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Conflict of Laws-Presumption of Foreign Law-Indiana Cases and the Restatement

CONFLICT OF LAWS—PRESUMPTION OF FOREIGN LAW—INDIANA CASES AND THE RESTATEMENT—There are some fifty or more reported Indiana cases in which presumption of foreign law is considered, yet this point has not been satisfactorily settled. In several of the cases, which have been subsequently cited as precedent and made the basis of a later decision, the remarks of the court upon this question are purely dicta and in no respect necessary to the decision of the case in which they appear. And other cases are found to indicate, by the language employed, that a certain rule is the prevailing one while following a different rule in actual decision.

The rule supported by the majority of the cases is the general American rule that in the absence of any showing to the contrary the presumption is that the common law prevails in the foreign state. *Titus v. Scantling*, 4 Blackf. 89 (1835); *Trimble v. Trimble*, 2 Ind. 76 (1850); *Cunningham v. Jacobs*, 120 Ind. 306 (1889); *Gates v. Newman*, 18 Ind. App. 392 (1897); *Penn. Mutual Life Ins. Co. v. Norcross*, 163 Ind. 379 (1904); *Baltimore & Ohio R. Co. v. Freeze*, 169 Ind. 370 (1907); *Southern R. Co. v. Elliott*, 170 Ind. 273 (1907); *Cobe v. Malloy*, 44 Ind. App. 8 (1909); *Wallace v. Thompson*, 49 Ind. App. 211 (1911); *W. McMillen & Son v. Hall*, 59 Ind. App. 545

(1915); *Cleveland, etc. R. Co. v. Wolf*, 114 N. E. 236 (App. Ct., 1916); *Swain v. Schild*, 66 Ind. App. 156 (1917); *Chalmers & Williams v. Surprise*, 70 Ind. App. 646 (1919); *Henning v. Hill*, 80 Ind. App. 363 (1923).

This rule has even been applied in many cases where the Indiana law on the subject is statutory. *Stout v. Wood*, 1 Blackf. 71 (1820); *Johnson v. Chambers*, 12 Ind. 102 (1859); *Engler v. Ellis*, 16 Ind. 475 (1861); *Mendenhall v. Gately*, 18 Ind. 149 (1862); *Crake v. Crake*, 18 Ind. 156 (1862); *Buckinghouse v. Gregg*, 19 Ind. 401 (1862); *Smith v. The Muncie National Bank*, 29 Ind. 158 (1867); *Schurman v. Marley*, 29 Ind. 458 (1868); *Lichtenberger v. Graham*, 50 Ind. 288 (1875); *Alford v. Baker*, 53 Ind. 279 (1876); *Smith v. Peterson*, 63 Ind. 243 (1878); *Robards v. Marley*, 80 Ind. 185 (1881); *Rogers v. Zook*, 86 Ind. 237 (1882); *Supreme Council v. Garrigus*, 104 Ind. 133 (1885); *Jackson v. Pittsburgh, etc. Ry.*, 140 Ind. 241 (1894); *B. & O. R. Co. v. Reed*, 158 Ind. 25 (1901); *B. & O. R. Co. v. Jones*, 158 Ind. 87 (1901); *B. & O. R. Co. v. Adams*, 159 Ind. 688 (1902); *B. & O. R. Co. v. Hollenbeck*, 161 Ind. 452 (1903); *Midland Steel Co. v. Citizens Nat. Bank*, 34 Ind. App. 107 (Dictum, 1904); *Wabash R. Co. v. Hassett*, 170 Ind. 370 (1907); *Crume v. Brightwell*, 69 Ind. App. 668 (1918); *Culp v. Butler*, 69 Ind. 668 (1918); *Clark v. Southern Ry. Co.*, 69 Ind. App. 697 (1918); *Gates v. Fauvre*, 74 Ind. App. 382 (1920).

An exception to this rule is indicated, by way of dictum, in *Buchanan v. Hubbard*, 119 Ind. 187 (1889) to the effect that in respect to those states or territories in which the common law did not prevail prior to their entrance into the Union it will not be presumed that the common law is in force there now but that the law in such state is the same as that of the forum. And in *Krouse v. Krouse*, 48 Ind. App. 3 (1911) in which the law of California was involved the rule was laid down that the court having judicial notice of the fact that the civil law once prevailed in California the presumption that the common law prevails there is removed and therefore the case must, as a matter of necessity, be decided in accordance with the laws of Indiana. The court declares that this case falls within the rule laid down in *Buchanan v. Hubbard, supra*, but, although in practical effect they are the same, there is technically a difference in these two rules. The former presumes the laws of the two states to be the same while the latter recognizes, logically, the absence of any presumption and the application of the law of the forum as a matter of necessity. This latter is a logical result of the general rule above stated.

A second rule, and one which is directly contra to the rule presuming that the common law prevails, is laid down in a number of cases that it will be presumed, in the absence of any showing to the contrary, that the foreign law is the same as the law of the forum. *Shaw v. Wood* (dictum) 8 Ind. 518 (1856); *Draggoo v. Graham* (dictum), 9 Ind. 212 (1857); *Farhni v. Ramsee* (dictum), 19 Ind. 400 (1862); *Buchanan v. Hubbard*, 119 Ind. 187 (1889); *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246 (1893); *Cooley v. Kelley*, 52 Ind. App. 687 (1912); *Irose v. Balla*, 181 Ind. 49 (1913); *Spielman v. Herskovitz*, 78 Ind. App. 131 (1921). And to the same effect there is the rule that where there is no common law on the subject and the foreign law is not shown the law of Indiana will be applied. *Hollman v. Collins*, 1 Ind. 24 (1848); *Blystone v. Burgett* (dictum), 10 Ind. 28 (1857); *Crake v. Crake* (dictum), 18 Ind. 156 (1862); *Patterson v. Carrell*, 60 Ind. 128 (1877). Since if there was no common law on the sub-

ject there would have been no cause of action or defense at common law this is in effect the same rule as the second rule stated above.

In *Crake v. Crake, supra,* it was held that where a contract, governed by foreign law, embraces terms upon a subject not settled by the common law and no statute of the foreign state is shown the courts of this state will presume such contract valid. And *Cunningham v. Jacobs, supra,* which was an action upon an attachment bond executed in Illinois, held that although a writ of attachment is the creature of statute law and was unknown to the common law yet where a court of a state in which the common law is presumed to prevail has issued such a writ it will be presumed that the proceeding was valid and that the court did not exceed its powers since "it is always to be presumed that everything was rightly done in court unless the contrary expressly appears by the record."

In view of the state of the authority in Indiana it would be a simple matter to adhere to the rules set out in the *Tentative Draft No. 5* of the *Restatement of the Law of Conflict of Laws* which was submitted for discussion at the seventh annual meeting of *The American Law Institute,* May 9, 1929. They are as follows:

"Section 654. FOREIGN COMMON LAW. In the absence of evidence, the common law of another common law state is presumed to be the same as the common law of the forum.

Section 655. FOREIGN STATUTORY LAW. In the absence of evidence, there is no presumption that a particular statute exists in another state.

Section 656. PRESUMPTION AS TO FOREIGN LAW. In the absence of evidence, the law of a state not governed by the system of the common law will not be presumed to be like that of the forum."

Obviously these rules do not cover the whole problem but they are in accord with the majority of the Indiana cases. S. J. S.