Recent Decisions

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A common arbitration provision states that each party to the agreement selects an arbitrator and the arbitrators in turn select a third; should either party fail to appoint an arbitrator, the one arbitrator selected may be authorized to act as the sole arbitrator or, in the alternative, appoint the remaining arbitrators. Such provisions were of little effect at common law, however, since agreements to submit controversies to arbitration could be revoked at any time before an award was made. A different result appears to be required in those jurisdictions having statutes making agreements to arbitrate binding and irrevocable.

In Brink v. Allegro Builders, Inc., such a provision was held to be enforceable. Although the 1961 revisions to the Code of Civil Procedure were not applicable to the case in question, the same result would appear to be required in any case arising under the present law, which states that agreements to arbitrate existing or future controversies are "valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract."

In Brink the plaintiffs engaged the defendant to erect a house on a lot owned by them. Clause 26 of the written contract provided that plaintiffs were to be responsible for necessary grading; however, grading work was done by a third person, allegedly chosen by defendant, and plaintiffs contended that they were entitled to repayment of the cost of grading and compensation for the damages incurred.

The defendant, upon being notified of plaintiffs' demand, took the initiative and made a written request for arbitration of plaintiffs' claims. After consulting with an attorney, who advised that it had no responsibility under Clause 26, defendant informed plaintiffs by telephone of its intention to rescind its demand for arbitration. A confirming letter was also sent.

Plaintiffs, in a letter to defendant, stated that they had been informed of defendant's intention to rescind but since the confirming letter had not yet arrived, they were appointing an arbitrator.

Four days later plaintiffs informed defendant that they were proceeding to arbitration unilaterally as provided in the contract. The ex parte arbitration was held before the arbitrator chosen by plaintiffs. Defendant did not select an arbitrator, but did appear and present evidence at the hearings before plaintiffs' arbitrator, after making it clear that it did not intend to waive its objection that the dispute was not within the arbitration clause. The arbitrator made an award in favor of plaintiffs, but the superior court denied confirmation and granted defendant's motion to vacate the award.

The supreme court reversed the order and held that when a contract expressly permits one arbitrator to proceed, the party not in default is not compelled to seek court aid in invoking the arbitration clause. The statutory procedure to enforce an agreement

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4 CAL. CODE CIV. PROC. § 1281.

5 A similar result was reached in Kentucky River Mills v. Jackson, 206 F.2d 111, 47 A.L.R.2d 1331 (6th Cir. 1953), decided under the provisions of the United States Arbitration Act, 9 U.S.C. § 1-14. This case concerned a contract for the shipment of goods in interstate commerce.
6 CAL. CODE CIV. PROC. § 1281.2.

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to arbitrate by means of a court order was designed to afford a remedy where the contract did not provide for a procedure to follow upon the refusal of either party to arbitrate or where the contractual scheme has failed; it has no application where the parties have expressly provided for such contingency.

The decision poses serious problems to the party who does not desire to arbitrate. Must he arbitrate disputes which have no substantive merit? Must he arbitrate disputes concerning matters which he believes are not within the scope of the arbitration agreement? Must he arbitrate when he believes an enforceable contract does not exist?

Section 1281.2 permits a party to an arbitration agreement to petition the court for an order compelling the parties to arbitrate; the order shall issue if the court determines that an agreement to arbitrate exists, the petitioner has not waived his right to compel arbitration, and grounds do not exist for the revocation of the agreement. The section also provides: "If a court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate may not be refused on the grounds that the petitioner's contentions lack substantive merit."

Since the effect of Brink is to permit the parties to a contract to provide by express terms an effective means for the enforcement of arbitration provisions as a substitute for section 1281.2, it would appear that a party to a contract containing a provision similar to that in Brink could not object on the grounds that the claim lacked substantive merit. In view of the court's expressed policy in favor of arbitration, it would seem to follow that claims without substantive merit should be handled without resort to judicial process.

A more serious question arises when the party objects to arbitration on the grounds that the dispute was not within the arbitration clause. The contract in Brink specifically stated that grading was the responsibility of the plaintiffs. The arbitration clause was particularly broad however: "As between the parties hereto, all questions as to the rights and obligations arising under the terms of the contract, the plans, and specifications are subject to arbitration."

The court did not consider the defendant's specific objection, indicating that where the scope of subject matter is broad, the parties should endeavor to solve all problems concerning the contract by arbitration.

The district court of appeals had held that the ex parte arbitration without first resorting to a petition to the court for an order directing arbitration was invalid. Among the reasons listed in adopting its view this court said:

[P]ermitting an ex parte arbitration, even where the resisting party in good faith has raised questions concerning either the existence of a valid contract or whether an arbitrable issue has been presented, is extremely burdensome and unfair to such resisting party. It compels such party to go through the arbitration procedure, including the hearing and introduction of evidence, before there has been any judicial determination that a valid contract is in force or that an arbitrable contract exists.

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9 Clause 26 of the contract reads, in part: "The following specified items are the sole responsibility of the Owner, and all charges or costs incurred shall be paid by the Owner over and above the contract price. (a) Grading of lot." Brink v. Allegro Builders, Inc., 58 A.C. 589, 590, 375 P.2d 436, 437, 25 Cal.Rptr. 556, 557 (1962).


11 See Food Handlers Local 425 v. Pluss Poultry, Inc., 260 F.2d 835 (8th Cir. 1958). "Mere assertion of non-arbitrability by one of the parties would not make it necessary for the other to petition for a court order to proceed, provided for in Section 4 of the United States Arbitration Act. Questions as to the arbitrability of such disputes are initially for the arbitrators and if they reach a wrong conclusion in that regard it is subject to correction by the court." Id. at 838. The case concerned a labor arbitration agreement.


13 Id. at 443.
The supreme court considered the scope of arbitration provisions in Posner v. Grunwald-Marx Inc., an action in which a labor union sought a court order to compel arbitration. The employer objected to the issuance of the order on the grounds that the subject of the dispute was not within the agreement. In considering the scope of arbitration provisions in collective bargaining agreements, the court adopted the "federal rule." This rule states that where the agreement provides for the arbitration of all disputes pertaining to the meaning, interpretation and application of the collective bargaining agreement and its provisions, any dispute as to the meaning, interpretation and application of specific matter covered by the collective bargaining agreement is a matter of arbitration. Doubts as to whether the arbitration clause applies are to be resolved in favor of coverage. This is to be contrasted with the "Cutler-Hammer" doctrine that the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. If the meaning of the provision sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.

The district court of appeals determined that by application of the federal rule as stated in Posner (even though the agreement before it was not a collective bargaining agreement) the responsibility for the grading of the Brinks' lot may possibly have been an arbitrable issue. Whether the Posner rule should be applied to a non-collective bargaining agreement is questionable in view of the supreme court's statement that "the 'Cutler-Hammer' doctrine is based on a strict and technical application of ordinary contract law while the rule adopted by the United States Supreme Court properly takes into consideration the peculiar nature of the collective bargaining agreement." The arbitration agreement in Brink was very general, however, and could be construed as an agreement to arbitrate disputes as to what is a matter for arbitration.

It appears that the employer in Posner initially proceeded to arbitrate the dispute and then withdrew. The supreme court stated that the action of the employer "in first proceeding to arbitrate is some evidence in support of the inference that it intended the [dispute] to be arbitrable." This should be compared with the defendant's action in Brink; defendant initially sought arbitration, withdrew, and finally appeared before the sole arbitrator and presented evidence after specific objection. The district court of appeals stated, "[Defendant] raised objections to the validity of the proceedings on this matter. The fact that the hearing took over six hours and both sides presented evidence could not be construed as a waiver of any of [defendant's] rights." Perhaps the defendant's action in first seeking arbitration is evidence in support of the arbitrability of the dispute, regardless of his objection at the time of the hearing.

The supreme court also disapproved of any statement in Drake v. Stein, contrary to its decision in Brink. In Drake the applicants refused to appoint an arbitrator on the grounds that they had rescinded the entire contract. Respondent proceeded to appoint an arbitrator under a contract provision very similar to that in Brink and obtained an award ex parte. The court held that the award should not be confirmed.

[A] claim that the contract is invalid or that it has been rescinded places the controversy on the conscience of the court which must determine the equitable issues

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18 See text accompanying note 10 supra.
19 Id. at 176, 363 P.2d at 316, 14 Cal.Rptr. at 301. (Emphasis supplied.)
raised by the defendant. It is only after a finding has been made that under a written contract of arbitration a party is in default in the performance thereof, that the court will order the parties to the contract to proceed in accordance therewith. Repudiation by one of the parties does not enable the other to proceed without leave of the court. . . . [T]he court below invaded the rights of appellants by its approval of the arbiter's award before it had first determined under section 1282 . . . that a valid, enforceable contract did exist.

Did the supreme court mean that a party must submit to arbitration even if there is a good faith belief that a valid contract does not exist? This would appear to be an extreme position, for section 1281 specifically excepts from enforceability contracts where grounds exist for revocation. To require arbitration of disputes arising under unenforceable contracts would certainly be unfair. The New York courts have adopted a position in agreement with that taken in *Drake*. The full implications of the disapproval of *Drake* must await further decision.

One important limitation upon the power of a single arbitrator to proceed ex parte where the other party refuses or neglects to appoint an arbitrator was stated in *Smith v. Campbell and Facciolla, Inc.* In interpreting an arbitration clause similar to that in *Brink*, the court said the arbitrator could not proceed with a hearing without giving notice to the respective parties. The court also reiterated that a waiver of a right to a hearing will not be deemed to have been made in the absence of explicit language to that effect.

In view of the foregoing, it would appear that a party to a contract providing for ex parte arbitration upon the failure or refusal to appoint an arbitrator had best appoint his own arbitrator rather than risk a one sided award. If his only objection is lack of substantive merit to a claim, there would seem to be no unfairness in requiring arbitration, for in most cases a determination favorable to the objecting party would result. When faced with a demand for arbitration concerning subject matter beyond the scope of the agreement, the reluctant party should not initially seek arbitration as was done in *Brink*. If the claimant demands it, one approach would be to object specifically to the arbitration of the dispute and to appoint an arbitrator for the sole purpose of determining whether the matter is within the agreement. No evidence as to the merits of the controversy should be given. If an affirmative determination is made, the reluctant party should proceed to arbitrate the matter. Should a party believe that no valid contract exists, he should specifically object to arbitration and have this issue determined; if a finding is made that a contract exists, the matter should be submitted to further arbitration only after the specific objection is made again. If unfavorable results follow from the arbitration the party then may seek relief in court by petitioning to have the award vacated.

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22 *Id.* at 784, 254 P.2d at 617. (Emphasis supplied.)
23 CAL. CODE CIV. PROC. § 1281.
24 *Bullard v. Morgan H. Grace Co.*, 240 N.Y. 388, 148 N.E. 559 (1925). "If a bona fide question arises as to the proper construction of the submission agreement, a party may raise the question by withdrawing from the arbitration. If the party aggrieved then desires to go on with the arbitration, he must apply to the court, and the court will determine whether or not the withdrawing party was in default in refusing to proceed to arbitrate a question covered by the submission agreement. Such construction of the Arbitration Law prevents a party or the arbitrators from proceeding to arbitrate and decide questions which the other party never agreed to submit to arbitration. Arbitration should be encouraged, but arbitration tribunals may not determine for themselves, over the objection of a party, to include within the scope of the arbitration questions which were never submitted to arbitration." 148 N.E. at 562.
27 CAL. CODE CIV. PROC. § 1285.

In Roseleaf Corp. v. Chierighino, the plaintiff sold a hotel and its furnishings to the defendant, who in return made a cash payment on a portion of the purchase price and gave several notes covering the balance. One note was secured by a deed of trust on the hotel and personal property situated therein. The other notes were secured by second deeds of trust covering certain property owned by the defendant. The latter property was subsequently sold by the holders of the first trust deeds. Plaintiff's second trust deeds were not protected at the sales and were thereby rendered valueless. Defendant defaulted in the payment of the notes, and the plaintiff brought this action to recover the full amount owing on each. The trial court's judgment for the plaintiff was upheld by the supreme court, which determined that recovery was not barred by the antideficiency judgment statutes.

In the intermediate appeal, the district court of appeal had held that the action was barred by Code of Civil Procedure section 580d, which prohibits deficiency judgments where the foreclosure is under a power of sale as opposed to a judicial proceeding. That the sale had been by someone other than the plaintiff was not considered material. The court was relying on a previous statement of the supreme court concerning the antideficiency judgment statutes where the high court had said, "These provisions indicate a considered course of action on the part of the Legislature to limit strictly the right to recover deficiency judgments, that is, to recover on the debt more than the value of the security." The supreme court, apparently recognizing that some confusion prevailed regarding when the anti-deficiency judgment sections should apply, inquired into the purposes of the statutes and arrived at some basic principles for their application.

Code of Civil Procedure sections 726 and 580a contain provisions, inter alia, that no deficiency judgment shall be greater than the difference between the fair market value of the property foreclosed upon and the amount owing on the debt. Such provisions "are designed to prevent creditors from buying in at their own sales at deflated prices and realizing double recoveries by holding debtors for large deficiencies." But this protection is unnecessary in the case of sold-out junior lienors, because they are in no better position to buy in at a low price than is the debtor himself. Therefore, the debtor should bear the risk of a low foreclosure sale price, for he has provoked the senior sale. If this were not so, the junior lienor might end up with neither the security nor a personal cause of action. The court concludes that if a judgment is available at all, it will be for the whole debt, not limited by the fair value provisions.

Whether a judgment may be had at all depends upon the applicability of two statutes, sections 580b and 580d of the Code of Civil Procedure. Contrary to the decision of the district court of appeal, the supreme court held that section 580d does not govern this case. That section by its own terms applies "in any case in which the real property

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2 This note and trust deed were not here involved. It did not appear what became of the hotel.
3 CAL. CODE CIV. PROC. §§ 580a, 580b, 580d, 726.
5 CAL. CODE CIV. PROC. § 580d: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such a mortgage or deed of trust." The remainder of the section sets out exceptions which are not material here.
9 Id. at 51, 378 P.2d at 99, 27 Cal.Rptr. at 875.
has been sold by the mortgagee or trustee under power of sale contained in such mortgage or deed of trust." The power exercised must be contained in the very instrument securing the note sued upon. As the purpose of section 580d is to insure that the sale will bring an adequate price, the legislature, reasoned the court, in order to equalize the advantages of judicial and non-judicial foreclosures, could have imposed upon sales under a power of sale either a right to redeem (which would insure an adequate sale price by allowing the mortgagor to redeem at the price brought by the sale) or a denial of deficiency judgments. It chose the latter. However, to deny a deficiency judgment to a sold-out junior lienor would not accomplish the purpose of insuring an adequate sale price, for the junior has nothing to do with the sale. Therefore, section 580d does not apply.11

As to section 580b, which bars deficiency judgments where the mortgage is for the purchase price of realty, the court again looked to the legislative purpose to determine its applicability. Originally, the basic obligation of any loan was the personal obligation of the debtor, whether or not the debt was secured, so that a personal judgment was generally available to the extent the security did not cover the debt. During the Depression it became obvious, however, that these judgments were unduly burdening the small buyer. As a result, the legislature took steps to alleviate the hardships.12 Among these was the enactment of section 580b.13

A question soon arose as to how far this statute was to extend. From time to time it was argued that an action brought because the security was totally exhausted did not fall within the section, for the reason that the relief sought was not a "deficiency judgment." Although this argument prevailed in Hillen v. Soule,14 it was expressly rejected by the supreme court in Brown v. Jensen,15 where the court said that a deficiency resulting from a total depletion of the security is still a deficiency, and that section 580b shows a legislative intent to strictly limit deficiency judgments. After the decision in Brown, it appeared that in no case would a personal judgment be allowed where there had been purchase money security in a sale of realty.16 However, with the appearance of the facts in Roseleaf, where the equities weighed heavily in favor of the plaintiff, the court was forced to re-examine the purpose of the statute.

Section 580b provides that in no event will a deficiency judgment be awarded where the foreclosure sale was on a mortgage given to secure the purchase price of realty. The court in Roseleaf finds that this section was drafted with the standard purchase money mortgage in mind, where the buyer gives back a mortgage on the very property purchased to secure payment of the price. When this standard is deviated from, the court announces that it will look to the purpose of the section to determine its applicability to the case. "Variations on the standard are subject to section 580b only if they come within the purpose of that section."17

Reviewing prior statements as to the purpose of section 580b and finding them inadequate, the court advanced two basic reasons for the statute.

10 For a discussion of how the right of redemption guarantees an adequate sale price, see Salsbery v. Ritter, 48 Cal.2d 1, 11, 306 P.2d 897 (1957).
12 OSBORNE, MORTGAGES 975 (1951).
13 CAL. CODE CIV. PROC. § 580b: "No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property. "Where both a chattel mortgage and a deed of trust or mortgage have been given to secure payment of the balance of the combined purchase price of both real and personal property, no deficiency judgment shall lie at any time under either one thereof."
18 Id. at 52, 378 P.2d at 101, 27 Cal.Rptr. at 877.
First, by placing the risk of inadequate security on the mortgagee, vendors are discouraged from overvaluing their security. "Precarious land promotion schemes are discouraged, for the security value of the land gives purchasers a clue as to its true market value." If the vendor sells land for more than it is worth, and takes the normal proportion as a down payment, he will have to settle for what the land is really worth when he realizes upon his security. Similarly, when he takes an unduly small down payment, he will be able to look only to the land for satisfaction of the balance. To avoid such a risk, the vendor is forced to evaluate his security conservatively.

Second, if the deficiency results not from an overvaluation by the vendor, but from a decline in the market value of the property, the statute tends to check the further economic downturn that would result from imposing large personal liability on many purchasers while simultaneously confiscating their land.

Having arrived at the purpose of the statute, the supreme court applied it to the facts and found that the two evils which the section was designed to prevent were not present. "There is no indication in the present case that the hotel was overvalued. The purchaser will not lose the property he purchased yet remain liable for the purchase price. To apply section 580b here would mean that the Chierighinos would acquire the hotel at less than the agreed price."

It will be observed from the foregoing statement that in applying the two policies to the facts, the court seems to use two different approaches. With regard to the policy of discouraging overvaluation, the court considered it sufficient to state that in the present case there was no evidence of overvaluation. On the other hand, with regard to the policy of checking depression, the court was not concerned with whether there was currently a declining real estate market. The court said only that in this case the purchaser will not lose his property yet remain liable for the price. Apparently the thinking was that any time a purchaser loses his purchase yet remains liable, the policy of section 580b is thwarted, regardless of whether there is in fact a depression which ought to be checked.

No doubt these divergent approaches can be justified, for in a given case the overvaluation, if any, will have already taken place by the time it gets to court, while the uncertainty of economic fluctuations does not lend itself to determining whether there is in fact a current depression or recession. The point is, that on the one hand the court seems to be looking to whether the particular vendor should be prevented from profiting by overvaluation, while, on the other hand, determining whether a deficiency judgment is barred on the extremely broad basis of possible detriment to the economy. If this is the basis upon which the court intends to apply the statute, the "anti-depression" aspect of its purpose will encompass nearly every purchase money mortgage and the exceptions to section 580b will be rare indeed. This is probably in keeping with the legislative intent, and an examination of various situations will bear it out.

According to Roseleaf, the basic questions to be asked in each situation are whether the security was overvalued and whether the purchaser will lose the property purchased yet remain liable for the purchase price. In the standard purchase money mortgage, the answer to one of these questions will always be in the affirmative. The deficiency may or may not result from overvaluation, but no matter why there is a deficiency, the purchaser loses the property purchased, for that is what he mortgaged and a deficiency judgment would leave him liable for the price. If the value of the security is lost because of fire or other accident, or because of the intervention of a prior lienor, it seems the statute will still apply, for in Brown it was held that a foreclosure sale is unnecessary if a sale would be useless.

Where the property mortgaged is not the same as the property purchased, the security may prove inadequate for a variety of reasons. If because it was overvalued, a

19 Ibid.
20 Ibid.
deficiency judgment is unavailable. If because of a decline in the market, the section would seem to apply, even though the purchaser does not lose the property purchased, for the policy of preventing depression would be served by barring judgment. If, however, the security is lost for any other reason, it would seem that the statute does not apply, as in Roseleaf where the security was lost because of a sale by a prior lienor. It would seem that the holding in Roseleaf would be followed if the security were lost by fire or earthquake or other accident, for these situations are basically similar to that case. The situation in each is twice removed from the standard purchase money mortgage: first, the mortgage is on property other than that purchased by the vendee; and second, the deficiency results from causes other than a foreclosure by purchase money mortgagee.

Thus it has been shown that where a mortgage or deed of trust is given to secure the payment of the purchase price of realty, no personal judgment for the price may be had against the purchaser unless two questions can be answered in the negative: was the security overvalued; will the purchaser lose his purchase yet remain liable. A negative answer requires two factors removing the case from the standard situation. First, the mortgage must be on property other than that purchased, so that the purchaser will not lose what he purchased. Second, the deficiency must result from some cause other than a foreclosure by the vendor, for such a foreclosure could produce a deficiency only because of overvaluation or a decline in the market. These factors must be present before a purchase money mortgagee may recover a personal judgment for the price.

With these principles in mind, one more situation might be envisaged. Assume a case similar to Roseleaf, where the property mortgaged was other than that purchased and its security value lost by the intervention of a prior lienor, but where there is evidence that the realty sold was in fact overvalued. Does section 580b provide a defense to the vendor's action for the price? The court in Roseleaf said, "There is no indication in the present case that the hotel was overvalued." This statement might imply that if it had been overvalued the section would be applicable. This illustrates that although the factors mentioned above must be present for the vendor to prevail, they will be ineffectual unless they negatively answer the basic questions: was the property overvalued; will the purchaser lose the property he bought yet remain liable for the price.

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Since Lord Campbell's Act in 1846, the wrongful death action has provided one of the most fertile fields for conflicts problems in the tort liability area. One of the most recent examples is Kilberg v. Northeast Airlines, Inc., where the New York Court of Appeals reviewed an action brought by a New York resident against a Massachusetts airlines to recover for the death of her husband, allegedly caused by the defendant's negligence. The issue ostensibly before the court concerned the plaintiff's second cause of action which sounded in contract, breach of a carrier's contract of safe carriage. This contract theory was undoubtedly formulated to avoid a $15,000 ceiling on death case damages imposed by the Massachusetts wrongful death statute, the law of the place where the injury causing death occurred. If the action were correctly characterized

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22 See text accompanying note 20 supra for the full quotation.
1 Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93.
3 Id. at 38, 172 N.E. at 527, 211 N.Y.S.2d at 135.
4 Mass. Acts 1949, c. 427, § 2: "If the proprietor of a common carrier of passengers . . . by reason of . . . its negligence . . . causes the death of a passenger . . . it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant." The statute has since been amended on two
as contractual, the New York court could, under its choice of law rules, properly apply forum law, which not only lacked any such statutory limitations but in fact had a constitutional provision prohibiting recovery restrictions in wrongful death actions. The New York Court of Appeals, however, did not so characterize the plaintiff's case and affirmed the appellate division's dismissal of the second, or contractual, cause of action.

Had the court stopped here, the Kilberg case would not have received the attention which it has. However, the plaintiff had also stated a cause of action in tort based on the Massachusetts wrongful death statute, apparently acquiescing in the traditional choice of law rule that the \textit{lex loci delictus} controlled the tort action, including the measure and extent of damages. This problem was not in issue before the New York Court of Appeals; it was neither argued by the parties nor raised or presented by the record. Nevertheless, the majority of the court stated that the plaintiff could maintain her tort action in the New York courts under the Massachusetts statute without regard to its statutory limitations, and it granted her leave to amend her complaint accordingly if she were so inclined. In this dicta the New York court has been charged with holding contrary to the overwhelming weight of authority and overturning numerous prior New York decisions. It is submitted, however, that the only real fault with the Kilberg dicta is its semantic uncertainty.

Undoubtedly, the decision was based upon public policy grounds and the increasing volume of interstate air travel. The New York public policy against death case recovery limitations was "strong, clear and old," and the court felt that New York residents should be protected against "unfair and anachronistic treatment of the lawsuits" resulting from these air disasters. While still requiring the plaintiff to sue on the Massachusetts statute, it would "refuse on public policy grounds to enforce one of its provisions as to damages."

It is equally undeniable, however, that the Kilberg court was also very much concerned with the substance versus procedure approach to the same problem. After setting out the commonly accepted rule regarding the application of the distinction, and finding that, on the issue of whether the measure of damages was substantive or procedural, there was authority both ways, the court concluded, "It is open to us, therefore, particularly in view of our own strong public policy as to death action damages, to treat occasions. The first amendment raised the maximum recovery to $20,000. Mass. Gen. Laws ch. 229, § 2 (Supp. 1961). In the second, Mass. Acts 1962, c. 306 (effective Jan. 1, 1963), the Massachusetts legislature raised the minimum to $3,000 and the maximum limitation to $30,000. It also had before it two bills which would have removed altogether the ceiling on death case damages. Both were rejected. See Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 567 n.3 (2d Cir. 1962) (dissent), cert. denied, U.S.L. Week 3261 (U.S. Feb. 19, 1963).


8 N.Y. Const. art. I, § 16: "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."


10 The Kilberg case has been exhaustively noted. See, e.g., Note, 49 Calif. L. Rev. 187 (1961); Note, 74 Harv. L. Rev. 1652 (1961).


12 Id. at 43, 172 N.E.2d at 529, 211 N.Y.S.2d at 138 (separate opinion of Fuld, J.).

13 Ibid. (majority opinion).

14 Id. at 46, 172 N.E.2d at 532, 211 N.Y.S.2d at 143 (separate opinion of Froesseld, J.).


16 Ibid.
the measure of damages in this case as being a procedural or remedial question controlled by our own State policies."  

Beyond this the Kilberg court did not expressly go. But its language and its selection and handling of cases in support of its conclusion clearly indicates that substance-procedure considerations were uppermost in its mind.

When the Kilberg decision was handed down, a similar case involving the same airplane crash was pending in the federal district court in New York. This was the subject case of Pearson v. Northeast Airlines, Inc. In Kilberg, Justice Froessel, in a separate concurring opinion, agreed with the majority on the dismissal of the second cause of action, but he vigorously dissented from the proposition propounded by the court on the tort action. While not elaborating, he expressed "grave doubts" as to the constitutionality of the Kilberg dicta in light of the full faith and credit clause and interpretative law. In Pearson these doubts achieved fruition and the constitutional issues were thoroughly litigated.

Under Erie Railroad Co. v. Tompkins and Klaxon Co. v. Stentor Electric Manufacturing Co., the federal district court was, of course, bound to apply New York law, including her choice of law rules. Upon the authority of Kilberg, therefore, it ruled that the plaintiff's cause of action was not subject to the Massachusetts limitations, denied several motions by the defendant to fix damages at the $15,000 maximum, and entered judgment on a verdict for approximately $134,000. The defendant appealed

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16 Id. at 42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137. (Emphasis supplied.) The court cited Walton School of Commerce v. Stroud, 248 Mich. 85, 226 N.W. 883 (1929). It also maintained that there were no controlling New York authorities, although it relied very heavily on Wooden v. Western N.Y. & Pa. R. Co., 126 N.Y. 10, 26 N.E. 1050 (1891) where the following statement appeared: "A restriction pertains to the remedy, rather than the right . . . [and] does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced, or the cause of action permitted to be prosecuted." Id. at 16, 26 N.E. at 1051. The statement is in point but, ironically, the holding is not. In Wooden the New York forum applied its own recovery limitations to a Pennsylvania wrongful death statute which had none. The majority also relied somewhat on Conklin v. Canadian-Colonial Airways, 266 N.Y. 244, 194 N.E. 692 (1935).

17 It has been said, however, that this language may have been mere subterfuge, that it has since been disregarded by the court itself, and Kilberg interpreted as an affirmation of a strong state public policy. Kilberg v. Northeast Airlines, Inc., 309 F.2d 553, 559 n.14 (2d Cir. 1962), cert. denied, 31 U.S.L. Week 3261 (U.S. Feb. 19, 1963). This conclusion would appear to be borne out by the subsequent case of Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962), where the court refused to apply the lex fori to the issue of prejudgment interest on damages in a wrongful death action based on a Maryland statute. In Davenport the court said the measure of damages was inseparably connected with the right of action—a matter or substance to be treated by the lex loci—particularly in wrongful death cases. Id. at 393, 183 N.E.2d at 903, 230 N.Y.S.2d at 18. "Kilberg . . . must be held merely to express this State's strong policy with respect to limitations in wrongful death actions." Id. at 395, 183 N.E.2d at 904, 230 N.Y.S.2d at 19. The trouble with Davenport, however, is that Chief Justice Desmond, author of the majority opinion in Kilberg, although concurring in the result, stoutly maintained that the majority opinion here was "inconsistent with our stated grounds for decision in Kilberg v. Northeast Airlines." Ibid. (Emphasis supplied.) Moreover, it is interesting to note that Justice Frossel, who so vigorously disagreed with the majority in his separate opinion in Kilberg, dissented here because he thought "reason and logic" dictate that the court follow its prior rule and apply it to interest as "an inseparable part of the damages." Id. at 396, 183 N.E.2d at 905, 230 N.Y.S.2d at 20.

18 199 F.Supp. 539 (S.D.N.Y.), aff'd, 309 F.2d 553 (2d Cir. 1962).


20 Id. at 51, 172 N.E.2d at 535, 211 N.Y.S.2d at 146.

21 304 U.S. 64 (1938).

22 313 U.S. 487 (1941).

to the United States Court of Appeals for the Second Circuit where a majority of a panel of three circuit judges held that the Kilberg dicta violated the full faith and credit clause of the federal constitution.\textsuperscript{24} Judge Swan, writing for the panel majority, noted that under 

*Erie* the federal district court was bound to apply New York law unless precluded by some constitutional prohibition.\textsuperscript{25} Balancing the purpose and influence of the full faith and credit clause against New York public policy, he concluded that the former should prevail in this case, and it was, therefore, error for the trial court to apply the Massachusetts statute without regard to its statutory limitations.\textsuperscript{26} Circuit Judge Irving Kaufman entered a strong dissent upholding the trial court and the Kilberg rule.\textsuperscript{27}

It is at this point that the waters become muddy, for, within a short time *Pearson* was reheard by the Second Circuit *en banc*, and, in a 6-3 decision, the court reversed the panel and affirmed the district court.\textsuperscript{28} Judge Kaufman, now writing for the majority on the rehearing, went on to further elaborate the views set out in his earlier dissent.

In essence the Second Circuit’s holding was that each state has the power to develop its own conflicts of law doctrine and that the refusal of New York in Kilberg to honor the Massachusetts limitations was not an unconstitutional exercise of that power.\textsuperscript{29}

The panel decision was criticized as exalting the *lex loci delictus* theory to constitutional status and as barring New York from applying any of its own wrongful death policy to the Massachusetts cause of action.\textsuperscript{30} “If this is indeed the rationale of the panel’s opinion,” Judge Kaufman ironically observed, “then it is the first decision to ‘freeze’ into constitutional mandate a choice-of-law rule derived from what may be described as the Ice Age of conflict of laws jurisprudence—at a time when that jurisprudence is in an advanced stage of thaw.”\textsuperscript{31} Noting the apparent concession that New York had sufficient ties in the transaction to justify the application of its own wrongful death law to the case, he characterized the objectors as arguing that, although New York is not required to give any faith or credit to the Massachusetts act, “once it gives Massachusetts law some faith and credit it must also give it full faith and credit.”\textsuperscript{32} But, he reasoned, the statutory limitations on recovery in the Massachusetts statute are entitled to no more obeisance than certain other statutory limitations,\textsuperscript{33} and the defendant has no “vested right” in the application of the Massachusetts rule of liability for wrongful death.\textsuperscript{34}

Finally, the opinion writer failed to find anything truly revolutionary or radical in the Kilberg dicta: the New York court merely applied a traditional choice of law rule which designated the Massachusetts law as the source of liability for the wrongful death.\textsuperscript{35}

It has absorbed the Massachusetts rule into the corpus of New York law for the purposes of adjudicating this case fairly. . . . We believe that in so doing New York is not bound to model all of the rules governing this litigation in which it is conceded it has a legitimate interest, on Massachusetts law. We are convinced that New York may examine each issue in the litigation—the conduct which creates liability, the parties who may bring an action, the extent of liability, the period during which the liability may be sued upon, and in appropriate cases, matters of immunity, insurance procedure, etc.—and by weighing the contacts of various states with the transaction, New York may, without interfering with the


\textsuperscript{25} *Id.* at 133.

\textsuperscript{26} *Id.* at 133-36.

\textsuperscript{27} *Id.* at 136-47 (dissent).


\textsuperscript{29} *Id.* at 556.

\textsuperscript{30} *Id.* at 557.

\textsuperscript{31} *Ibid.*

\textsuperscript{32} *Ibid.* (Emphasis by the court.)

\textsuperscript{33} *Ibid.*

\textsuperscript{34} *Id.* at 560-61.

\textsuperscript{35} *Id.* at 560-62. See note 45 infra.
Constitution, shape its rules controlling the litigation. . . . We therefore see no escape from the proposition we announce today, that a legitimately interested state may, under the circumstances of this case, apply a firmly fixed and long existing policy of its own, although this would remove a defense provided by an 'integral' provision of the locus' statute creating the cause of action.\textsuperscript{36}

Although, very much in the manner of the New York Court of Appeals, the Second Circuit does not expressly decide the case on the substance versus procedure approach, again the language of the opinion, despite certain disclaimers,\textsuperscript{37} and the selection and handling of precedents leads inexorably to the conclusion that this consideration was in large measure responsible for the decision.

Looking at the situation from another point of view, moreover, much, if not most, of the criticism of the Kilberg dicta has been directed at its substantive-procedural implications. In fact, it appears to be the major argument of the dissenters on the rehearing that Kilberg provides a wanton and arbitrary distinction between the substantive and procedural elements of a foreign-based cause of action, and that this is, in turn, proscribed by the full faith and credit clause.\textsuperscript{38}

Certiorari now having been denied by the United States Supreme Court,\textsuperscript{39} it remains to speculate on the future of the Kilberg-Pearson rule. Seemingly, the denial signals a victory for those advocates of a more flexible approach to choice of law issues in tort cases.\textsuperscript{40} In its present form, however, it is submitted that the rule is not a satisfactory rule of law for conflicts purposes. It involves three separate elements: substantial connection with the transaction, a "strong, clear and old" public policy, and, by implication at the very least, some substantive-procedural distinction through which recovery limitations can be divorced from the substantive elements of liability. The first element of necessity brings into play problems of residence and domicile, which of themselves present interesting variations. As interpreted and applied by the Second Circuit, the Kilberg rule approaches what, for want of a better term, might be called a "proper law" of torts in conflict cases.\textsuperscript{41} There is some question whether that is a logical or desirable development and, to borrow Judge Kaufman's metaphor, whether this is not melting a pleistocene glacier a bit too rapidly than is in reality called for.

The present statement of the rule is cumbersome and may lead to precedential inconsistency within each state and circuit. Contacts will vary from case to case and, in their comparative weight, from court to court. Defining public policy on any particular issue is always a highly sensitive and delicate task, bringing in political and social considera-

\textsuperscript{36} Ibid.

\textsuperscript{37} Id. at 559: "Our decision cannot, therefore, be interpreted to condone a forum's applying its own rules in a wanton manner by labeling matters 'procedural' while arbitrarily choosing the parts of a foreign statute it wishes to enforce by labeling them 'substantive.' 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. . . . But that is, ex hypothesi, not the case before us." But quaere.

\textsuperscript{38} Id. at 567-68 (dissent). See also Note, 74 Harv. L. Rev. 1652 (1961). Throughout the entire litigation in both the Kilberg and Pearson cases, neither the proponents nor the opponents of the rule have presented a united front. Judge Froessell objected to the interpretation of the Massachusetts statute and felt the rule violated the overwhelming weight of authority. See text accompanying notes 19 and 20 supra. Judge Swan, writing for the Second Circuit panel majority, held the rule violative of the full faith and credit clause by balancing New York public policy against the purpose and influence of the constitutional provision. See text accompanying notes 24-26 supra. Judge Kaufman, when dissenting from the panel decision, wrote, "the precise question which must be decided in this case is whether New York has a 'sufficiently substantial contact' with the events surrounding the action maintained by Mrs. Pearson for the death of her husband in this particular airplane crash." Pearson v. Northeast Airlines, Inc., 307 F.2d 131, 142, rev'd on rehearing, 309 F.2d 553 (2d Cir. 1962). In the principal case, however, he appears to adopt a substantial-contact-public-policy-procedural combination rationale. And as Webb shows, the New York Court of Appeals has not itself been consistent in its justification of the rule. See note 17 supra.


\textsuperscript{40} See Morris, The Proper Law of a Tort, 64 Harv. L. Rev. 881, 885-88 (1951).

\textsuperscript{41} Ibid. Compare Restatement, Conflicts, §§ 332-32b (Tent. Draft No. 6, 1960).
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tions as well as judicial. Only five states have constitutional prohibitions against death damage restrictions similar to New York. On the other hand, Massachusetts is joined by twelve other states having statutory limitations on wrongful death recoveries. In the other jurisdictions, there is probably only conjecture.

Moreover, the present justification of the rule is not entirely free from objection, for no matter how the substantial connection theory is applied in such a case, the feeling is inescapable that the forum is giving extraterritorial effect to its law in the true and not just the conflicts sense. And any extension of the rule in its present form might lead to some strained logic and reasoning, as, for example, where the public policy is contra or less strong, or where a nonresident defendant or a corporation not doing business in the forum state is involved. Nor does the combination remove the constitutional dangers lurking in the background.

As both the Kilberg and Pearson decisions indicate, however, the rule can be upheld on a substantive-procedural approach alone, and without considerations of public policy or substantial contacts. As thus delimited, it would be a far more satisfactory rule, administratively speaking at least. It would leave each court free to approach the problem on a rational and logical basis without the necessity of making additional inquiries into the contacts of the transaction, the extent and degree of its own public policy, or of the domicile and residence of the parties. By so confining the rule it is submitted, it is less vulnerable to attack and offers a far less novel solution to the problem. Furthermore, it would be simpler, more workable, and would apply in a greater number and variety of cases.

Richard J. Kohlman

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43 Ibid. Illinois, Maine, Virginia ($30,000); Colorado, Kansas, Minnesota, Missouri, New Hampshire, West Virginia ($25,000); Wisconsin ($22,500 to $36,500); Oregon, South Dakota ($20,000).
45 Id. at 188-91: "In any event, the Kilberg decision clearly does not compel the trial court to depart from the general rule that the elements are determined by application of the lex loci. . . . [J]udicial dissatisfaction with the lex loci rule indicates the Kilberg case is likely to be followed in other jurisdictions. . . . The Kilberg court's assertion that the measure of damages is governed by the lex fori because it is procedural and because the limitation of the lex loci is contrary to the public policy of the forum could be made in any case involving a foreign limitation, regardless of the residence of the parties." But cf. Wilson v. Lockheed Aircraft Corp., 210 Cal.App.2d 509, 26 Cal.Rptr. 626 (1962), where the plaintiff brought an action in California on a Texas wrongful death statute. The foreign statute provided that actions by the beneficiaries must be brought within three months of the death of the decedent, otherwise the executor or administrator was the proper party to bring the action. The court found nothing contrary to the policy of California and applied the three months limitation to the action, although it observed, inter alia, that the purpose of the limitation was to "simplify and expedite matters." Id. at 511, 26 Cal. Rptr. at 628. Apparently the plaintiff relied on the Texas general statutes of limitation to control the issue. It would seem that a strong substance versus procedure argument could have been urged, but if presented, was not discussed in the opinion. Kilberg or Pearson were not discussed. See also Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953).