect to the employment K that parts of it aren’t assignable

§ 348

* Whether a right under a contract is capable of being transferred by the owner, is determined by the law of the place of contracting
* X and D enter into an employment contract in Maine.
* Under the law of Maine, D may assign his interest in future wages.
* But in Maine the assignment must be in writing, whereas in Massachusetts, assignment may be done orally.
In Massachusetts, X assigns his interests in future wages to P orally.
* Is the assignment valid?
	+ Now we’re asking if the assignment K itself is valid; therefore MA

§ 352

* The law of the place of assignment determines the formalities necessary to make an effective assignment of a right under an informal contract.
* In Maine A agrees to sell and B to buy goods to be packed in Massachusetts in the presence of two adults.
* Under Maine law someone is an adult if 18 or over.
* Under Massachusetts’s law the relevant age is 17.
* 17 year olds are used.
* Has the provision been satisfied?
	+ Place of performance is used for the details of the manner of performing K.
	+ Distinction between *duties* (place of K) and *details* (place of performance).
		- But, it’s really hard to draw these distinctions
	+ Obviously, a rule that can be contracted around (K could state must use 18yo)