§8.1. Co-guaranty: Equitable duty of contribution. In Nissenberg v. Felleman,\(^1\) the Massachusetts Supreme Judicial Court concluded that an equitable co-guarantor relationship, not directly based upon a guaranty agreement but rising out of it, is governed by New York law, the guaranty agreement and related loan agreement being made and portending performance in New York, at least when the guaranty agreement broadly stipulates New York law as governing the rights and obligations of the parties. The Massachusetts forum then afforded the plaintiff co-guarantors recourse to equitable exoneration as against the defendant co-guarantors, a "remedy" in excess of the equitable rights of co-guarantors to contribution as defined under the controlling substantive law of New York.

The Nissenberg case was an equity suit. Both the plaintiffs and the defendants, physical persons, were joint and several co-guarantors, under a written guaranty agreement between themselves on one side and Y corporation on the other side, of loan payment obligations due from the debtor X corporation to the creditor Y corporation under a written loan agreement. X corporation was a Massachusetts corporation and Y corporation was a New York corporation. New York was determined by the Court to be the place of making and intended performance of both agreements.\(^2\) The plaintiffs and the defendants, residents of Massachusetts, collectively comprised the directors, officers, and stockholders of X corporation.

The loan agreement provided that "this agreement and all transactions, assignments and transfers hereunder, and all rights of the parties, shall be governed as to validity, construction, enforcement, and in all other respects by the laws of . . . New York." The guaranty agreement provided: "This guaranty, all acts and transactions hereunder, and the rights and obligations of the parties hereto, shall be governed, construed and interpreted according to the laws of . . . New York."\(^3\)

JEAN E. DE VALPINE is a member of the firm of Powers, Hall, Montgomery and Weston, Boston.

\(^2\) This resulted from orthodox application of relevant conflicts rules and hence is not specially reviewed herein. 339 Mass. at 717, 719, 162 N.E.2d at 306.
\(^3\) 339 Mass. at 717 n.1, 162 N.E.2d at 306 n.1.
After the commencement of separate suit in Massachusetts by the New York creditor against the plaintiffs, alleging failure of the debtor X corporation to pay sums due under the loan agreement and seeking satisfaction from the plaintiffs as co-guarantors under the guaranty agreement, but prior to adjudication in such suit, the plaintiffs sought by this bill in equity against their co-guarantors, the defendants, (1) a decree that the defendants "are jointly and severally liable for one half of the obligation which the plaintiffs . . . may be required to pay" and (2) an order that the defendants pay to the creditor one-half of any judgment that the creditor may recover against the plaintiffs. The defendants' demurrer was sustained in the lower court and a final decree dismissing the bill was entered.

The Supreme Judicial Court treated the case as capable of decision in two phases: (a) determination of the jural relationship between the co-guarantors; and (b) determination of remedies, if any, available to give effect to the right-duty correlatives of that relationship. The difficulty is that (a) may swallow (b). Right and remedy are frequently equivalent, mutually reflexive implications from the same jural relationship. Certain entire jural relationships resist breakdown into two concrete component parts consisting of a "substantive" right-duty aspect as distinct from a "procedural" or "remedial" aspect. It is not surprising that this is particularly true of relationships of equitable origin, in view of equity's historical propensity to think and act in remedial terms.

Treating right and remedy as separable, the Court first chose the law establishing the extent of equitable duty of contribution among co-guarantors. In this phase of its decision the Court contributed an increment of new precedent to the underdeveloped methodology of choice of law in the field of equitable relationships.

Cognizant of the traditional view that this equitable duty of co-guarantors does not constitute a contractual duty based directly upon the guaranty agreement, but rather is an "implied" duty inhering in the co-guarantor relationship, the Court was well aware that determination on the substantive law of the guaranty contract does not necessarily compel choice of the same law as governing the right-duty substance of the co-guarantor relationship. Indeed, given the nexus that the co-guarantors are all of Massachusetts, as is the debtor, and the concept that the co-guarantor relationship is strictly equitable and interpersonal, it seems plausible a priori to choose Massachusetts as the source of the applicable substantive law. The Court, however, chose New York law as the controlling substantive law of the co-guarantor relationship, on the rationale that this relationship, albeit generative of rights and duties premised in equity and not in contract, arose out of execution and delivery of a guaranty agreement incontrovertibly governed by New York law and in consequence was to be governed by the same law, at least when the parties have stipulated that law as the law of the agreement itself "in such broad language." 4

That this phase of the *Nissenberg* decision breaks new ground in Massachusetts and constitutes an addition to a very sparse body of Anglo-American and Civil Law authority and commentary is attested by the absence in the opinion of supporting citations and a footnote reference to "the varying views governing implied obligations." Examination of the material thus footnoted by the Court reveals, however, that the "implied obligations" over which views are said to vary are mainly of the simple quasi-contractual, unjust enrichment variety and are distinguishable from the "implied obligation, equitable in character, growing out of the relationship of co-surety or co-guarantor," that confronted the Court.

More apposite discussion than that found in the sections of Rabel cited by the Court is to be found in another section of Rabel, advancing as not necessary, but convenient, the position of the German Supreme Court, consistent with the *Nissenberg* result, "to the effect that when the co-sureties are bound under one law to the creditor, they are presumed to be bound under the same law as to contribution among themselves," and noting as consonant with this view a number of Anglo-American cases.

The second interesting conflicts aspect of *Nissenberg* lies in the action of the forum Court in extending to the plaintiff co-guarantors equitable remedies that the Court frankly recognized may exceed in scope remedies available under New York law, the law chosen as governing the right-duty relationship of the co-guarantors. The Court followed the formula, (1) that the forum determines what is procedure and what is substance, and (2) that equitable remedies as between co-guarantors are matters of procedure. The difficulty is in the underlying premise upon which the Court based its approach to the entire case, namely, that the substantive obligations of the parties as determined under New York law subsist sufficiently separable from remedies so that Massachusetts can apply its own remedies without disturbing the content of the substantive obligations.

The Court stated the substantive New York law as follows: "The right to contribution from co-guarantors arises in New York when a co-guarantor who is 'legally liable upon his guaranty' has 'paid the claim' of the creditor. . . . 'Then, and not until such payment, has he the right to exact contributions.'" The Court expressed doubt whether in any event a New York court would grant conditional relief

---


7 3 Rabel, Conflict of Laws 357-359, especially 358 (1950).


by way of equitable exoneration to the plaintiffs in advance of payment
by the plaintiffs of more than their share of the debt. But, in guise of
remedy, as distinct from right, the Court accorded the plaintiffs the
opportunity to amend their equity bill to qualify, on adequate proof,
for equitable exoneration entailing specific performance by simultane­
ous payment by all co-guarantors.

It seems, at least, that the New York “right to contribution” as stated
by the Supreme Judicial Court, requires reformulation in retrospect of
the Massachusetts remedy entailing equitable exoneration. Can it be
that “equitable contribution” is the name of a “right,” but “equitable
exoneration” is the name of a “remedy”? Query whether the con­
ceptual difficulty arises in part from the fact that the so-called “right to
contribution” itself originated as an equitable remedy.

By way of peripheral comment, the Nissenberg case can be con­
sidered in view of the Restatement rule that “If a judgment in an
action provided by the law of the forum would impose on the defend­
ant a more onerous duty than that imposed by the law of the state
which created the right, or a substantially different duty, no action can
be maintained.” 10

§8.2. Miscellaneous cases. The five decisions briefly noted in this
section neither significantly augment nor disturb the existing texture of
the conflicts jurisprudence of Massachusetts.

In Weir v. New York, New Haven, & Hartford R.R.,1 a Connecticut
statute required that a railroad engine sound a bell or whistle within
eighty rods of approach to a public crossing. It is not clear whether
the Massachusetts Supreme Judicial Court perceived this statute, as
applied by Connecticut courts, either (1) as establishing a definitive
standard of care (as opposed to a “rule of ordinary care,” as applied by
the forum) binding on the forum, thereby reducing the scope of applic­
cable forum law to the purely probative and evidentiary domain, that
is, the quantum of evidence necessary to prove facts and the inferences
permissible from such facts to reach a finding of negligence by reason
of failure to meet such standard of care of the locus; or (2) as simply in
accord with the forum's own norm of ordinary care so that due proof
of violation of the statute is sufficient to permit a finding of negligence
by reason of failure to meet the forum's norm.

In Franklin Foundation v. Attorney General2 absence of argument as
to possible relevance of the law of Pennsylvania, the domicile at death
of the testator whose will created the subject charitable trust, enabled
the forum court to apply its own law, bypassing a cluster of vexing
questions as to what aspects of trust termination are substantive, and as
such governed by the creation locus, and what are administrative, and
as such governed by the administration locus. The case is set in a con­
text of contemplation by the Pennsylvania testator of long-term admin­

(Mass. 1862); Erickson v. Nesmith, 15 Gray 221 (Mass. 1860).


http://lawdigitalcommons.bc.edu/asml/vol1960/iss1/11
istration in Massachusetts with Massachusetts political officers serving as part of the administrative body of the trust and a Massachusetts political body having the remainder interest. One may speculate that at least in such a context, all questions affecting the trust (whether "substantive," "procedural," or "administrative"), perhaps excepting the threshold question of basic validity, may fall within the purview of the law of the administration locus.

In *West Side Motor Express, Inc. v. Finance Discount Corp.*, the general rule that the law of the place of making governs the validity of a contract, was routinely applied to sustain a contract challenged as usurious under Connecticut law. Obiter dicta possibly adumbrated treatment of usury and like contract vitiation issues by application, given facts having sufficient nexus with several jurisdictions, of the law of the jurisdiction favoring validity, whether or not it be the contract-making jurisdiction.

In *Tsacoyeanes v. Canadian Pacific Ry.*, the Massachusetts forum iterated, in an action of tort for injuries sustained by the plaintiff passenger on the defendant's train by reason of jolts occurring at a Toronto terminal, the established rule that the substantive law of the jurisdiction in which the accident happens determines tort liability. In the absence of invocation of Ontario law by counsel for the parties, the Supreme Judicial Court declined to take judicial notice of Ontario law, noting, however, that counsel apparently tried the case upon the theory that relevant Ontario law was the same as the forum law.

In *Eisel v. Columbia Packing Co.*, the Federal District Court routinely applied the conflicts rule that the law of the forum furnishes the substantive doctrine determinative of the issue of collateral estoppel.

---