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TORTS IN THE CONFLICT OF LAWS

A COMPARATIVE STUDY

BY

STIG STRÖMHOLM

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P. A. NORSTEDT & SÖNERS FÖRLAG

Herr Professor Kurt Grönfors
vördsamt från förf.

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Edidit ÅKE MALMSTRÖM

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PREFACE

The chapter on torts is usually one of the shortest in textbooks on the conflict of laws, and from a theoretical point of view, it is no doubt one of the least complicated departments of this branch of legal science. Compared with the classical battlefields of private international law, it may seem a remote corner of small interest. This, however, is not an entirely negative virtue, for battlefields easily become graveyards, and nothing could be more dangerous for a beginner than digging in the graveyards of legal theories, some of which still exercise that "fatal fascination" described by Professor Cheshire. A study of torts in the conflict of laws is, and must be, chiefly a study of judicial decisions.

This does not mean that the branch of torts in private international law is virgin soil. In America, Professor Hancock has treated it extensively in a very valuable monograph, and the chapter on torts in Professor Rabel's Conflict of Laws contains a rich material from various countries. However, the last few years have brought an increasing number of new problems, some of which had not emerged when these books were written. Indeed, there are signs which seem to indicate that the once peaceful field of torts in private international law is becoming a battlefield in its turn. This may serve as the present writer's excuse for attempting this modest expedition to reconnoitre the ground.

The idea of the present study was given by Professor Åke Malmström, of Uppsala University, the author's first teacher in private international law, to whom he is deeply grateful for encouragement, criticism, advice, and assistance in obtaining the necessary grants for the printing of the book.

The work was prepared and essentially completed during a period of research at the University of Cambridge in the years 1957 and 1958. Throughout that period the author had the privilege of working under the supervision of Dr. Kurt Lipstein, of

Clare College, without whose patient support and advice the book would hardly have been written.

The writer spent a good deal of his Cambridge days in the excellent Squire Law Library, but even students of the conflict of laws need a home, and the author was fortunate enough to have one of the best: he is deeply grateful to the Master and Fellows of Magdalene College, and particularly to his tutor, Mr. Ralph Bennett, for the friendly and stimulating atmosphere of that hospitable institution. Whatever may be the fate of his legal lucubrations, the author will always have the comfort of remembering his terms of residence at Magdalene as a very worthwhile experience and a very happy period. He is further particularly indebted to another Fellow of Magdalene College, his friend Dr. John Walsh, now of Jesus College, Oxford, for making time in the midst of his teaching duties to read most of the manuscript and correct those errors of English which are difficult to avoid for a foreigner trying for the first time to handle the subtle instrument of English legal language. It should be added, in justice to Dr. Walsh, that the manuscript has been redrafted so extensively after the author's return to Sweden that any barbarisms found in the text should be laid exclusively at the writer's own door. The author also wishes to acknowledge his gratitude to his wife whose patient assistance in the final stages of the work — which had to be brought up to date in 1960, two years after its completion, in the midst of other duties — has been most valuable.

The book would have remained unwritten but for the generous economic assistance of the Rotary Foundation, Evanston, Ill., from which the author received a scholarship enabling him to take up his research in Cambridge, and it would never have been printed without a substantial grant from the Swedish Council for Research in the Social and Legal Sciences. The author wishes to acknowledge his gratitude to these institutions and to the Uppsala Södra Rotary Club, of Uppsala, which supported his candidacy for a Rotary Foundation Fellowship.

Uppsala, July 1960.

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State ex rel. Weaver v. *Missouri Workmen's Comp. Comm'n* (1936), 95 S. W. 2d 641

Wells v. *Simonds* (1953), 345 U. S. 514
Western Fuel Co. v. *Garcia* (1921), 42 S. Ct. 89; 257 U. S. 233
Western Union v. *Brown* (1914), 234 U. S. 542
Western Union v. *Favish* (1916), 71 So. 183
Western Union v. *Fuel* (1910), 51 So. 571
Western Union v. *Pratt* (1907), 89 P. 237
Whitten v. *Bennett* (1896), 77 F. 271
Wiener v. *Pharmaceuticals Inc.* (1949), 83 N. E. 2d 673
Williams v. *East St. Louis Ry. Co.* (1950), 100 S. W. 2d 51
The Windrush (1922), 286 Fed. 251 and (1924), 5 F. 2d. 425
Young v. *Masci* (1933), 53 S. Ct. 599; 77 L. Ed. 1158
Young v. *U. S.* (1950), 184 F. 2d 587.

8. FRENCH

Cour de Cassation 9. 6. 1880, *S.* 81. 1. 449; *Clunet* 1880, p. 394
Cour d'appel de Rennes 21. 12. 1887, *S.* 88. 2. 25
Cour de Cassation 16. 5. 1888, *S.* 91. 1. 509; *Clunet* 1889, p. 664
» » » 4. 11. 1891, *Clunet* 1892, p. 152
Cour d'appel d'Angers 15. 12. 1891, *Clunet* 1892, p. 1144
Cour de Cassation 29. 5. 1894, *S.* 94. 1. 48
» » » 18. 7. 1895, *S.* 95. 1. 305; *Clunet* 1896, p. 130
Tribunal civil de la Seine 6. 2. 1897, *Clunet* 1899, p. 771
Cour d'appel de Caen 23. 6. 1897, *S.* 98. 2. 44
Cour de Cassation 24. 11. 1897, *S.* 98. 1. 311
Cour d'appel d'Aix-en-Provence 23. 1. 1899, *Clunet* 1901, p. 104
Cour d'appel de Paris 23. 6. 1899, *Clunet* 1901, p. 128
Tribunal civil de la Seine 7. 11. 1900, *S.* 1901. 2. 223
Tribunal civil de Narbonne 8. 11. 1900, *Clunet* 1901, p. 108
Cour d'appel de Rennes 22. 12. 1902, *Clunet* 1903, p. 598; *Revue* 1905, p. 131.
Tribunal civil d'Alais 27. 1. 1903, *Revue* 1905, p. 135
Cour de Cassation 16. 11. 1903, *Clunet* 1904, p. 353
Tribunal de commerce de Marseille 5. 7. 1904, *Clunet* 1906, p. 434
Cour de Cassation 15. 2. 1905, *S.* 1905. 1. 209
Tribunal civil de Sousse 16. 3. 1905, *Revue* 1906, p. 706
Cour d'appel de Douai 4. 4. 1905, *S.* 1907. 1. 43
Cour de Cassation 5. 6. 1905, *D. P.* 1906. 1. 121
Cour d'appel de Douai 9. 8. 1905, *Revue* 1906, p. 154
Cour d'appel de Nancy 10. 2. 1906, *Clunet* 1907, p. 541
Tribunal de simple police de Luzarches 5. 1. 1906, *Revue* 1906, p. 705
Cour d'appel de Caen 11. 2. 1907, *Revue* 1912, p. 762
Cour de Cassation 8. 5. 1907, *Revue* 1907, p. 539
Cour d'appel de Rouen 26. 6. 1907, *Clunet* 1908, p. 776
Tribunal de commerce de la Seine 4. 12. 1907, *Clunet* 1908, p. 846
Cour d'appel de Rennes 7. 1. 1908, *Clunet* 1908, p. 1101

Cour d'appel de l'Indo-Chine 27. 3. 1908, *Clunet* 1909, p. 453
Cour de Cassation 5. 5. 1908, *Répertoire* V, p. 469
» » » 15. 6. 1909, *Revue* 1911, p. 339
Tribunal civil de la Seine 28. 1. 1911, *Clunet* 1912, p. 185
Tribunal civil de Grasse 3. 5. 1911, *Clunet* 1912, p. 814
Cour d'appel de Paris 1. 6. 1911, *Revue* 1912, p. 752
Cour d'appel de Rouen 1. 3. 1914, *Revue* 1914, p. 426
Cour de Cassation 16. 3. 1914, *Clunet* 1914, p. 1312
» » » 26. 5. 1921, *S.* 1923. 1. 33
Cour d'appel de Nancy 8. 6. 1921, *Clunet* 1923, p. 267
Cour d'appel de Rennes 19. 11. 1924, *Clunet* 1925, p. 386
Cour d'appel de Paris 16. 3. 1925, *Clunet* 1926, p. 346
Cour d'appel de Lyon 9. 5. 1925, *Revue* 1926, p. 391
Cour de Cassation 14. 6. 1926, *S.* 1927. 1. 25
Cour d'appel d'Algers 11. 10. 1926, *Clunet* 1927, p. 719
Cour d'appel de Rennes 12. 5. 1927, *Clunet* 1929, p. 680
Tribunal civil de la Seine 19. 5. 1927, *Clunet* 1927, p. 686
Tribunal civil de Béthune 8. 11. 1927, *Clunet* 1929, p. 734
Cour d'appel de Bordeaux 22. 5. 1928, *Clunet* 1929, p. 418
Tribunal civil de Strasbourg 28. 1. 1929, *Clunet* 1929, p. 1131
Cour d'appel de Bordeaux 30. 5. 1929, *Clunet* 1932, p. 907
Cour d'appel de Rouen 8. 1. 1930, *S.* 1930. 2. 167; *D. P.* 1930. 2. 85; *Revue* 1931, p. 292
Cour d'appel de Riom 24. 12. 1930, *Clunet* 1932, p. 85, *Revue* 1931 p. 140
Cour d'appel de Nimes *D. H.* 1932. 78
Tribunal civil de la Seine 2. 7. 1931, *Clunet* 1933, p. 622
Tribunal civil de Montpellier 13. 1. 1932, *Clunet* 1932, p. 1001
Cour de Cassation 22. 7. 1931, RabelsZ. 6, 1932, p. 383
Tribunal civil de Chinon 27. 7. 1931, *S.* 1932. 2. 153; *Revue* 1931, p. 668
Cour d'appel de Riom 29. 1. 1932. *S.* 1934. 2. 49
Cour d'appel de Besançon 22. 4. 1932, *Clunet* 1933, p. 68
Tribunal civil de Saint-Nazaire 19. 11. 1932, *Revue* 1933, p. 106
Cour de Cassation 6. 12. 1932, RabelsZ. 7, 1933, p. 403
Cour d'appel d'Orléans, 28. 12. 1932, *Revue* 1933, p. 340
Cour d'appel de Paris 9. 1. 1933, *Clunet* 1933, p. 618
Cour d'appel de Montpellier 4. 3. 1933, *Clunet* 1934, p. 854
Tribunal civil de Lille 6. 3. 1933, *Clunet* 1934, p. 334
Tribunal civil de la Seine 14. 3. 1933, *Clunet* 1934, p. 610
Cour d'appel de Lyon 25. 7. 1933, *Clunet* 1934, p. 881
Tribunal civil de Saintes 3. 10. 1933, *Clunet* 1935, p. 69
Cour de Cassation 27. 2. 1934, *Revue* 1934, p. 714
Tribunal de commerce de Dunkerque 19. 3. 1934, *Clunet* 1935, p. 334
Tribunal civil de Charolles 14. 6. 1934, *Clunet* 1935, p. 342
Tribunal correctionnel d'Avesnes 6. 11. 1934, *Revue* 1935, p. 432

Cour d'appel de Chambéry 17. 12. 1934, *Clunet* 1935, p. 612
Tribunal civil de Vitry-le-François 20. 12. 1934, *Revue* 1935, p. 813
Tribunal civil de la Seine 2. 1. 1935, *Clunet* 1936, p. 904
Tribunal civil de Valenciennes 19. 12. 1935, *Revue* 1936, p. 468
Cour de Cassation 24. 2. 1936, *S.* 1936. 1. 161; *D. P.* 1. 1936. 49; *Clunet* 1937, p. 70
Tribunal civil de la Seine 16. 6. 1936, *S.* 1939. 2. 1; *Clunet* 1937, p. 279
Cour d'appel d'Orléans, *Clunet* 1937, p. 272
Tribunal civil du Havre 7. 2. 1936, *Clunet* 1937, p. 758
Cour d'appel de Rouen 15. 7. 1936, *Clunet* 1937, p. 758
Cour d'appel de Colmar, *Clunet* 1936, p. 626
Cour d'appel de Paris 10. 2. 1937, *Revue* 1938, p. 116
Cour de Cassation 8. 3. 1937, *S.* 1937. 1. 241
» » » 5. 5. 1937, *Clunet* 1938, p. 69
Cour d'appel de Montpellier 7. 6. 1937, *Clunet* 1938, p. 266
Tribunal civil d'Alençon 9. 11. 1937, *Clunet* 1938, p. 42
Cour d'appel de Paris 3. 12. 1937, *Clunet* 1938, p. 312
Cour d'appel de Bordeaux 21. 2. 1938, *Clunet* 1939, p. 58
Cour de Cassation 11. 7. 1938, *Clunet* 1939, p. 645; Revue 1939, p. 100
Cour de Cassation 4. 6. 1941, *S.* 1944. 1. 133; *Clunet* 1945, p. 112
» » » 2. 12. 1941, *D. C.* 1942. 25
» » » 2. 11. 1943, *Revue* 1947, p. 291
» » » 25. 5. 1948, *S.* 1949. 1. 21; *D.* 1948. J. 357; *Clunet* 1946—1949, p. 38; *Revue* 1949, p. 89
Cour de Cassation 13. 7. 1948, *D.* 1948. J. 433; *Revue* 1949, p. 94
Cour d'appel de Hanoï 24. 3. 1949, *Revue* 1950, p. 399
Cour de Cassation 1. 6. 1954, *Revue* 1954, p. 534
» » » 23. 6. 1954, *Revue* 1954, p. 536
» » » 9. 12. 1954, *Revue* 1956, p. 462
Cour d'appel de Douai 21. 6. 1955, *Revue* 1956, p. 71
Cour d'appel de Paris 18. 10. 1955, *Revue* 1956, p. 484

9. GERMAN

Reichsgericht 1882. 20. 9., *RGZ* 7, p. 374
» 1886. 2. 10., *RGZ* 18, p. 28
» 1887. 23. 9., *RGZ* 19, p. 382
» 1888. 30. 5., *RGZ* 21, p. 136
» 1888. 20. 11., *RGZ* 23, p. 305
» 1891. 15. 5., *RGZ* 27, p. 418
» 1892, 25. 6., *RGZ* 29, p. 90
» 1894. 14. 11., *RGZ* 34, p. 46
» 1895. 4. 11., *RGZ* 36, p. 27
» 1896. 1. 7., *RGZ* 37, p. 181
» 1897. 21. 6., *RGZ* 39, p. 304

Reichsgericht 1899. 3. 7., *RGZ* 44, p. 136
» 1899. 7. 11., *RGZ* 45, p. 143
» 1899. 2. 12., *RGZ* 45, p. 147
» 1900. 2. 5., *Clunet* 1900, p. 812
» 1901. 18. 11., *RGZ* 49, p. 182
» 1902. 3. 7., *RGZ* 52, p. 119
» 1903. 30. 3., *RGZ* 54, p. 198
» 1903. 12. 5., *RGZ* 54, p. 414
» 1903. 16. 6., *RGZ* 55, p. 199
» 1904. 25. 4., *RGZ* 57, p. 142
» 1906. 8. 11., *Clunet* 1909, p. 212
» 1909. 18. 10., *RGZ* 72, p. 41
» 1910. 5. 7., *RGZ* 74, p. 171
» 1910. 6. 7., *RGZ* 74, p. 46
» 1916. 31. 3., *RGZ* 88, p. 183
» 1919. 30. 5., *RGZ* 96, p. 96
» 1923. 19. 6., *RGZ* 108, p. 8
» 1925. 10. 2., *RGZ* 110, p. 176
» 1929. 17. 1., *IPRspr.* 1929, nr. 52
Landesgericht Berlin 1929. 14. 2., *IPRspr.* 1929, nr. 139
Oberlandesgericht Karlsruhe 1929. 28. 2., *IPRspr.* 1930, nr. 51
Reichsgericht 1929. 2. 5., *IPRspr.* 1929, nr. 60
» 1929. 22. 6., *IPRspr.* 1929, nr. 66
» 1929. 18. 12., *IPRspr.* 1930, nr. 59
» 1930. 28. 4., *IPRspr.* 1930, nr. 55
Kammergericht 1930. 8. 5., *IPRspr.* 1930, nr. 105
Reichsgericht 1930. 8. 7., *RGZ* 129, p. 385
» 1931. 31. 3., *IPRspr.* 1931, nr. 42
Oberlandesgericht Karlsruhe 1931. 28. 10., *IPRspr.* 1932, nr. 41
Oberlandesgericht München 1932. 6. 2., *IPRspr.* 1932, nr. 42
Reichsgericht 1932. 12. 2., *IPRspr.* 1932, nr. 60
» 1933. 17. 2., *RGZ* 140, p. 25; *IPRspr.* 1933, nr. 67
Oberlandesgericht Nürnberg 1934. 4. 1., *IPRspr.* 1934, nr. 26
Oberlandesgericht München 1934. 13. 2., *IPRspr.* 1934, nr. 27
Reichsgericht 1936. 14. 2., *RGZ* 150, p. 265
Oberster Gerichtshof der Brittischen Zone 1949. 17. 11., *BGHZ* 3, p. 321
Bundesgerichtshof 1954. 13. 7., *BGHZ* 14, p. 286
» 1956. 13. 7., *BGHZ* 21, p. 266
» 1956. 2. 10., *BGHZ* 22, p. 1
» 1956. 21. 12., *BGHZ* 23, p. 65

10. Miscellaneous

Haute Cour des Pays-Bas 24. 6. 1927, *Clunet* 1928, p. 1288
Corte d'appell. Venezia 5. 9. 1929, *RabelsZ.* 4, 1930, p. 1017
Tribunal civil de Liège 4. 11. 1929, *Clunet* 1931, p. 733
Cour de Cassation (Brussels) 13. 2. 1930, *RabelsZ.* 6, 1932, p. 183
Tribunal supérieur de la Sarre 2. 12. 1930, *Revue* 1933, p. 146.

SELECTED BIBLIOGRAPHY

The list comprises only works referred to in abbreviated form in the text. Abbreviations are given within parentheses.

1. English, Commonwealth and American

Baty, T., *Polarized Law. Three Lectures on Conflicts of Law*, London 1914, (Baty).

Beale, J., *A Treatise on the Conflict of Laws*, New York 1935, (Beale).

Cheatham, E. E. *et alii*, *Cases and Materials on Conflict of Laws*, 4th ed., Brooklyn 1957, (Cheatham).

Cheshire, G. C., *Private International Law*, 4th ed., Oxford 1952, (Cheshire).

Cook, W. W., *The Logical and Legal Bases of the Conflict of Laws*, (Harvard Studies in the Conflict of Laws, vol. 5), Cambridge, Mass. 1942, (Cook).

Dicey, *A Digest of the Laws of England with Reference to the Conflict of Laws*, 7th ed., 1958, (Dicey).

Falconbridge, J. D., *Essays on the Conflict of Laws*, 2d ed., Toronto 1954, (Falconbridge).

Foote, J. A., *A Concise Treatise on Private International Law Based on the Decisions in the English Courts*, 5th ed., London 1925, (Foote).

Goodrich, H. F., *Handbook of the Conflict of Laws*, 3rd ed., St. Paul, Minn. 1949, (Goodrich).

Graveson, R. H., *The Conflict of Laws*, 3rd ed., London 1955, (Graveson).

Hancock, M., *Torts in the Conflict of Laws*, (Michigan Legal Studies), Chicago 1942, (Hancock).

Johnson, W. S., *The Conflict of Laws with Special Reference to the Law of the Province of Quebec*, Montreal 1934—1937 (vols. 1—3), (Johnson).

Kerly, *Law of Trade Marks and Trade Names*, 7th ed., London 1951, (Kerly).

Nussbaum, A., *Principles of Private International Law*, New York 1943, (Nussbaum).

Rabel, E., *The Conflict of Laws. A Comparative Study* (Michigan Legal Studies), Chicago 1945—1950 (vols. 1—3), (Rabel).

Robertson, A. H., *Characterization in the Conflict of Laws* (Harvard Studies in the Conflict of Laws, vol. 4), Cambridge, Mass. 1940, (Robertson).

Schmitthoff, C. M., *The English Conflict of Laws*, 3rd ed., London 1954, (Schmitthoff).
Stumberg, G. W., *Principles of Conflict of Laws*, 2d ed., Brooklyn 1951, (Stumberg).
Westlake, J., *A Treatise on Private International Law with Principal Reference to its Practice in England*, 7th ed., London 1925, (Westlake).
Wharton, F., *A Treatise on the Conflict of Laws, or Private International Law*, 2d ed., Philadelphia 1881, (Wharton).
Wolff, M., *Private International Law*, 2d ed., Oxford 1950, (Wolff).

2. French

Arminjon, P., *Précis de droit international privé*, 2e éd., Paris 1934, (Arminjon).
Aubry et Rau, *Droit civil français*, 6e éd., Paris 1951 (tome 6), (Aubry et Rau).
Batiffol, H., *Traité élémentaire de droit international privé*, 2e éd., Paris 1955, (Batiffol).
Bartin, E., *Principes de droit international privé selon la loi et la jurisprudence française*, Paris 1932, (Bartin).
Despagnet, F., *Précis de droit international privé*, 5e éd., Paris 1909, (Despagnet).
Donnedieu de Vabres, J., *L'Évolution de la jurisprudence française en matière de conflit de lois depuis le début du XXe siècle*, Paris 1938, (Donnedieu de Vabres).
Lerebours-Pigeonnière, P., *Précis de droit international privé*, (Petits Précis Dalloz), 4e éd., Paris 1946, (Lerebours-Pigeonnière).
Mazeaud, H. and Mazeaud, L., *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, 4e éd., Paris 1950, (tome 3), (Mazeaud).
Niboyet, J.-P., *Traité de droit international privé français*, Paris 1948, (tome 5), (Niboyet).
Pillet, A., *Principes de droit international privé*, Paris 1903, (Pillet).
Planiol-Ripert, *Traité pratique de droit civil français*, 2e éd., Paris 1952, (tome 6, 1ère partie), (Planiol-Ripert).
Valéry, J., *Manuel de droit international privé*, Paris 1914, (Valéry).
Weiss, André, *Manuel de droit international privé*, 9e éd., Paris 1925, (Weiss).

3. German

von Bar, L., *Theorie und Praxis des Internationalen Privatrechts*, 2. Aufl., Hannover 1889, (vols. 1—2), (von Bar).
Binder, H., Zur Auflockerung des Deliktsstatuts, *Zeitschrift für Ausl. u. Internationales Privatrecht*, 20. Jahrg., 1955, pp. 401—499, (Binder).

Enneccerus, L., *Recht der Schuldverhältnisse. Ein Lehrbuch*, 13. Bearb., (Lehrbuch des bürgerlichen Rechts, begr. v. L. Enneccerus, Th. Kipp u. M. Wolff, 2. Band), Tübingen 1950, (Enneccerus).

Frankenstein, E., *Internationales Privatrecht (Grenzrecht)*, Berlin-Grunewald 1929—1935 (vols. 1—4), (Frankenstein).

Lewald, H., *Das deutsche internationale Privatrecht auf Grundlage der Rechtssprechung*, Leipzig 1931, (Lewald).

Raape, L., *Internationales Privatrecht. Ein Lehrbuch*, 3. neubearb. Aufl., Berlin u. Frankfurt a. M. 1950, (Raape).

Savigny, F. C. von, *A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time* (transl. Guthrie), Edinburgh 1880, (Savigny).

4. Swiss

Schnitzer, A., *Handbuch des Internationalen Privatrechts einschliessend Prozessrecht, unter besonderer Berücksichtigung der Schweizer Gesetzgebung und Rechtssprechung*, 4. neubearb. Aufl., Basel 1957, (vols. 1—2), (Schnitzer).

ABBREVIATIONS

1. Names of Courts

BGH = Bundesgerichtshof (Supreme Court of the German Federal Republic)
OLG = Oberlandesgericht (District Court of Appeal, Germany)
RG = Reichsgericht (Supreme Court of Germany till 1945).

2. Names of Statutes

BGB = Bürgerliches Gesetzbuch (German Civil Code)
C. c. = Code civil (French Civil Code)
C. instr. crim. = Code d'instruction criminelle (French Code of Criminal Procedure)
C. proc. civ. = Code de procédure civile (French Code of Civil Procedure)
EGBGB = Einführungsgesetz zum Bürgerlichen Gesetzbuch (Preliminary Dispositions of the German Civil Code)
WCA = Workmen's Compensation Act (in Anglo-American jurisdictions)
ZPO = Zivilprozessordnung (German Code of Civil Procedure).

3. Names of Law Reports and Law Reviews

(a) The abbreviations for British and American law reports and law reviews are generally those in common use. For less well-known series, the following publications can be consulted:

A Survey of Legal Periodicals. Union Catalogue of Holdings in British Libraries (*Institute of Advanced Legal Studies, Publication No. 1*), 2d ed., London 1957;

Union List of Commonwealth Law Literature in Libraries in Oxford, Cambridge and London (*Institute of Advanced Legal Studies, Publication No. 2*), London 1952;

Union List of United States Law Literature in Libraries in Oxford, Cambridge and London (*Institute of Advanced Legal Studies, Publication No. 3*), London 1954.

(b) French:

Clunet	= *Journal du droit international*, fondé par E. Clunet, Paris 1874 —
D. (D. C., D. H., D. P.)	= *Recueil hebdomadaire de jurisprudence Dalloz*, Paris 1862—1929. *Recueil Dalloz de doctrine, de jurisprudence et de législation*, Paris 1930—
Répertoire	= *Répertoire de droit international, éd. de Lapradelle et Niboyet*, Paris (Sirey) 1929—
Revue	= *Revue de droit international privé*, Paris 1905—1933. *Revue critique de droit international*, Paris (Sirey) 1934—
S.	= *Recueil Général des lois et des arrêts, fondé par B. Sirey*, Paris (Sirey) 1791—1949. *Recueil Sirey.* I. *Jurisprudence*, Paris (Sirey) 1950—

(c) German:

BGHZ	= *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, Karlsruhe 1951—
IPRspr.	= *Die deutsche Rechtssprechung auf dem Gebiete des internationalen Privatrechts*, Berlin u. Leipzig 1926—1934. *Sammlung der deutschen Entscheidungen zum internationalen Privatrechts* 1945—1953, Berlin u. Tübingen, vol. 1, 1956, vol. 2, 1957.
RabelsZ.	= *Zeitschrift für ausländisches und internationales Privatrecht*, Berlin u. Leipzig 1927—1939; Berlin u. Tübingen 1950—.
RGZ	= *Entscheidungen des Reichsgerichts in Zivilsachen* 1880—1945.

CHAPTER 1

TRENDS IN THEORETICAL DISCUSSION

A. *Earlier Development.* Only ten years ago, writers on the conflict of laws could approach the field of torts with a feeling of relative confidence. Here, for once, was a branch of private international law where scholars usually agreed, at least on basic principles, where drastic changes had not taken place for a long time and were not likely to occur. Here, also, was a field of simple solutions with little scope for the niceties of renvoi, characterization or preliminary questions to complicate the issues.

(a) *U. S. A.* First published in 1934 and revised in 1948, the American Restatement of the conflict of laws can fairly be considered as the most explicit expression of the doctrine prevailing in the western world, except for Great Britain and those parts of the Commonwealth where the common law is in force. The two cornerstones of the American doctrine are briefly set out in sections 377 and 378 of the Restatement: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place;" and "The law of the place of wrong determines whether a person has sustained a legal injury."[1] This doctrine, the rule of the *lex loci delicti*, is summarized more exhaustively in the *magnum opus* of Professor Beale, the most influential member of the editing committee of the Restatement: "If the law of the place where the defendant's act took effect created as a result of the act a right of action in tort this right will be recognised and enforced in another state unless to enforce the right is against the public policy of the *forum*."[2]

[1] *Restatement of the Law of Conflicts of Laws* (as adopted and promulgated by the American Law Institute at Washington, D. C., May 11, 1934), St. Paul 1934. — For a comparison between the Restatement and the traditional English rule of torts in the conflict of laws, se Willis, J., Two Approaches to the Conflict of Laws (1936), 14 *Can. Bar R.*, p. 1.

[2] Beale, vol. 2, p. 1290.

In no other country has the *lex loci* rule been more elaborated and nowhere has the law of the place of wrong been extended more widely than in the U. S. A. If, as will be submitted in the present study, the applicability of the law of the place of wrong has been extended too far, it is only fair to recall that the American development in this field started, like that of most other countries, from a rule in which the fortuitously chosen *lex fori* was given the same decisive importance as the *lex loci*, and that in a federation of states with closely similar legal, social and economic structure, this older order of things must have appeared singularly narrow and parochial.[1] Against this historical background, the zeal in favour of uniform enforcement of the *lex loci* is easy to explain, and its possible exaggerations can be considered as effects of the swing of the Hegelian pendulum. On the other hand, a particularly favourable climate for a generous application by the *forum* of a foreign *lex loci delicti* must exist among states so closely akin to each other. "Their differences relate to the minor morals of expediency, and to debatable questions of internal policy. It would be an intolerable affectation of virtue for the courts of one state to pretend that the mere enforcement of a right validly created by the laws of a sister state 'would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law', or would be of such evil example as to corrupt the jury or the public."[2] For this reason, the solutions of conflict problems given by American courts and writers may not always be applicable to the conditions prevailing in completely independent states with important differences in legal and social structure.

For the purposes of the present study, the theoretical foundations upon which the American doctrine of torts in private international law was built are not of immediate interest. It may be pointed out, however, that the most famous of these theories, and, indeed, the first attempt to find a ground for the classical rule which could satisfy both logical and social considerations,

[1] On the historical development of American conflict law, see Goodrich, pp. 275 ff.; Hancock, pp. 27 ff.; Rabel, vol. 2, pp. 235 ff. — The rule of concurrent actionability in Wharton, pp. 520 ff.

[2] Beach, J. K., Uniform Interstate Enforcement of Vested Rights, (1918), 27 *Yale L. J.*, p. 656, at p. 662.

namely Mr. Justice Holmes's "obligation theory", seems to provide the best argument for an uncompromising and all-embracing application of the law of the place of wrong to all the principal and incidental questions arising in international tort actions. In the words of the learned Justice: "The theory of the foreign suit is that, although the act complained of was subject to no law having force in the *forum*, it gave rise to an obligation, an *obligatio*, which, like other obligations follows the person, and may be enforced wherever the person may be found ... But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not only the existence of the obligation, ... but equally determines its extent."[1] The "obligation theory" has been largely superseded by the "homologous right theory" of Judge Learned Hand — according to which the *forum* when adjudicating upon a foreign tort creates a new right similar to that given by the *lex loci* — or by Professor Cook's "local law theory" which would seem to imply that the applicable foreign rules are incorporated by the *forum* into its own law; but this change in theoretical justification hardly seems to have affected either the general principles or the detailed rules of practical application as laid down in the Restatement.[2] [3]

Refraining from discussion at length of the theoretical background of the *lex loci* rule, American textbook writers have pointed out the practical reasons for its universal application. In the words of Judge Goodrich, each of the parties is, at the time of the tort "protected by and owes obedience to" the *lex loci*, their relations "ought in all fairness" to be considered in the light

[1] *Slater* v. *Mexican National Railway* (1904), 24 S. Ct. 581, 48 L. Ed. 900, at p. 903.

[2] Cook, pp. 20 ff.; Judge Learned Hand in *Direction der Disconto-Gesellschaft* v. *U. S. Steel Corp.* (1924), 300 F. 741; on the difference between these two theories, cf. Cavers, D. F., The Two "Local Law" Theories, (1950), 63 *H. L. R.*, pp. 822 ff.

[3] It should be pointed out that Professor Cook's criticism of the Restatement rule of the place of wrong — which will be discussed in a following chapter — seems to be founded upon practical considerations, independent of his "local law theory". It is therefore far from certain that courts which have expressed their approval of that criticism have also embraced the "local law theory". Cook, W. W., Tort Liability and the Conflict of Laws, (1935), 35 *Col. L. R.*, p. 202 (re-edited in *Logical and Legal Bases of the Conflict of Laws*, pp. 311 ff.)

of that law, and its standard of conduct is the only which has been "foreseen by at least one of the two."[1] The argument of fairness to the parties is particularly emphasized by Professor Stumberg.[2]

Studying the problems from a comparative point of view, Professor Rabel finds various reasons for the *lex loci* principle, and concludes that "it ought not to be deduced from a single, all-embracing rationale of absolute validity, ... it is reasonable and relatively simple."[3]

In his monograph on torts in the conflict of laws, Professor Hancock scrutinizes more closely the background of the generally prevailing *lex loci* doctrine in terms of "choice-of-law policies". The obligation theory is dismissed as insufficient to explain either the application of one set of rules in cases connected with several jurisdictions or, indeed, the *raison d'être* of the place of wrong rule.[4] This does not mean that the learned writer discards the American *lex loci* doctrine, but he finds its justification in various considerations of a practical order: it seems to secure uniformity wherever the case is tried,[5] it takes into account the social interest of the state where the tort was committed, and corresponds to the reasonable expectations of the parties.[6] The same concern for the social interests of the states involved dictates his solutions in those cases where two or more jurisdictions are interested.[7]

(b) The European Continent. In Europe and in those parts of the world where the French Civil Code has been introduced in a more or less modified form, writers on the conflict of laws have accepted the *lex loci delicti* rule almost as unanimously as in the United States.[8] Minor differences in general approach, and statutory

[1] Goodrich, p. 261.
[2] Stumberg, pp. 184 ff.
[3] Rabel, vol. 2, pp. 250 ff.
[4] Hancock, pp. 35 ff.
[5] *ibid.*, pp. 54 ff.
[6] *ibid.*, pp. 61 ff.
[7] *ibid.*, pp. 171 ff.
[8] A short comparative survey of the law of torts in private international law in Europe (except for Scandinavia and the Communist States) is given in Kuratowski, R. K., Torts in Private International Law, (1947), 1 *I. L. Q.*, p. 170; continental law is also discussed in Lorenzen, E. G., Tort Liability and the Conflict of Laws, 47 *L. Q. R.*, p. 483; more exhaustive, Rabel, vol. 2, pp. 229—

provisions eliminating or restricting the application of a foreign *lex loci* are generally unimportant and need not be discussed here.[1]

In *France*, certain provisions in the *Code civil* — which will be enlarged upon *infra* — concern the territorial application of French law, and in the light of these rules, the problem of choice of law was originally envisaged as one of statutory interpretation. Thus, the majority of French writers in the earlier part of this century advocated the *lex loci* rule mainly because the law of torts was considered as a *"loi de police et de sûreté"* which, for reasons of public policy, must be uniformly applied to tortious acts committed within the territory of the state.[2] This theoretical foundation of the enforcement of the *lex loci delicti*, although it is a logical deduction from the principles of the Civil Code rather than an explanation of the underlying *rationale*, has kept its position even among more recent writers,[3] but other arguments of a practical and theoretical order have been put forward in support of the current theory. Thus Niboyet stresses the importance of international uniformity and objectivity which can be attained only if the easily ascertainable *locus delicti* is used as the principal connecting factor.[4] The social interest of the country where a tort has been committed, and the natural connection of the act with its social environment, are also frequently referred to as reasons for the *lex loci* rule.[5] Professor Batiffol, in a recent textbook, gives another series of arguments: the place where a tort is committed is normally the only or at least the most natural element of connection between the tort and legal standards of conduct; only by application of the law of the place of wrong

332. For Scandinavia, see Borum, O. A., *Lovkonflikter*, 3 ed., Copenhagen 1948, p. 164; Nial, H., *Internationell förmögenhetsrätt*, 2nd ed., Stockholm 1953, p. 79; Karlgren, Hj., *Kortfattad lärobok i internationell privat- och processrätt*, Lund 1950, p. 108; Malmström, Å., Till frågan om skadestånd utanför kontraktsförhållanden i den internationella privaträtten (in *Festskrift til Henry Ussing*, Copenhagen 1951, p. 362.).

[1] Unfortunately, the most exhaustive comparative historic study so far on the development of conflict rules in different countries, Professor Torsten Gihl's brilliant monograph *Den internationella privaträttens historia och allmänna principer*, Stockholm 1951, is available only in Swedish.

[2] Pillet, p. 416; Valéry, pp. 972 ff.; Weiss, p. 582; Bartin, tome 2, pp. 397 ff.

[3] Donnedieu de Vabres, p. 587.

[4] Niboyet, J.-P., *Manuel de droit international privé*, 2 éd., 1928, p. 616.

[5] Arminjon, p. 345; Lerebours-Pigeonnière, p. 287; Niboyet, tome 5, p. 148.

can the rights of the parties be equitably balanced against each other and the reasonable expectations of the parties taken into account.[1]

Like their French colleagues, *German* writers on private international law are in the first place concerned with the interpretation of the conflict provisions of the introductory part of the Civil Code (Bürgerliches Gesetzbuch, BGB). Their theoretical outlook, however, is almost unanimously in favour of the *lex loci*, and this holds true also of the independent legal systems of Switzerland and Austria.[2] The development of ideas in Germany seems to have followed the same course as in France: whereas early writers emphasized the public policy of the *locus delicti*, and the similarity between tortious and criminal liability,[3] modern theorists stress the social and economic interests involved.[4]

(c) England. Compared with the theoretical discussion of Continental and American writers, English and Commonwealth literature in the field of torts in private international law presents several particular features. Less concerned with the theoretical implications of different choice-of-law rules than with the law of England as administered by the courts, writers have mainly devoted themselves to the interpretation of those leading cases where the rules applicable to torts committed abroad have been laid down. Unlike the Continental development where professorial *dicta* have often carried more weight than judicial holdings, and where writers have allowed themselves to reject flatly and without apologies the decisions of the highest judicial authorities, the evolution of English conflict law is closely connected with those few cases where general rules have been laid down. As these cases will be dealt with in a later part of this paper, the discussion of their implications will be more conveniently treated in that connection. In this introductory survey of general theories, studied as a background to the recent development which has been called "a general crisis of the *lex loci* rule",[5] little need be said,

[1] Batiffol, pp. 601 ff.

[2] Switzerland: Schnitzer, vol. 2, pp. 675 ff.; Austria: Walker, G., *Internationales Privatrecht*, 2. Aufl., 1922, pp. 448 ff.

[3] von Bar, vol. 1, p. 118.

[4] Lewald, pp. 260 ff.; Raape, pp. 360 ff.

[5] Wengler, W., Laws Concerning Unfair Competition and the Conflict of Laws, (1955), *Am. J. Comp. L.* 4, p. 167, at p. 176.

therefore, of that part of English and Commonwealth literature which deals with the interpretation of positive rules of law.

Upon the whole, English writers of the late 19th and early 20th centuries seem to have entertained at least a platonic preference for the *lex loci* rule. Thus it is stated in the 5th edition of Foote's *Treatise* that when a foreign *lex loci* "goes to the nature of the right, the essence of the obligation" and not merely "affects the manner in which the right is to be enforced", the foreign law "must be respected by all Courts alike."[1] Likewise, Westlake, approaching the problem from the point of view of jurisdiction, holds that the proper *forum* for torts is the *forum delicti*, applying its own law; when the *forum rei* is resorted to, however, this means a submission to the use of its law concurrently with the *lex loci*.[2] A similar standpoint seems to be reflected in Sir Frederick Pollock's criticism of the decision of the Court of Appeal in *Machado* v. *Fontes*, where damages were granted for an act which allegedly gave rise to no civil liability under the foreign *lex loci*.[3] The reviewer finds the decision sensible but logically incompatible with "the fundamental principle of private international law ... that rights duly acquired under the law of any country ought to receive recognition in every other civilized country."[4] Baty, who emphasizes the similarity between the law of torts and penal law, seems to approve of a *lex fori* rule,[5] whereas Gutteridge, without further enlarging upon the theoretical aspects of the question, stresses the fact that in *Machado* v. *Fontes*[3] both parties to the action owed allegiance to the *lex fori* as their national law.[6]

The touchstones for the classification of later British writers are the judgment of the Court of Appeal in *Machado* v. *Fontes*[3] and Mr. Justice Willes's decision in *Phillips* v. *Eyre;*[7] in the latter case it was held that an action brought in England for a tort

[1] Foote, p. 521 f. The authority cited in support of the *lex loci* theory is *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at p. 28, *per* Willes, J.

[2] Westlake, p. 282.

[3] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[4] Note in (1897), 13 *L. Q. R.*, p. 233. Cf. the severe criticism in (1898), 11 *H. L. R.*, p. 261.

[5] Baty, p. 50.

[6] Gutteridge, H. C., in (1939), 55 *L. Q. R.*, p. 130, and (1938), *Cambr. L. J.*, p. 20.

[7] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

committed abroad can succeed only if "the wrong is of such a character that it would have been actionable if committed in England", and the act is "not justifiable by the law of the place where it was done." A major attack against both these cases is mounted by Dr. Robertson who seems to advocate a *lex loci* rule of the American type and based upon a "local law theory".[1] This theoretical foundation has also been used by those writers who defend the English doctrine as traditionally interpreted. Thus Professor Lorenzen, applying a "homologous right theory", finds *Machado* v. *Fontes*[2] "entirely defensible from the standpoint of the fundamental theory of the conflict of laws."[3] In spite of this and of the fact that the decision in *Machado* v. *Fontes*[2] seems justified under the circumstances of the case, the learned writer hesitates over the desirability of the rule, which he fears may lead to injustice in other cases where the defendant has incurred no civil liability under the *lex loci* but where English law imposes such liability.[4] The "homologous right theory" also seems to provide the theoretical background for Dean Falconbridge's defence of the English tort rule as laid down in *Phillips* v. *Eyre*.[5] Other theoretical arguments invoked in favour of the English leading cases are the notion of public policy and considerations of morality: enforcement of foreign law would be against the morality of English courts in cases where an act is innocent in England but creates a civil liability under the foreign *lex loci delicti*.[6]

(d) Dissenting opinions. The foregoing paragraphs have shown that since the beginning of this century and, indeed,

[1] Robertson, A. H., The Choice of Law for Tort Liability in the Conflict of Laws, (1940—41), 4 *M. L. R.*, pp. 27 ff.; similar criticism in Hancock, M., Torts in the Conflict of Laws, (1940), 3 *U. of Tor. L. J.*, p. 400; Yntema, H. E., (1949), 27 *Can. Bar R.*, p. 116.

[2] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[3] Lorenzen, E. G., Tort Liability and the Conflict of Laws, (1931), 47 *L. Q. R.*, p. 483, at p. 487.

[4] *Ibid.*, p. 488 f., p. 500.

[5] Falconbridge, J. D., Torts in the Conflict of Laws, (1945), 23 *Can. Bar R.*, p. 309, at p. 312.

[6] Curiously enough, this argument is found in English textbooks, like the 5th edition of Dicey, and also in the law of Quebec, where the French doctrine of *ordre public* prevails; Johnson, vol. 3, pp. 357 ff.

throughout the better part of the history of modern conflict law, the vast majority of writers have found overwhelmingly strong reasons in favour of the application of the *lex loci delicti commissi* to torts perpetrated outside the jurisdiction of the *forum*. As may be expected, however, unanimity has never been complete, and before studying the discussion of the last ten years, it may be of some interest to examine briefly the most important dissenting theories. The oldest of these is the *lex fori* theory, which was once universally acknowledged in Continental law, partly because it goes back to Roman principles — the proper court for the trial of delicts being the *forum delicti*, which applied its own law — and partly, in more recent times, because it could claim the authority of Savigny. Although the *lex fori* principle has been loosing ground steadily since the later half of the 19th century, it is still defended by some Continental lawyers, among them the eminent French scholars M. and L. Mazeaud. Savigny based his preference for the law of the court on purely deductive reasoning: "the laws relating to delicts are always to be reckoned among the coercitive, strictly positive statutes" and are thus to be applied uniformly by the *forum* whether the case at bar contains foreign elements or not.[1] The reasons put forward by MM. Mazeaud are mainly founded upon their construction of French statutory law and do not present any general interest.[2] Another French scholar has advocated the English rule of concurrent actionability (as interpreted by himself, as a means of satisfying both the public policy considerations of the French *lex fori* and the requirements of justice.[3] On one major exception from the *lex loci* rule, most French authors seem to agree: French law should always apply to tort claims raised in criminal proceedings in the French courts. The reason for this is based entirely upon formal logic and considerations of systematic clarity, and can hardly be considered entirely convincing: as French courts

[1] Savigny, § 374 c (p. 253).

[2] Mazeaud, H., Conflits de lois et compétence internationale dans le domaine de la responsabilité civile délictuelle et quasi-délictuelle, *Revue* 1934, pp. 377 ff.; Mazeaud, p. 343: "Résoudre le conflit par l'application de la *lex loci delicti*, c'est donc violer l'art. 3, § 1er du C. c."

[3] Valéry, p. 973.

can only administer French penal law, the civil liability must also be determined in accordance with the *lex fori.*[1]

The application of the personal law of the parties — *lex patriae* or *lex domicilii* — has hardly found any supporters in modern conflict literature. The only advocate of this doctrine, Frankenstein, disagrees not only with all his learned German colleagues but also with a series of well-established judicial decisions in his country. As it seems fairly obvious that the courts of the *locus delicti* would apply their own law in tort actions against a foreigner, Frankenstein must sacrifice uniformity to obtain the application in all other courts of the domestic law (*"Heimatsrecht"*) of the defendant. The arguments invoked by the learned writer are essentially of a deductive character: the citizens of a state are subject to no other law than that of their own country, and there is "no possibility whatsoever of subjecting a Swiss to any law other than his own for a delict committed in Germany, once the tortfeasor has left that country".[2]

A less sweeping application of the national or domiciliary law of the parties has frequently been advocated in cases where for one reason or another several elements of the tort point towards that law. The most commonly cited example of such cases is where the domestic law in question is common to both parties. This view is referred to by Dean Falconbridge in defence of *Machado* v. *Fontes,*[3] it is discussed by Rabel and may possibly be supported by judicial authority in some countries.[4]

[1] Despagnet, p. 937; Bartin, p. 411; Valéry, p. 974; *contra* Batiffol, p. 610.

[2] Frankenstein, vol. 2, pp. 359 ff. An important modification of the practical results of this somewhat startling theory is effected by the use of *renvoi.* Thus, if the domestic law of the tortfeasor refers to the *lex loci*, that law applies.

[3] *Machado* v. *Fontes* [1897] 2 Q. B. 231. — Falconbridge in (1949), 27 *Can. Bar R.*, p. 375.

[4] Rabel, vol. 2, p. 244. To the cases cited by Rabel (p. 244, note 64) may be added a Norwegian case, *The Irma and Mignon, Retstidende* 1923 II, p. 58, which is interesting because the facts are closely similar to a well-known English decision, *The Halley* (1868), L. R. 2 P. C. 193. Two Norwegian ships, the Irma and the Mignon, had collided on the Tyne through the fault of the English compulsory pilot on board one of the ships. Under the *lex loci* as it stood at the time, a shipowner was not liable for acts committed by compulsory pilots. In the *lex fori,* which was also the *lex patriae* and *domicilii* of the parties, the shipowner was responsible for the acting of the pilot. The Norwegian Supreme

If the mere fact that the parties are domiciled in the same country or owe allegiance to the same nation has not generally appeared sufficient to justify the application of their domestic law, the presence of more substantial connections with a legal system common to the parties has been considered by several writers a good reason for exceptions from the *lex loci* rule. Thus Niboyet advocates the application of the law governing the divorce of the parties in cases where an action against a third party for alienation of affections is brought in connection with the divorce; the same writer holds that the law governing the administration of a decedent's estate should apply in cases of succession where conversion of property belonging to the estate is alleged to have been committed by one of the successors.[1] Rabel and Hancock consider the law of the matrimonial status of the parties more apposite than the *lex loci* to govern the capacity of one spouse to institute legal proceedings against the other,[2] and Kuratowski favours a broader application of the *lex patriae* or *lex domicilii* in torts where the family relationship of the parties is in any way involved.[3] The same writer also suggests the *lex patriae (domicilii)* as a more appropriate law than the *lex loci* in cases where the alleged tortfeasor is a public servant and is sued in the courts of his own country for acts or omissions done abroad in his official capacity.[4]

To complete the picture of the various theories of choice of law, it may be added that voices have been heard in favour of a more radical approach to the problems of torts in the conflict

Court found that the legal relation at issue was more closely connected with the common law of the parties, and sustained the action. It would seem, however, that this decision is so far unique in Scandinavian law. The Swedish Supreme Court has upheld the *lex loci rule* in a number of cases concerning actions between Swedes founded upon torts committed abroad. *Nytt Juridiskt Arkiv* 1915, p. 1; 1933, p. 364; 1935, p. 585.

[1] Niboyet, tome 5, pp. 153 f., 156.

[2] Rabel, vol. 2, pp. 266 ff.; Hancock, p. 236. Cf. also Rheinstein, M., The Place of Wrong: a Study in the Method of Case Law, (1944), 19 *Tul. L. R.*, p. 4 and p. 165, at p. 199.

[3] Kuratowski, R. K., Torts in Private International Law, (1947), 1 *I. L. Q.*, p. 172, at p. 189.

[4] *Ibid.*, at p. 190; this view is supported by Mann, F. A., in Libellous Communication by a Foreign State Official, (1946), 9 *M. L. R.*, p. 179.

of laws. The common denominator of such theories seems to be that they all recommend the splitting up of the issues involved into separate questions, each to be answered by the law with which it is most closely connected. The practical suggestions have been few, however, and so far only a few writers — among them the German scholar Mr. Binder, whose suggestions will be discussed more fully below — have ventured to challenge the prevailing *lex loci* doctrine with a complete system of this more complicated kind.[1]

B. *Recent Trends.* (a) The "proper law" of a tort. As mentioned above, the almost unanimously accepted *lex loci* has recently been subject to so much criticism that a learned writer has seen reasons for speaking of a crisis in the history of the rule. Although, as will be submitted in greater detail later in this study, the alleged crisis is more theoretical than practical, it is undoubtedly true that the last ten years have seen a great number of more or less elaborate attempts to replace the generally prevailing rule with other systems. This development cannot be said to have affected the courts in their decisions, and in those very particular branches of the law of torts where the problems created by the *lex loci* rule have been evident for a considerable number of years, the courts are still using and perfecting the solutions reached on the basis of the old-established doctrine. The greatest achievement of recent attempts to reform or to discard the *lex loci* rule seems to lie in "the breaking of one of the rigid axioms of private international law in favour of a free study of the problems involved".[2]

The most radical suggestion so far and, it would seem, the

[1] Professor Lorenzen has advocated a more "flexible" system without actual concrete suggestions in (1931), 47 *L. Q. R.*, p. 483, at p. 501. Rabel, discussing the American place of wrong rule, has suggested a less rigid view than that endorsed by the Restatement (Rabel, vol. 2, pp. 320 ff.). A brilliant case-note in (1935), 44 *Yale L. J.*, p. 1233, enumerates several incidental questions which ought to be governed by another law than the *lex loci*. Professor Cook, in his criticism of the Restatement place of wrong theory, also goes a long way towards a more differentiated choice of law; see, more particularly, Cook, W. W., Tort Liability and the Conflict of Laws, (1935), 35 *Col. L. R.*, p. 202, at pp. 215 ff.

[2] Neuhaus, P. H., Morris, The proper law of a tort (review), *RabelsZ.* 16, 1951, p. 651, at p. 655 (the present writer's translation).

starting-point of recent Anglo-American discussion, is Dr. Morris' suggestion that a "proper law" of the tort be found and applied in each individual case.[1] Although no court seems to have put this theory to practical use and there is no great probability that the idea will be accepted in a foreseeable future, the proposal has aroused so much attention that it seems justified to discuss its implications at some length. In his criticism of the decision of the Court of Session in *M'Elroy* v. *M'Allister*,[2] Dr. Morris suggests that in an action for a tort committed in Scotland by one Englishman against another, English courts should apply their own law, thus giving due consideration to those factors — nationality, domicile and residence of the parties — to which importance may be attached in actions on international contracts.[3] In his article in the *Harvard Law Review*, the learned author expresses doubts as to the possibility of reaching desirable results by means of the *lex loci delicti* rule in fields as different as "liability for automobile negligence, radio defamation, escaping animals, the seduction of women, economic conspiration, and conversion,"[4] and proceeds to discuss the effects of the traditional rule in a number of examples where the *locus delicti* seems particularly fortuitous and the parties particularly unconnected with the legal system and social order of the *locus:* the seduction of an American girl by a boy from the same state taking place in a holiday camp in a secluded and remote part of Canada; injury inflicted by a driver to a guest passenger in his car where both parties come from the same state and happen to drive in a foreign country. Other examples relating to conversion, workmen's compensation, vicarious liability, and the distribution of damages under wrongful death statutes, are equally intended to show the unhappy results attending a mechanical application of the *lex loci* (in combination

[1] Inaugurated in a criticism of the Scottish decision *M'Elroy* v. *M'Allister* [1949] S. C. 110, in (1949), 12 *M. L. R.*, p. 248, at p. 251 f., the idea is more fully developed in Morris, J. H. C., The Proper Law of a Tort, (1950), 64 *H. L. R.*, p. 881. See also Morris, *Cases on Private International Law*, 2 ed., 1951 (reprinted 1956), p. 228. An article by Briggs in (1953), 6 *Vand. L. R.*, expressing ideas similar to those of Dr. Morris, has not been available to the present writer.

[2] *M'Elroy* v. *M'Allister* [1949] S.C. 110.

[3] (1949), 12 *M. L. R.*, p. 248, at p. 251 f.

[4] (1950), 64 *H. L. R.*, p. 881, at p. 884.

with one or the other of the fixed rules determining the place where the tort is supposed to have taken place).

The principal importance of Dr. Morris' theory has so far been to focus attention to the problems of torts in private international law and to initiate discussion.[1] Critics have argued that the suggested method would "land in absurdity", on account of the difficulty of finding the proper law when the parties are of different nationality.[2] A German writer has pointed out that several of the problems raised by Dr. Morris have been discussed for some time by Continental writers, and an American author refers to the "proper law" theory as a "give-it-up theory." [3 4]

Some of this criticism is undoubtedly too severe. Dr. Morris seems to admit that the old-established rule may be used as a subsidiary resource, intended to meet *e. g.* the cases where the parties involved are of different nationality; and the contention that a "proper law" rule would mean surrender in face of the difficulties of finding a suitable rule hits equally hard the English doctrine of international contracts which has been working satisfactorily for a long time.

The examples chosen by Dr. Morris seem to fall into two distinct categories, the one comprising those cases — conversion, workmen's compensation, vicarious liability, and distribution of damages under wrongful death acts — where a rigid application of the *lex loci* rule leads to inadequate results in dealing with questions incidental to a tort action; the other consisting of cases where the tortious act itself would allegedly be judged more fairly under a proper law as opposed to the fortuitous *lex loci.* It is submitted that the traditional rule completed with a discerning use of that old-established tool of the conflict of laws — characterization — is sufficient to deal with the problems belonging to the first

[1] The theory is mentioned with approval in Smith, C., *Machado* v. *Fontes* Revisited, (1956), 5 *I. C. L. Q.*, p. 466, at p. 471; Thomas, J. A. C., Damages and the Tort Rule in the Conflict of Laws, (1954), 3 *I. C. L. Q.*, p. 651, at p. 659; analysed in Falconbridge, p. 821; Graveson, p. 432; Dicey, p. 937.

[2] Gow, J. J., Delict and Private International Law, (1949), 65 *L. Q. R.*, p. 313, at p. 316.

[3] Neuhaus, P. H., Morris, The proper law of a tort (review), *RabelsZ.* 16, 1951, p. 651, at p. 652.

[4] Ehrenzweig. A. A., The Place of Acting in International Multi-State Torts, (1951), 36 *Minn. L. R.*, p. 1, at p. 2.

category, and that writers and, indeed, as will be shown later, courts in all countries have successfully solved these problems without great difficulty. It seems obvious that whereas in a case of wrongful death, *lex loci delicti* may be wholly inappropriate to govern the distribution of damages recovered, the conduct of the tortfeasor and the extent of his liability are generally more suitably judged by the *lex loci*, and that no "proper law" need be invoked to support a splitting up of the action when certain elements of it seem to belong to the law of torts and others to be more closely related to the personal law of the victim or to some other legal system which governs questions of succession, wills, or such other legal problems as may be raised.

As for the second category, the application of a proper law selected as the result of a "social surroundings" test is far more attractive. It is submitted, however, that the arguments against it are too powerful to make such a rule desirable.

In the first place, it sacrifices uniformity. The loss may be light enough if it is done in the interest of justice, but it is submitted that this will not necessarily be the case. For the system advocated by Dr. Morris also sacrifices predictability, and although it is certainly true that modern tort law is more concerned with the equitable shifting of losses in a given economic system than with repressing undesirable acts, and thus in its social implications comes nearer the law of contract than penal law, it is equally true that there is a very clear difference between torts and contracts which gives a considerable importance to predictability. The notions of "*actes juridiques*" and "*faits juridiques*", well-known in French law,[1] may be used as convenient terms of comparison. A contract, however simple, is always an "act", legally qualified and intended by the parties to affect their relations, economically or otherwise, in a legally binding way. Thus, consciously or not, the parties follow a legal pattern. A tort, on the other hand, is a mere fact, legally irrelevant until some action is taken by which a process of legal characterization is instituted. The consequence of this is that in ascertaining the proper law of a contract, the court has to find the intrinsic legal pattern of the contract, whereas in an action for tort, the courts

[1] Batiffol, p. 684.

are confronted by the task of making a legal appreciation of a raw material — the facts of the case — and that appreciation is completely foreign to these facts at the time the tort took place. Thus, it is submitted, it is hardly permissible to use the term "proper law" in referring to torts — they have no proper law until a court has pronounced upon them. The truth of this statement is not impaired by the fact that when submitted to a court, the series of events making up the tortious act has been, as it were, robed in legal concepts, and its essential elements chrystallised into an action at law as defined by the legal system chosen by the plaintiff: the task of the court is nevertheless to go back to the naked facts. It may be objected that the "intrinsic legal pattern" of an international contract is often no more than a fiction, and that it is indeed easier to determine that an allegedly tortious act constitutes a breach of a given pattern than to find such a pattern in respect of a contract. The answer is that the *method* is nevertheless another: however fictitious the process of reading a legal pattern into a contract may be, it still remains true that all clues must be sought *in the contract* (and in the circumstances attending its conclusion), whereas no *tort* can be found before the incriminated set of facts has been brought into a certain relationship to a legal system which alone attributes relevance to some of these facts and denies it to others.

Torts can be divided into intentional and unintentional, but in both these categories, predictability is essential for fair treatment. Unintentional torts are, by definition, accidents. The only way in which they can be reasonably forestalled is by insurance, and the very basis of insurance is statistical predictability. Intentional torts, on the other hand, comprise a number of actions which in most countries are also governed by penal law. It is submitted that those considerations of fairness which make predictability a cornerstone of the penal law systems of civilized countries are also largely applicable to the civil liability incurred by intentional torts.

To these objections of principle can be added arguments of a practical order. In a great number of countries, the law of torts belongs to the category of laws known in the terms of the French Civil Code as *"lois de police et de sûreté"*, uniformly applied to all infringements occurring within the jurisdiction. Even in count-

ries where this doctrine is unknown, it is probable that tortious acts which constitute in any way disturbances of the social order would not be left by local authorities for the parties to settle between them. Even such trivial torts as injurious language or minor assaults committed by foreigners between themselves would probably not be left without interference — let alone then traffic offences which are probably the most numerous category of torts.

This would single out for the application of the *lex patriae* or *lex domicilii* only such torts as could be settled without inconvenience when the parties return home. It is submitted that this very unimportant group of torts is hardly worth the creation of a special rule. The English presumption of identity between the *lex loci* and the *lex fori* in the absence of evidence to the contrary provides a practical way of settling such trivial litigations. If the defendant will submit to his own law and refrain from the trouble and expense of proving provisions of foreign law by expert witness, the "proper law" will be automatically applied.[1] If, on the other hand, the defendant has a clear justification in the *lex loci* and makes use of it, the plaintiff can hardly complain of a treatment prescribed by the law of the foreign country and thus part of the risk he assumed when entering its territory.

The search for a proper law not identical with the *lex loci* would furthermore involve the difficult problem of extra-territorial operation of statutes. Suppose an Englishman and a foreign refugee, domiciled in England but not naturalized, are involved in an automobile accident in France caused by the negligence of one of them. Even allowing that Parliament can legislate for British subjects all over the world,[2] there is no authority to the effect that English statutes can be applied to foreigners domiciled in

[1] In most Continental jurisdictions, rules of foreign law are found and applied by the courts *ex officio*. However, in some countries, *e. g.* Italy, Greece, and possibly also Denmark, the principle of proving foreign law as a fact seems to be adopted; see *Clunet* 1957, p. 169; *Revue* 1957, pp. 526 ff.; *Clunet* 1954, p. 495. For German and French decisions, see *Clunet* 1954, p. 994, and 1956, p. 1009.
[2] As held by Dr. Lushington in *The Zollverein* (1856), Swa. 96; quoted by Darling, J. in *Adam* v. *British and Foreign Steamship Co. Ltd.* [1898] 2 Q. B. 430, at p. 433; further *Howgate* v. *Bagnall* [1951] 1 K. B. 272, *per* Barry, J., at p. 275. But cf. *Yorke* v. *British & Continental Steamship Co.* (1945), 78 Ll. L. R. 181; (1946), 9 M. L. R., p. 184.

England but acting or suffering injury abroad,[1] although for all other purposes English law as *lex domicilii* would be considered their personal law and thus, in all likelihood, the proper law in litigations between them and British subjects domiciled in England.

(b) Other suggestions. Although it is true that most of the well-known textbooks on private international law do not reflect any "crisis" of the traditional tort rule,[2] it is equally true that the discussion of the last ten years is characterized by a greater freedom from settled axioms and time-honoured rules and by a greater interest in those specialized branches of the law of torts where the rigid application of the *lex loci* rule has created practical difficulties. Thus, without abandoning the general principles embodied in the traditional American solutions, Professor Stumberg advocates a breaking-up of the problems (presumably by special place-of-wrong rules for special cases and by means of different characterization of incidental questions raised in tort actions) in such cases where two or more local policies clash, either because a tortious action is related to more than one jurisdiction or because certain questions raised in the same lawsuit belong to fields of the law unconnected with the law of torts, such as the survival of claims or the administration of a decedent's estate.[3] The same concern about local policies appears in the latest edition of a well-known case-book on American conflict law.[4] French literature on private international law seems so far unaffected by these recent trends,[5] whereas other Continental writers have suggested an approach similar to that advocated by Professor

[1] The case of *Davidsson* v. *Hill* [1901] 2 K. B. 606, where the Fatal Accidents Act, 1846, was held applicable to a foreigner killed by the negligence of the crew of a British ship, can be distinguished, as the accident took place on the high seas and not within the jurisdiction of a foreign sovereign. The same unwillingness to extend the application of special statutes as opposed to the common law (*droit commun*) seems to exist in France: Cour d'appel de l'Indo-Chine 27. 3. 1908, *Clunet* 1909, p. 453; Donnedieu de Vabres, p. 215 f.

[2] The traditional discussion of *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, and *Machado* v. *Fontes* [1897] 2, Q. B. 231, is found in Cheshire, Schmitthoff and Wolff.

[3] Stumberg, pp. 202 ff.

[4] Cheatham, pp. 440 ff.

[5] Batiffol, pp. 600 ff.; Planiol-Ripert, tome 6, pp. 774 ff.

Stumberg.[1] The field of unfair competition has been the object of special studies on the basis of American practical experience in recent years.[2] In England, this unorthodox approach has been adopted in the latest edition of Dicey's Digest,[3] where it is argued that courts should have greater freedom in determining the *locus* and that a "social surroundings" test would often, in special cases, be more adequate than the purely geographical connection with the *lex loci*. "By thus applying the law of what has been called the 'most characteristic locality' of the tort, the courts would avoid some of the difficulties which may be involved in defining the *locus delicti*, especially where an alleged tort is connected with many jurisdictions, as *e. g.* where the goods are passed off in many countries or a person is defamed through media such as radio or television. Perhaps the case of *Scott* v. *Seymour*[4] provides some authority for this more flexible approach. In that case Wightman J. in an *obiter dictum* expressed the opinion that if a matter were actionable as a tort in England, then even though damages were not recoverable in the *locus delicti commissi*, one British subject could succeed in recovering damages against another British subject in respect of such a matter." The practical results of such an approach are not very different from those obtained by application of Dr. Morris' idea of a "proper law of the tort", and it is submitted that the same criticism can be directed against them. It is further submitted that the authority so cautiously invoked is hardly sufficient to cover even a very moderate change of the present British rules. Quite apart from the fact that it is highly unlikely that Wightman J. should have thought of a "most characteristic locality" test, the *dictum* only

[1] Schnitzer, vol. 2, p. 676, suggests *"den Zusammenhang des Tatbestandes untersuchen und ihn funktionell einordnen, um zu einer innerlich gerechtfertigten Rechtsanwendung zu gelangen.* Neuhaus, P. H., Morris, The proper law of a tort (review), *RabelsZ.* 16, 1951, p. 651, points out the special problem of choice of law in torts where the parties stand in a contractual relationship with each other.

[2] Wengler, W., Die Gesetze über unlauteren Wettbewerb und das internationale Privatrecht, *RabelsZ.* 19, 1954, p. 401. This particular topic has been treated in a great number of American case notes, often fertile in suggestions departing from the traditional tort rule.

[3] Dicey, p. 938.

[4] *Scott* v. *Seymour* (1862), 1 H. & C. 219.

applies to the very limited group of international torts where both parties are British subjects, and it seems probable that in the mind of the learned Judge the justification for an extraterritorial application of British law was the national allegiance of the litigants.

A traditional line in American criticism of the Restatement rules is carried on by Dr. Cook and Professor Ehrenzweig. The former advocates the application of the law of the place where the tortfeasor acted, for reasons of convenience in the case of torts committed within one jurisdiction but resulting in harm in several states — as *e. g.* radio defamation — and for reasons of justice and fairness in those cases where a tort is committed in one jurisdiction and its injurious effects take place in another.[1] Professor Ehrenzweig uses a vast material of American cases to show that the established "place of wrong" rule causes injustice and is generally disregarded by American courts in cases of intentional torts where the gist of the action is the infringement of a moral standard of behaviour.[2]

(c) The suggestion of Mr. Binder. A few Continental writers have endeavoured to create and introduce complete new systems of rules applicable to torts in private international law.[3] The most brilliant and, it is submitted, the most helpful and realistic, contribution to the discussion of the last ten years has been made by a German scholar, Mr. Binder, in an article in *Zeitschrift für ausländisches und internationales Privatrecht.*[4] As this very scholarly and exhaustive paper does not seem to have attracted much attention in England and America, it may be

[1] Cook, S. E., Long Distance Torts, (1950), 10 *La. L. R.*, p. 329 (at p. 338).

[2] Ehrenzweig, A. A., The Place of Acting in Intentional Multi-State Torts, (1951), 36 *Minn. L. R.*, p. 1, at pp. 5 ff.

[3] The system elaborated by a Dutch scholar, Professor Drion, in De ratio voor toepassing van vreemd recht in zake de onrechtmatige daad in het buitenland (*Rechtsgeleerd Magazijn Themis*, 1949) is briefly mentioned in Mr. Binder's article, at p. 471. Cf. also De Nova, R., Appunti sull'illecito civile, in *Comunicazioni e Studi, Istituto di diritto internazionale e straniero della Università di Milano*, vol. 4, 1952, p. 7; and Dubbink, *De onrechtmatige daad in het internationaal privaatrecht*, The Hague 1947. The two Dutch works have not been available to the present writer.

[4] Binder, H., Zur Auflockerung des Deliktsstatuts, *RabelsZ.* 20, 1955, p. 401. For a critical appreciation, cf. *Revue* 1955, p. 838.

justified to discuss it in some detail. Starting with a number of examples, — many of them taken from reported cases — Mr. Binder shows the disadvantages of the *lex loci* rule in various situations: assault between two Frenchmen on an organized trip in Germany; seduction of an American girl in youth camp in Canada (Dr. Morris' example); German schoolchildren injured through their teacher's breach of his professional duties on a mountaineering holiday abroad; copyright infringement by a German Himalayan expedition giving material to a German publisher after the copyright of all reports has been sold to another German firm; passing-off committed in Europe by one American company against another; broadcasting over several states of gramophone records protected in some of these states; American of nation-wide reputation libelled in a newspaper spread throughout the Union; New York husband sued under the law of Florida for assault committed by his wife while staying alone in Florida; the wife of a soldier domiciled in Pennsylvania seduced in Massachusetts. It may be pointed out that the first three cases may be ranged with the second category of Dr. Morris' examples, discussed at some length *supra*, and that the criticism directed against the illustrations of the English author is also applicable to Mr. Binder's cases. The remaining examples can be divided into two groups, the one comprising the last two illustrations, the other one all the rest. This last-mentioned category presents a real choice-of-law problem: it can be ascertained where the acting of the tortfeasor took place, but the injury is of such a nature that it can be located only with the help of the artificial devices known as legal concepts. The ascertainable reality underlying the legal injury in cases of copyright infringement is presumably the decrease of sales of the protected work — a phenomenon already difficult to give a local habitation — but also a great number of psychological processes affecting the attitude of an indefinite circle of individuals, such as readers, booksellers, critics etc. *Mutatis mutandis*, this is also true of unfair competition and libel. In the last two illustrations given by Mr. Binder, the problem is clearly different. The tort, including both the acting and the ensuing injury, is completed in one place, but what complicates the issue is the fact that a third party is involved, by status or by contractual relationship with the tortfeasor or the victim.

It is submitted that there is some reason to keep these groups of torts separate, as the problems presented by each group can hardly be solved in the same way.

Mr. Binder goes on to study the solutions of courts and the theories of legal doctrine in the principal European and American states, and, after discussing exhaustively the merits of the different theories put forward by courts and scholars, arrives at the conclusion that no single rule can satisfy completely the conflicting policies involved in the various types of tort cases. The solution presented by the writer is a series of special rules. This suggested catalogue contains no less than nine principal rules, several of which comprise sub-rules. The first item of the series are torts within a family or against the family as such: to these the law of the domicile of the family should apply; where vicarious liability is involved, the law of the place of acting should apply unless the liability is incurred because the actual tortfeasor is used for gainful purposes by the *superior* against whom liability is claimed; in such cases and in cases of strict liability the plaintiff should be given the choice between the law of the place of acting and that of the seat of the actual tortfeasor's *superior*. Workmen's compensation cases should be judged by the law of the business establishment where the injured workman is normally employed. The law of the state where unlawful practices have taken place should govern torts belonging to the category of unfair competition; where the competitors are nationals of the same state, however, their national law should apply. Sovereigns should be treated like private persons when engaged in gainful pursuits; in all other cases, the law of the sovereign itself should govern tort claims raised against it. The last groups cover various torts like defamation and invasion of privacy by press and radio — where the law of the injured person's domicile is recommended; — fraud and blackmail — the law of the place where title to property as a result of the tort is suggested — and torts of omission, which, in Mr. Binder's suggestion, should be governed by the law which created a duty to act. Further rules on maritime and aerial torts are omitted in this study as these branches of the law will not be discussed in the following.

It is submitted that if some of the problems raised by tort actions in private international law cannot be conveniently solved

within the frame of the traditional *lex loci* rule, the method suggested by Mr. Binder is the safest and most practical way out of the dilemma. In a later part of this paper, after a survey of the practical solutions given by courts in the leading states of the Western World, a fuller discussion will be devoted to the question whether such an elaborate system of rules as Mr. Binder's catalogue is really needed.

CHAPTER 2

LEGAL TECHNIQUES USED BY COURTS

A. *Procedure and Substance.* Before we discuss the various solutions given by courts of justice to problems raised by international tort actions, it may be of some interest to consider what actually happens in a lawsuit where a tort claim based upon a law other than that of the *forum* is litigated. A good description is furnished by Professor Yntema: "An attorney appears and puts in a claim. As part of his proof required by the legal practice of the *forum*, he puts in evidence an authenticated copy of a statute, a judicial decision, or a judicial record, emanating from another jurisdiction. It becomes part of the evidence in the case. And, in the last analysis, it is a simple question of convenience and equity, roughly controlled by the traditions of the *forum*, as to how far the court will, can, or should relax its domestic habits of decision to give a judgment more or less remotely resembling that which might be secured in the courts of another jurisdiction."[1]

(a) The preliminary stages of the action. It is submitted that it might be of some interest to analyse the situation facing a court seized with a foreign tort claim, and the possible solutions available to the court in a simple case of this kind. The material upon which the court has to issue such orders and instructions as are necessary for the preliminary stages of the action is normally a description of the underlying facts, a claim under the foreign law allegedly applicable to these facts, and a more or less succinct statement to the effect that this or that rule of the conflict law of the *forum* prescribes the application of the indicated foreign law. What the court has to do in order to perform the "integration of foreign data into *lex fori*"[2] is to find out, in the first place, whether jurisdiction should be taken. There would seem to be general agreement on the proposition that this is a matter for the *lex fori*. It should be emphasized, however,

[1] Yntema, H. E., The Hornbook Method and the Conflict of Laws, (1928), 37 *Yale L. J.*, p. 468, at p. 478.

[2] Nussbaum, p. 83.

that although jurisdiction rules must be considered as part of the internal procedural law of the *forum*, considerable importance is attached to the conflict rules of the *lex fori* even at this early stage. For jurisdiction rules are usually connected with, and indeed often based upon, the location of the facts at issue, and whenever such location is in any way problematic, it is submitted that it should be — and normally is — undertaken in accordance with the body of rules and precedents in this field which has presumably been developed in the conflict law of the *forum*, rather than according to the provisions of that legal system on the local competence of courts for purposes of internal law.

Next, the judge has to analyse such *prima facie* evidence as he may get from the available material in order to determine whether the alleged acts are of such a character as to be classified under the heading of "torts", and whether the elements connecting them with the foreign legal system invoked by the plaintiff are the connecting factors acknowledged in the conflict rules of the *lex fori*. The general implications of the problem of characterization will be discussed more fully below, but it seems obvious that this preliminary analysis must be undertaken within the frame provided by the *procedural* rules of the *lex fori*, and particularly by its rules on evidence.

Then, and only then, the judge is willing to admit evidence intended to establish rules of foreign law, or, if the *lex fori* adheres to the principle that the court has a duty to know the applicable foreign rules, to collect information about the provisions of the relevant legal system.

Suppose, however, that at this early stage the basic facts are disputed or uncertain and the foreign law provides certain facilities, as *e. g.* presumptions, by means of which one of the parties would be able to prove either that the alleged act has in fact been committed, or that it stands in a certain relation to the alleged *lex loci*. It is submitted that no such foreign rules can be applied. Until it has been established, by application of the procedural rules of the *forum*, that a given foreign law is applicable, that law has no influence upon the solution of such legal problems as may face the court, and when it is stated that *e. g.* certain presumptions should be taken from the chosen *lex causae* — as will be submitted below — it must always be borne

in mind that the statement is true only in so far as it has been decided by the court that the foreign legal system is applicable to all the elements of the action, or at least to that part of them to which the presumption refers. Thus, apart from the generally accepted methods of classification by the *lex fori* and the rules of jurisdiction and competence binding upon the court, the law of the *forum* supplies an initial control over the admission of foreign tort actions simply by applying its own procedural rules, and that control is far from unimportant, as the relevant procedural rules are usually of a kind which allows considerable discretion to the courts, *e. g.* minimum requirements of probability, etc., where national habits of legal thinking and precedents from various fields of municipal law are the most important guidance available to the court.

Once the court has taken jurisdiction over the action, the classical problem of distinguishing between substance and procedure is raised. Even in the presence of binding statutory or judicial catalogues establishing exhaustively such a classification, the problem must ultimately be solved by the judge on the facts of the case.[1] It is submitted that a purely semantic interpretation of common usage or legal language is not sufficient: the normal meaning of "substantive" and "procedural" provides, of course, the frame within which the solution must be situated, but this frame is by far too large to indicate precisely the correct answer.[2] Professor Hancock, after a very careful survey of the problem, arrives at the solution "to give the law of the place of wrong the maximum possible application consistent with the due and effective administration" of justice.[3] It is submitted, with respect, that such a rule is not only too vague to give any real guidance but also attended with certain dangers.

(b) Presumptions. One of the most important reasons why the *lex loci* is applied to a foreign tort in preference to the *lex*

[1] A catalogue by high judicial authority in the U. S. A. may be quoted as an example. "The laws of the *forum* determine the jurisdiction of the courts, the capacity of parties to sue or to be sued, the remedies, which are available to suitors and the procedure of the courts." *Mertz* v. *Mertz* (1936), 3 N. E. 2d (S. Ct. of N. Y., Appellate Div'n), 597, *per* Lehman, J., at p. 599.

[2] Cf. *Collins* v. *American Automobile Ins. Co.* (1956), 230 F. 2d (U. S. Court of Appeals, Second Circuit) 416, at p. 419.

[3] Hancock, p. 76.

fori is presumably the fact that the choice of *forum* is often fortuitous and an application of its material rules would be inconsistent with prevailing considerations of fairness and justice. The conflict rules of the *forum* are concerned with the choice of proper instruments of distributive justice, not with their actual operation, but at every stage of the process, *i. e.* at every choice effected by the machinery of the *lex fori*, the ultimate material result is sensibly affected. If the court chosen by the plaintiff has some substantial connection with the action or any of its elements, it easily happens that the ideas of justice prevailing at the court are engaged, thus strengthening the normal "homeward trend"[1] of the *forum*.

To minimize the risk for such deviations from what are considered as desirable solutions of conflict problems, a clear rule for the classification substance and procedure is necessary. It is submitted that the distinction between rules intended to ascertain physical facts and such provisions as "ascribe legal meaning to those facts"[2] may provide a better solution. Professor Hancock raises a very serious objection to such a test by pointing out that very often rules relating to the finding of facts, and normally considered as procedural, really embody important social policies and are consequently part of the substantive law of the *locus delicti*.[3] Presumptions of negligence against railway companies or motorists are examples of such rules: their function is generally to impose a high standard of care and to shift the losses for inevitable accidents in a way considered socially desirable by the legislature. Courts in various countries have often classified as substantive such presumptions, rules regulating the burden of proof, contributory negligence and the doctrine of *res ipsa loquitur*,[4]

[1] Nussbaum, p. 37.

[2] *The Gaetano and Maria* (1882), 7 P. D. 137, at p. 144, *per* Brett, L. J.

[3] Hancock, p. 77.

[4] Presumptions of negligence characterized as substantive by a French court: Cour d'appel de Colmar 1936, *Clunet* 1936, p. 262 (motor accident); by German courts: Oberlandesgericht (OLG) Karlsruhe 1929. 28. 2., *IPRspr.* 1930, nr. 51; same court 1931. 28. 10., *IPRspr.* 1932, nr. 41; by an American court: *Pittsburgh etc. Ry. Co.* v. *Grom* (1911), 133 S. W. 977 (Ct. of Appeals of Ky.). Contributory negligence held substantive in *Fitzpatrick* v. *International Ry. Co.* (1929), N. E. 112 (S. Ct. of N. Y. Appellate Div'n); (1930), 39 *Yale L. J.*, p. 901; cf. Robertson, pp. 259 ff.; Coltharp, L. H., Contributory Negligence in

and it is submitted that by studying similar provisions in their own municipal law and in the *lex loci*, and by developing a catalogue of such exceptions, the judges of the *forum* will get better guidance to objective decisions than by using the vague test of "maximum possible application of the *lex loci*."

A particular problem raised by presumptions and rules concerned with the burden of proof should be pointed out in this connection. When the tortious act takes place in one state and the injury in another, perhaps determined by a course of highly artificial reasoning, as is often the case in the determination of the *locus injuriae* of libel and unfair competition, the application of the presumptions and burden of proof rules of the place of harm may cause considerable hardship to the defendant. Using the presumptions of the law of the place of acting may, conversely, be unfair to the plaintiff. The problem is closely related to, but not identical with, the major problem of the ultimate choice of law, which will be discussed later. Such presumptions and rules governing the burden of proof are mainly concerned with the acting of the defendant, whereas substantive choice-of-law rules must take into account the whole cause of action, in which the acting and the ensuing injury are entitled to equal consideration. It is therefore particularly harsh to impose upon a tortfeasor the securing of evidence required by another law, valid in a state where the effect of his act took place. In cases of this character, it may be tempting to apply the presumptions and burden of proof rules of the *forum*, which would at least be equally hard to both parties. To solve this problem, it is necessary to undertake an attempt at analysing, at least in a very general fashion, the nature and functions of those particular rules of law which are likely to raise it. It is submitted that such rules may be divided into certain groups kept together by some common denominator.

The first, and most important one, concerns, in broad language, liability for injuries occurring in the course of particularly dan-

the Conflict of Laws, (1950), 10 *La. L. R.*, p. 365. Same result, *semble*, in *Brown* v. *Poland* (1952), 6 W. W. R. (N. S.) 368 (S. Ct. of Alberta). The doctrine of *res ipsa loquitur* treated as substantive: *Lobel* v. *American Airlines Inc.* (1951), 192 F. 2d 217 (U. S. Ct. of Appeals, Second Circuit); (1952), 27 *N. Y. U. L. R.*, p. 348; Bowen, F., Evidence — Res Ipsa Loquitur . . . (1952), 50 *Mich. L. R.*, p. 1108.

gerous activities. Historically, the introduction of strict liability in most countries goes back to a presumption that damage resulting from such activities should be imputed to the owner of the facility through the operation of which the damage has occurred. If it was originally held that this type of responsibility should induce owners of such facilities to observe a very high standard of care, the owner's liability was gradually detached, in some cases, from the notions of care or fault, and became a strict liability in the proper sense of that expression — a liability which may be considered as a part of business costs, to be met by a suitable insurance policy. In the process, this type of liability has ceased to be a part of the problem to which we are presently devoting our attention. There remains, however, a number of situations in which questions of fault or innocence are still raised, and often in the form of presumptions and rules on the burden of proof. Such rules and presumptions are often applicable to the behaviour of motor car drivers, railway companies, and air carriers. It is submitted that while the activities of the subjects envisaged by rules of this kind may often cover several jurisdictions, the torts are usually of a fairly uncomplicated order, and normally consist of simple chains of physical causes and effects. It would seem, therefore, that it is for the law chosen to govern the tort as such to apply its presumptions and rules on the burden of proof. A person, or company, using potentially dangerous facilities in several jurisdictions is normally in a position to secure an insurance coverage adapted to the various legal provisions of the jurisdictions in which such facilities may reasonably be expected to be used. Where the chain of events forming the tort has taken place in more than one jurisdiction, it seems fair and logical to apply the same considerations as will be put forward below, in Chap. IV, with regard to the choice between the laws of several places of wrong.

Other rules regarding presumptions and the burden of proof seem to have a somewhat different object: to provide, in the interest of expediency, solutions to problems which would otherwise be extremely difficult, if not impossible, to solve, such as, for instance, the order in which two persons killed in the same accident have died. The justification of rules of such and similar character is, in the first place, the need for a rational solution

of some kind, and it is submitted that they serve the purpose of ascertaining physical facts rather than that of attributing legal consequences to these facts. It would seem, therefore, that it is just as natural for the *forum* to apply its own law as to follow the notions of probability — for such, it is submitted, is the character of these rules — of another legal system. Exceptions from this principle may be made when the action in tort is complicated by other elements, and the court finds, as a result of secondary characterization, that some incidental question, *e. g.* a problem of succession upon death, should be governed by a third legal system to which the presumption at issue should be referred as a part of its substantive rules.

Mention should finally be made of a third group of presumptions and similar rules which may be applicable in actions on such torts as constitute attacks upon property or other legally protected rights. To obtain recovery, it may be necessary, at least in certain jurisdictions, to prove that the alleged tortfeasor knew of the legally protected position of the plaintiff, and such proof may be furnished by a presumption that possession of movables indicates ownership, or that the holder of a negotiable instrument is entitled to dispose of it. Presumptions of this kind being intimately connected with the underlying question of ownership (or any similar legal right) it seems most suitable to apply the law governing that question — normally the *lex situs* — which is likely to coincide, in the vast majority of cases, with the legal system chosen to govern the principal elements of the action in tort.

Whatever the test used by courts to distinguish substantive and procedural rules, it is submitted that in the conflict of laws, that distinction can never be as clear as in municipal law. As this point seems to have some bearing upon the interpretation of conflict cases dealing with the problem of substance and procedure, it may be worth some discussion.

(c) Proper parties to the action. The following question may serve as an illustration: What are the conditions for the litigants in a given case to be considered as proper parties to the action?

The question can be considered, under the current distinction between procedure and substance, as procedural. To what extent

is it, in conflict cases, a "threshold requirement?"[1] It is submitted that in the course of a lawsuit, questions of this character are answered by the courts twice: first, on the *prima facie* evidence put forward in order to institute proceedings; secondly, on the strength of all the material brought before the court. The first time, the questions are considered in the light of the procedural rules of the *forum*, and the second time, after they have been classified, and the provisions of the chosen law are to be applied, they belong to the substantive questions of the action. This weakening and, indeed, in some cases, obliteration of the ordinary distinction between substance and procedure must be remembered when such expressions in judicial *dicta* as may denote both substantive and procedural requirements are to be interpreted.[2]

The application of choice-of-law rules has been described above as a choice of instruments for the enforcement of substantive justice rather than an actual operation of such instruments. However, conflict law also disposes of a number of tools of its own, the first of which is the process known as characterization. No attempt will be made here to add to the impressive number of rules suggested by writers to govern the use of that elaborate instrument. The vast majority of scholars agree that the *lex fori* must serve as the basis of characterization, but whereas some authors suggest an unmodified *lex fori*,[3] others stress the importance of studying the social functions of the foreign rules of law invoked in support of an action and of ascertaining their systematical affinity with one or the other branch of domestic law;[4] a third group, finally, headed by Professor Rabel, advocate an even broader approach, based upon a comparative study of municipal rules in various countries and of their social functions.[5]

[1] French: *conditions de recevabilité;* German: *Prozessvoraussetzungen.* In English law, the distinction between "treshold requirements" and conditions which must be satisfied by the plaintiff in order to recover seem to be less clearcut, presumably because procedure and substance were closely interwoven under the old English system of forms of action.

[2] The most famous instance, the word "actionable" used by Willes, J. in *Phillips* v. *Eyre* (1870), L. R. 6 Q.,B. 1, at p. 28, will be discussed *infra.*

[3] Schnitzer, vol. 1, p. 98; Lorenzen, E. G., in 47, *L. Q. R.*, p. 483, at pp. 495 ff.

[4] Lewald, p. 266 f.; v. Schelling, in RabelsZ. 3, 1929, at p. 858.

[5] Rabel, vol. 1, p. 49; cf. vol. 2, pp. 229 ff. and pp. 253 ff.

(d) Practical purposes of characterization. What are the practical purposes of characterization rules? Professor Hancock has shown that whether the process is considered one of formal logic or of policy, "the actual problem is always the same irrespective of the form in which it is stated; the courts must decide which of two conflicting rules shall govern the decision."[1] Thus characterization is, properly analysed, a preliminary application of choice-of-law rules, and the same considerations as influence conflict rules in general must be taken into account in this process.

This point has been particularly developed by two Swedish scholars, Professor Malmström and the late Professor Hult.[2] While Malmström's work is largely a critical analysis and development of Rabel's suggestions, Hult emphasizes the importance of making a clear distinction between the relatively small group of "true" problems of characterization, exemplified by the famous Maltese case, and such other situations where the problem can be dissolved, or at least reduced to an ordinary choice-of-law question, by means of an analysis of the practical functions of the rule of municipal law concerned. The latter group of cases is illustrated by a well-known problem: are limitation rules to be considered as substantive or procedural? It is a generally adopted principle of private international law that in the former case, they shall be governed by the chosen *lex causae*, whereas the latter alternative implies the applicability of the *lex fori*. Professor Hult argues that rules of this kind are in no way connected with the procedural machinery of the *forum*, and as only such provisions as ensure the proper functioning of that machinery can reasonably be called procedural for conflict purposes, it would follow that limitation statutes are matters of substantive law. It is submitted that this approach is correct from both theoretical and practical points of view. However, it is far from universally adopted by

[1] Hancock, p. 184.

[2] Malmström, *Det s. k. kvalifikationsproblemet inom internationell privaträtt. En principundersökning*, Uppsala and Leipzig 1938; Hult, Kvalifikationsproblemet i den internationella privaträtten, in *Festskrift tillägnad Halvar Sundberg* (Uppsala Universitets Årsskrift 1959: 9), Uppsala 1959 (at pp. 243 ff.). An English translation of Professor Hult's article is due to appear in the Scandinavian review *Nordisk Tidsskrift for International Ret*.

courts, and as the present study purports to deal chiefly with the law as it appears in judicial decisions, we may be justified in giving some consideration to the practical results of different methods of characterization applied in such decisions.

The result can be, and normally is, the recognition of the claim as an action in tort under *lex fori* and the foreign *lex loci*, in which case the next step is the choice and application of the governing law. In this case, characterization has no independent effect upon the outcome of the action — it is the instrument which serves to connect two legal systems.

On the other hand, the final result of the process can be a refusal on the part of the *forum* to proceed further, because the alleged tort is unknown as such to the *lex fori*. This result of the characterization process can be reached in three cases. In the first place, the action complained of can be dismissed without further trial because no liability of this particular kind exists in the law of the *forum*. Courts following methods of characterization based upon comparative studies or a broadened *lex fori* concept of the category of acts known as torts will hardly ever reach this result, whereas the strict application of the legal definitions of the *forum* will inevitably lead to such an outcome of the suit in a certain number of cases. Characterization, thus used as an instrument to ascertain, and, if needs be, enforce, complete congruity between *lex fori* and *lex loci* is interchangeable and identical in effect with two other special instruments of the conflict of laws: — the principle of public policy and rules of concurrent actionability.[1]

Secondly, the *forum* can refuse to apply the foreign tort rule because under its own classification the action does not sound in tort but belongs to some other legal category, as contract or matrimonial relations. This does not mean, of course, that the plaintiff cannot pursue the action, but the tort claim as such is

[1] The point will be further considered in connection with the traditional English choice-of-law rule as laid down in *Phillips* v. *Eyre*. See pp. 89 ff. For German law, see von Schelling, F. W., Unerlaubte Handlungen, *RabelsZ.* 3, 1929, p. 854, at p. 860. The case cited by v. Schelling as an example of this method of characterization — RG 1892. 25. 6., *RGZ* 29, p. 90 — could also be used as an example of the exception of public policy. The facts are closely similar to those in *The Halley* (1868), L. R. 2 P. C. 193.

barred at the chosen *forum*. Some of the problems arising out of this situation, in which the action is almost invariably referred to one of the two categories just mentioned, will be discussed later.

The third situation in which an independent and materially important influence is exercised by rules of characterization is where the action sounds in tort in *lex loci* but is governed by penal law at the *forum*. This particular case is not normally considered as a problem of classification, but it is submitted that for present purposes it can be conveniently analysed as such. It is true that the ultimate object of characterization rules is the finding of the proper law in each case whereas the reasons underlying the refusal of courts to apply foreign penal law can be decribed as a consideration of public policy. However, as has been shown above, when characterization assumes material importance, it acts as a bar to a particular action, and in these cases the underlying policy is largely identical with the motives forbidding the application of foreign criminal law. Thus characterization is occasionally resorted to as one of the safety appliances by which the *forum* discards actions which are incompatible with its own legal system.

(e) Torts in different municipal laws. What is the practical importance of the bar to foreign actions created in some cases by the process of characterization? This is not the place to undertake a detailed comparison between the tort laws of the leading Occidental states,[1] but a few points may be made.

The French tort rules, laid down in articles 1382—1386 of the Civil code as complemented by later legislation, establishes in a general way a liability for actual and ascertainable injuries inflicted upon legally protected interests, provided the injury is directly caused by the wilful or negligent conduct of the defendant.[2] Although French courts have always maintained the essential requirement of fault on the part of the tortfeasor, a strict liability for injuries caused by employees and by property under the custody of the owner has been introduced by means of various

[1] For a short comparative study, see Winfield, Sir P., The Law of Torts — Conflict of Laws, (1949), 35 *Tr. Gr. Soc.*, p. 133.

[2] Mazeaud, H. and L., tome 1, pp. 85 ff. — For judicial decisions, see Code civil (*Petits Codes Dalloz*), 1957, under articles 1382—1387.

fictions: negligence in appointing or supervising employees and in maintaining property in good repair is presumed and must be disproved by the employer or owner.[1]

German law originally established a tortious liability for injuries inflicted upon a certain number of specified interests and for certain forms of breach of legal duties, or of immoral behaviour.[2] Strict and vicarious liability was introduced very much in the same way as in France, and the general trend of decisions seems to be in favour of a general liability for wilful or negligent conduct, completed by the usual forms of liability without fault or for presumed fault.[3]

Compared with the two great Continental systems, the common law of England presents a catalogue of casuistically enumerated actionable torts. Although the rule in *Donoghue* v. *Stevenson*[4] has broadened the liability for negligent or wilful breach of duty, and the rule in *Rylands* v. *Fletcher*[5] as developed by the courts has created at least some sort of strict liability, it nevertheless remains true that English tort law does not provide a general protection of legally recognized interests but constitutes a series of different special actions.[6] A recent attempt at systematization of the English rules according to the Continental pattern comes closer to the original German system than to French law or to German tort law as developed by the courts.[7] Thus trespass can be compared with the German rules on protection of specified interests — an important difference is, however, that no negligence has to be proved in trespass — whereas actions on the case can be identified with liability for wilful or negligent conduct in the Continental systems, and the rule in *Rylands* v. *Fletcher*[5] can provide a somewhat inadequate equivalent of the strict liability recognized in civil law countries.

[1] Mazeaud, *ibid.*, pp. 87 f., 263 ff., 693 ff.

[2] BGB §§ 823, I and II, 826.

[3] A reform of the BGB which would bring German tort law very near the French system has recently been suggested; cf. Enneccerus, vol. 2, pp. 866 ff.

[4] *Donoghue* v. *Stevenson* [1932] A. C. 562 (H. L.)

[5] *Rylands* v. *Fletcher* (1866), L. R. 1 Ex. 265; (1868), L. R. 3 H. L. 330.

[6] See *Perera* v. *Vandyiar* (1953), 1 W. L. R. 672.

[7] Marsh, Norman S., Unerlaubte Handlungen im Englischen Recht, *RabelsZ* 20, 1955, p. 643.

Another general observation seems to have some bearing upon the problem under discussion. For various historical reasons, the law of torts has come to serve different social purposes in different countries. Thus the English trespass actions serve as an instrument for ascertaining titles to property; most Continental laws provide other forms of action for this purpose. On the other hand, in a general fashion, the interests of the state as distinguished from those of its individual subjects have been more emphasized in civil law, with the result that such actions as conversion, detinue, libel, slander, assault and battery, are primarily considered as penal in most Continental countries, whereas in English law they are classified as parts of the law of torts. This, of course, does not mean that the victim has no claim for economic recovery under the civil law of Europe nor that English criminal law is disinterested in such actions. The differences are rather differences of habits of thought and traditions of systematization than real disagreement in the underlying social evaluation of these wrongs.

What are the practical results, for conflict purposes, of the systematical variations pointed out above? If common law and civil law are considered separately, the result must be that the process of characterization, considered as an instrument of control in the interest of the *lex fori*, rules out a certain number of foreign actions, and generally speaking, more civil law actions will be ruled out in common law courts than *vice versa*. Thus the characterization habits adopted by common law courts would assume a very real importance. If a classification strictly based upon the *lex fori* were always made, the following groups of torts would be ruled out: claims for liability completely unknown in the *lex fori;* general liability for negligent or wilful conduct if not coinciding with one of the forms of action known at the *forum*;[1] claims considered as penal either under the *lex fori* or *lex loci*.

[1] This is particularly important in the field of unfair competition where a number of Continental states have adopted more or less sweeping definitions of unfair practices (France, Germany, Switzerland, Holland, Spain etc.), whereas others, among them England, have retained the system of a limited number of clearly defined actions. See Wengler, W., Die Gesetze über unlauteren Wettbewerb und das internationale Privatrecht, *RabelsZ.* 19, 1954, p. 401 (at pp. 402--406). Cf. Kerly, pp. 706 ff.

The main problem raised by common law tort claims in civil law courts would concern those actions, exemplified above, which are primarily regarded as penal in Continental law. An action in France for libel committed in England would thus be primarily classified as penal in the *forum*. There are few examples of solutions of this problem, but there seems to be at least some authority for the view that such actions would not be barred.[1] The common enforcement of claims for damages founded upon traffic accidents abroad seems to take place without any particular consideration of the fact that such accidents are often subject to special penal provisions in either *lex fori* or *lex loci*.[2] Thus, in the end, very few common law torts would be excluded from civil law courts as a result of characterization; the remaining group consists of such cases where the action is characterized by the *lex fori* as contractual or as an infringement upon some special relationship between the parties, such as matrimonial or parental relations. In these cases, however, the result of the characterization process is not merely to bar an action in tort but also to refer the suit to some other legal category; and as this often implies the application of some other choice-of-law rule, it will be discussed more fully below.

The characterization rules followed by English courts are very difficult to ascertain. Characterization is hardly ever a conscious process, clearly distinguishable from the stages of legal reasoning which logically precede or follow it: it is closely interwoven with considerations of choice-of-law and with the problem of jurisdiction. This is particularly true of English courts, and the discussion of English classification rules will therefore be reserved to a following chapter where the traditional English choice-of-law rule is enlarged upon.

It must be emphasized that although the process of characterization is merely a device of legal technique, which can hardly be caught within the narrow compass of fixed rules — an element of free examination is necessary to make it work properly — it is nevertheless highly desirable that the habits of characterization

[1] Damages granted by a Rumanian court in a penal action held recoverable in France: Cour d'appel de Lyon 9. 5. 1925, *Revue* 1926, p. 391.
[2] Mazeaud, tome 1, pp. 82 ff.

adopted by courts should be founded upon considerations of policy similar to those underlying choice-of-law rules. It is generally admitted that excessive use of the principle of public policy as well as excessive emphasis upon complete congruity between the *lex loci* and the *lex fori* are incompatible with the fundamental principle of private international law — that legal relations should be governed by the legal system with which they are most closely connected. As we have tried to demonstrate, however, a narrow characterization is almost as repugnant to that basic principle. It is submitted that the liberal approach advocated by Rabel and the above-mentioned Scandinavian scholars is likely to give the most desirable solutions.[1]

B. *Rules of Jurisdiction.* (a) Preliminary remarks. It has been shown above that whatever may be the choice of law adopted by the *forum*, its own rules are of considerable importance for the outcome of an action on a foreign tort: its characterization of different legal provisions as substantive or procedural can affect materially the final judgment; its classification of the action as part of one or the other legal category is either an instrument of control by which certain actions are barred, or a process connecting the action with a group of legal concepts to which, in the view of the *lex fori*, it rightly belongs. For all its importance, however, the *forum* has often been chosen fortuitously, and has little or no connection with the action or the parties. It is for the rules of jurisdiction to provide certain minimum requirements as to the connection of the *forum* with the action.[2] It would be logical and desirable that the greater importance a legal system allows its own *lex fori*, the stricter would its requirements for assuming jurisdiction be kept. Rules of jurisdiction in the conflict of laws have developed historically on the basis of competence rules in municipal law, and it may be of some interest to point out that these underlying domestic rules — the classical Roman formulae of *forum rei* and *forum delicti* and the common law rules attributing to the venue of a tort a decisive influence upon the competence of courts — obviously aim at finding a *forum*

[1] Rabel, vol. 1, p. 49; vol. 2, pp. 229 ff. and pp. 253 ff.; Malmström, *op. cit.*; Hult, *op. cit.*, at pp. 243 ff.

[2] This point is raised and elaborated by Graveson, at p. 426.

which is as little fortuitous as possible and coincides with the "social environment" of the tort or the tortfeasor.[1]

The solution of problems of jurisdiction is, of course, exclusively a matter for the *lex fori*. It is a procedural problem inasmuch as whatever the decision of the court may be upon a matter of jurisdiction, the substantive question: liability or no liability? is not affected; on the other hand, like most procedural questions in conflict cases, it can be raised at different stages of the suit. If the *forum* is not *prima facie* the *forum rei*, the court has to decide whether or not to take jurisdiction by allowing service of a writ abroad (or by a similar procedure); if, on the other hand, the court is not the *forum delicti*, it must be decided, either on the *prima facie* evidence supplied in support of a petition for service, or later in the action, on the full evidence produced by the parties, whether the court has jurisdiction or not.

(b) French rules. French rules on international jurisdiction are clearly based upon the Roman formulae, but have been broadened considerably in order to provide as complete protection as possible for French nationals against foreign tortfeasors. Thus, under the provisions of articles 2 and 59 of the C. proc. civ. as modified by statute (26 Nov. 1933), the court exercising civil jurisdiction over the place of wrong (*"le lieu où le fait dommageable s'est produit"*) is always competent concurrently with the court of the defendant's domicile (art. 59).[2] The competence of French courts is furthermore extended to cases where the act of the defendant is at the same time a criminal offence and French criminal courts are competent — in that case the court dealing with the criminal offence is always competent to pronounce upon the civil action as well (C. instr. crim., art. 3).[3] However, article 14 of the C. proc. civ. gives French citizens a general right to sue foreigners in French courts for obligations contracted abroad,

[1] It was, of course, part of the justification of these older rules that the courts always applied their own law at the exclusion of any foreign legal provision. Cf. Westlake, p. 282.

[2] Where neither of the parties is domiciled in France it has been held that any French court may be competent to adjudicate upon a tort committed in the country, provided the choice of *forum* is not vexatorious. Cour d'appel de Rennes 19. 11. 1924, *Clunet* 1925, p. 386, at p. 387; cf. Tribunal civil de la Seine 16. 9. 1936, *S.* 1939. 2. 1.

[3] Mazeaud, tome 3, p. 161.

and consequently extends the jurisdiction to all cases where the *plaintiff* is a Frenchman.[1] The corresponding right for foreigners to sue Frenchmen under the same conditions is hardly of the same value.[2] In the absence of any element connecting the action with France, the courts normally declare themselves incompetent if the parties have not agreed to submit to French jurisdiction.[3] In a certain number of cases, finally, the competence of French courts is governed by provisions in bilateral treaties with neighbouring states.[4]

(c) Germany. The competence rules of the German Code of civil procedure (ZPO) are closely similar to those originally found in the French Code. The provisions of articles 14 and 15 C. proc. civ., on the other hand, have no equivalents in German law. In cases of unfair competition, where the "homeward trend" has always been particularly strong in German courts, jurisdiction has

[1] The article is not often used. See, however, Tribunal civil de Montpellier 13. 1. 1932, *Clunet* 1932, p. 1001, where the tortfeasors were, and had always been, domiciled in Argentina, where the alleged wrong had taken place. Effectiveness was secured by the presence of property in France. Cf. Cour d'appel de Paris 23. 6. 1899, *Clunet* 1901, p. 128 and same court 18. 10. 1955, *Revue* 1956, p. 484.

[2] Historically, however, this right was an important concession. Earlier the right to sue was considered a *"droit civil"* and as such not open to aliens. A fairly modern example of the application of this doctrine is Cour de Cassation 5. 5. 1908, *Répertoire* V, p. 489, where German subjects were refused the right to sue Frenchmen for unfair competition. See Beale, J., Jurisdiction of Courts over Foreigners, (1913), 26 *H. L. R.*, p. 193, at p. 207.

[3] Cour de Cassation 5. 6. 1905, *D. P.* 1906. 1. 121. Collision on the high seas between Spanish and German ships. *Held, "les tribunaux français sont, en principe, incompétents pour statuer, en matière personnelle et mobilière, sur les contestations entre étrangers non admis à domicile en France . . ."* (at p. 122).

[4] The treaties between France and Switzerland (15. 6. 1869), Belgium (8. 7. 1899) and Italy (3. 6. 1930), provide exhaustive rules for the choice of *forum*. Belgian subjects are guaranteed complete equality with Frenchmen — cf. Tribunal civil de la Seine 16. 6. 1936, *S.* 1939. 2. 1. In tort actions against Swiss nationals, the action shall be referred to "the natural judge of the defendant''. This has been interpreted as the judge of the defendant's domicile: Tribunal civil de Charolles 14. 6. 1934, *Clunet* 1935, p. 342; Cour d'appel d'Orléans 16. 4. 1936, *Clunet* 1937, p. 272; Cour d'appel de Paris 10. 2. 1937, *Revue* 1938. p. 116. In a couple of much-criticized decisions, however, the courts have accepted the renvoi of Swiss law back to the French *forum delicti:* Cour d'appel de Chambéry 17. 12. 1934, *Clunet* 1935, p. 612 (note J(ean) P(erroud)); Tribunal civil de Vitry-le-François 20. 12. 1934, *Revue* 1935, p. 813.

occasionally been extended to torts committed abroad by foreign corporations when there has been reason to assume that the unlawful practices were initiated by domiciled Germans, acting as "indirect tortfeasors."[1]

(d) England and the Commonwealth. It seems to be commonly agreed that the basis of English jurisdiction rules is the principle of effectiveness. Once it had been established that transitory actions with foreign venue were triable in English courts — there does not seem to have been any hesitation as to the right of foreigners to sue[2] — the principle *actor sequitur forum rei* was acknowledged.[3] In practice, this meant that the defendant in a personal action had to be present within the jurisdiction so as to be liable to be served with the King's writ, the only way in which a tort action could be properly instituted.[4] That, on the other hand, mere physical presence is sufficient, may be inferred from early cases,[5] and is clearly laid down by the Privy Council in *Sirdar Gurdhyal Singh* v. *Rajah of Faridkote.*[6] The doctrine of *forum delicti* was not originally a part of common law.

The presence of the defendant in the jurisdiction was a necessary condition for service of the writ and had to be ascertained at the initial stage of the action. Other circumstances of decisive importance for the competence of English courts could either be

[1] RG 1936. 14. 2., *RGZ* 150, p. 265.

[2] *Pisani* v. *Lawson* (1839), 6 Bing. (N. C.) 90, *per* Tindal, C. J.

[3] Actions on foreign torts were allowed for more than a hundred years before Lord Mansfield held, in *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161, that "as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in England though the matter arises beyond the seas. . . ." *Skinner* v. *East India Company* (1666), 6 State Trials 710; *Blad's case* (1673), 3 Swans. 603 and *Blad* v. *Bamfield* (1673), 3 Swans. 604; *Ekins* v. *East India Company* (1717), 1 P. Wms. 395.

[4] Graveson, p. 426. In actions *in rem*, the presence of the *res* was sufficient; as the most important field of actions *in rem* for foreign torts is maritime law, this particular branch of the subject will not be further discussed here.

[5] The circumstances of *Blad's case* and *Blad* v. *Bamfield* (see note 3 *supra*) seem to indicate that the Danish defendant was only temporarily present in England. Cf. Beale, J., Jurisdiction of Courts over Foreigners, (1913), 26 *H. L. R.*, p. 193, at pp. 283 ff.

[6] *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670. Cf. Cheshire, pp. 104 ff.

considered at this early stage or later, in the course of the suit. If, at any stage of the proceedings, it was discovered that the action concerned trespass to foreign land, the courts declined, and still decline, to take jurisdiction.[1] There is some doubt as to other bars to the jurisdiction of English courts at common law.[2] It has been said that the courts could not grant recovery for an infringement of a foreign copyright committed in the foreign country where the right exists, but there is no authority on this topic, and writers of high repute have pronounced against such an assumption.[3] It has also been submitted that the condition of "actionability" laid down by Wille J. in *Phillips* v. *Eyre*[4] is to be interpreted as a "threshold requirement"[5] — by which, as the examples of other similar requirements by the learned writer seem to imply, must be understood a condition of jurisdiction. As this problem is closely related to the interpretation of the English choice-of-law rule, it will be discussed in that connection *infra.*

However, it is of some interest to examine somewhat more

[1] *Skinner* v. *East India Company* (1666), 6 State Trials 710; *Doulson* v. *Matthews* (1792), 4 T. R. 503; *British South Africa Co.* v. *Companhia de Moçambique* [1893] A. C. 602 H. L. The only exception to this rule is found in Admiralty where actions *in rem* for damage done by ships can be entertained whether the damaged property is realty or personalty: *The Tolten* [1946] P. 135. *The Mary Moxham* (1876), 1 P. D. 107 can be distinguished as the parties had agreed to submit to English law.

[2] A clear example of refusal to take jurisdiction for reasons of effectiveness seems to be *"Morocco Bound" Syndicate* v. *Harris* [1895] 1 Ch. 534, where Kekewich J. declined to give an injunction against copyright infringement in Germany: "If these defendants are not in England, they may set any such judgment at defiance, and unless they come to England, there will be no means of enforcing it against them."

[3] Copinger and Skone James on the *Law of Copyright*, 8 ed., 1948, p. 161. This view can possibly be supported by an Australian case, *Potter* v. *Broken Hill Proprietary Co.* (1905), V. L. R. 612, where the Supreme Court of Victoria took jurisdiction over a patent infringement committed in New South Wales, where the patent was registered. As the learned judge delivering the judgment of the court characterized the action as "local" (at p. 631) and yet proceeded to consider the merits of the case, it is submitted with respect that the reasoning of the court is inconsistent with well-established principles and authorities.

[4] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at p. 28.

[5] Yntema, H. E., Essays on the Conflict of Laws (review), (1949), 27 *Can. Bar R.*, p. 116, at p. 119.

closely, in the interest of clarity, the relations between such facts as constitute a bar to the jurisdiction of English courts and such as provide a substantive defence against an alleged tortious liability. This can conveniently be done by means of an illustration. Is the term "justifiable" as used by Willes J. in *Phillips* v. *Eyre*[1] to be considered as a bar to jurisdiction or as a substantive defence? The answer can only be found either by a study of the use of this term in the cases quoted by Willes J. or by considerations of a practical and logical order. In *Blad's case*, the first case where the defence of "justification" under *lex loci* was used in an action in tort, it seems fairly obvious that the defendant's plea was not as such considered an absolute bar to judicial proceedings.[2] In the next case in point, *Mostyn* v. *Fabrigas*, the court does not only require that the justification be proved but also proceeds to consider its merits.[3] In *Dobree* v. *Napier*, finally, the court draws the consequences of a foreign justification in plain words: "— — — we cannot consider the law to be, that where the act of the principal is lawful in the country where it is done, and the authority under which such act is done is complete, binding, and unquestionable there, the servant who does the act can be made responsible in the courts of this country for the consequence of such acts, to the same extent as if it were originally unlawful, merely by reason of a personal disability imposed by the law of this country, for contracting such engagement."[4] This language amounts to a clear acknowledgement of the fact that "justification" is a substantive plea, the merits of which are considered by the courts.

This solution is amply supported by theoretical considerations. Why is it that the courts occasionally use the technical device

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

[2] *Blad's case* (1673), 3 Swans. 603, *per* Lord Nottingham: ". . . it was an injury to the subject to stay his proceedings at law, and no injury to the Dane to let the suit go on, for whatever was law in Denmark would be law in England in this case, and would be allowed as a very good justification in the action . . ." What was barred was the right of the court to pronounce upon the intrinsic value of foreign official acts, once they had been proved; and this was a matter of public, not private, international law. Cf. *Blad* v. *Bamfield* (1673), 3 Swans. 604, at p. 607.

[3] *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161.

[4] *Dobree* v. *Napier* (1836), 2 Bing. (N. C.) 781, at pp. 796 ff.

of "bar to the jurisdiction"? The principle of effectiveness is only one of the underlying reasons. Another is the convenience of the courts — the refusal of French courts to entertain actions wholly unconnected with France may possibly serve to illustrate this policy. A third, finally, is the principle of *forum non conveniens*, where the principal consideration seems to be the interests of justice rather than those of the courts or the parties: it would be so difficult, or expensive, to put the *forum* in a position to adjudicate with any certainty upon the alleged facts that it simply refers them to another court. One of the principal advantages of such rules as define and limit the jurisdiction of courts in a certain country is that the courts are enabled to dismiss an action without creating a *res judicata* in respect of the disputed points as such. Indeed, it is submitted that this point of view may give some guidance to the solution of problems of jurisdiction in the absence of positive rules. Now, it is obvious that in cases where a foreign justification is pleaded, none of the reasons discussed above is opposed to a trial of the merits of the case resulting in a *res judicata*. Rules of public international law may impose certain limits upon the examination of the validity of a justification under foreign law, but apart from such obstacles — which are by no means particular to the field of torts in the conflict of laws — the court is certainly in a position to adjudicate upon the whole action brought before it. The test whether there is any valid reason against creating a *res judicata* by trying the intrinsic validity of a plea and passing a decision upon it may be of some assistance in determining the legal character of certain other objections raised by a defendant. Confronted with this test, the contention that a court should not take jurisdiction over copyright or patent infringements committed abroad would hardly seem sustainable. There is nothing in copyright or patent legislation which makes it radically different from such other rules of municipal law as provisions on unfair competition, traffic regulations, and similar rules, which are just as local in scope but have never been dismissed on the ground that the territorial character of the rules in question would prevent the court from assuming jurisdiction.

The statutory extension of the jurisdiction of English courts by Order XI of the Rules of the Supreme Court introduces the

forum delicti principle into English conflict law.[1] The principal interest of this innovation for present purposes lies in the necessity, thus imposed upon the courts, to determine the *locus delicti* and, having done so, to exercise their discretion in deciding whether service of notice abroad ought to be granted or not. The cases where the place of wrong has been discussed by the courts will be examined later;[2] in one case, at least, it is obvious that the court, in using the allowed discretion, followed the *forum non conveniens* doctrine.[3]

A special possibility to secure jurisdiction known in Scots law and some civil law codes is the doctrine of *arrestum ad fundandam jurisdictionem.*[4] Seasoned with the principle of *forum non conveniens*, this does not seem to imply any great dangers of hardship to the defendant.[5] In *S. S. Sheaf Lance* v. *S. S. Barcelo*[6] the Court of Session declined to uphold jurisdiction founded by arrest in a litigation between the owners of a Spanish and an English ship which had collided off the Spanish coast. In a case concerning a French charter-party in which Glasgow underwriters as co-plaintiffs provided the only link with Scotland, the House of Lords held that the arrestment of a ship belonging to the defendants was not sufficient to found jurisdiction, since it was found that "from the beginning to the end of the case there is not a breath of Scottish atmosphere".[7]

[1] Under Order XI, Rule I (ee), service of notice of a writ (or, if the defendant is a British subject or a foreigner present in the Commonwealth, service of the writ itself) can be granted "where the action is founded on a tort committed within the jurisdiction." Under O. XI, R. I (c), service or notice can be obtained when relief is sought "against any person or corporation domiciled or ordinarily resident within the jurisdiction." Finally, service can be had under O. XI, R. I, (g), "when any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person properly served within the jurisdiction."

[2] Cf. Heighington, A. C., in (1936), 14 *Can. Bar R.*, p. 389.

[3] *Kroch* v. *Rossell* (1937), 156 L. T. 379.

[4] Duncan and Dykes, *The Principles of Civil Jurisdiction as applied in the Law of Scotland*, 1911, pp. 71 ff.

[5] Jurisdiction was upheld in a libel action against two London journalists where the plaintiff, who was domiciled in Scotland, had founded jurisdiction by arresting some money due to the defendants in Edinburgh. *Longworth* v. *Hope and Cook* (1865), 3 M. 1049.

[6] *S. S. Sheaf Lance* v. *S. S. Barcelo* (1930), S. L. T. 445.

[7] *Sociètè du Gaz de Paris* case [1926] S. C. (H. L.) 13, *per* Lord Cave, at p. 17.

(e) U. S. A. The starting-point of the development of jurisdiction rules in those parts of the United States where the common law is in force was the older English case law and, generally speaking, the American rules in this field have developed along the same lines as the law of England.[1] The special conditions in which American conflict law operates, and to which reference has been made above, seem to provide the best explanation of such deviations from English common law rules as cannot be explained away as mere technicalities.

Some American common law jurisdictions have refused to follow the English rule of not entertaining actions to foreign land. "As between nations, this reasoning may be sound ... But the same difficulties do not exist with respect to land in another State", argues the Supreme Court of Arkansas in *Reasor Hill Corp.* v. *Harrison*;[2] the court finds that the "rule has no basis in logic or equity and rests solely upon English cases that were decided before America was discovered and in circumstances that are not even comparable to those existing in our Union." Most jurisdictions, including the federal courts, still refuse to assume jurisdiction over trespass to foreign land.[3]

The increasing number of accidents due to the circulation of motor vehicles has compelled the states of the Union to take legislative measures intended to facilitate service of writs upon motorists resident out of the jurisdiction. The device invented to satisfy this need is a statutory rule to the effect that the operation of a motor vehicle within the state should be "deemed equivalent to an appointment of the Registrar of Motor Vehicles (or similar officer of the state) as the driver's attorney upon whom process may be served" in any action against him arising from

[1] In an early case where a foreign cause of action was recognized, the U. S. Supreme Court seems to have relied upon the common American citizenship of the parties. *Mitchell* v. *Harmony* (1843), 13 How. 115. This argument has not been used in the following development. Cf. Beale, J., The Jurisdiction of Courts over Foreigners, (1913), 26 *H. L. R.* 193, at pp. 283 ff.

[2] *Reasor Hill Corp.* v. *Harrison* (1952), 249 S. W. 2d 994, at p. 995. Approving notes in (1952), *N. Y. U. L. R.* 27, p. 850; (1952), 65 *H. L. R.*, p. 1242. The same line was followed in an early case by the Supreme Court of Minnesota, *Little* v. *Chicago etc. R. R. Co.* (1896), 67 N. W. 846.

[3] Hancock, pp. 95 ff., Rabel, vol. 2, pp. 246 ff.

the operation of the motor vehicle.[1] In *Hess* v. *Pawlowski*[2] this rule was held contrary to the "due process of law" clause of the Federal Constitution, but the extension of state jurisdiction embodied in the statute seems to have been considered so useful that most states of the Union have now passed similar acts,[3] and the system seems to be recognized, although the courts have refused to allow such further extensions of the applicability of these laws as service upon the personal representative of the tortfeasor if he has died before the action is brought.[4]

Having examined some of the practical problems facing the courts whenever an action on a tort connected with more than one legal system is brought before them, we may be justified in considering briefly the theoretical aspects of the problem.

C. *Theoretical Discussion.* The theory which contends that a tort committed in a certain jurisdiction gives rise to an obligation defined by the law in force at the *locus delicti* can be attacked from many points of view. The essential objection seems to be that it does not give a true picture of what actually happens. It is fairly obvious that an "obligation" cannot lead an independent existence of this kind. The verbal symbol "obligation" itself is only an attempt to summarize, for reasons of convenience, in one word, a factual situation in which are projected certain historical facts and certain potential legal consequences. These consequences are in the first place determined by the law administered by the court which is likely to adjudicate upon the facts; in conflict cases, this law is the *lex fori*, and it seems almost a contradiction in terms to argue that the court is called upon to enforce an obligation born under the *lex loci*.

The "local law" and "homologous right" theories no doubt provide a more adequate description of facts. Here again, however, there are serious objections. In the first place they do not

[1] Scott, A., Hess and Pawlowski Carry on, (1950), 64 *H. L. R.*, p. 98. The first statute of this kind was that of Massachusetts, enacted in 1923.

[2] *Hess* v. *Pawlowski* (1927), 274 U. S. 352; (1927), 41 *H. L. R.*, p. 94.

[3] Scott, *op. cit.*, p. 100.

[4] *Leighton* v. *Roper* (1950), 91 N. E. 2d 876; *Martin* v. *Fischbach Trucking Co.* (1950), 183 F. 2d 53. On the attitude of Canadian courts to American statutes of this kind, see Richardson, B. V., Problems in Conflict of Laws relating to Automobiles, (1935), 13 *Can. Bar R.*, p. 201, at p. 207.

state any valid reasons why it should be that courts try to find and apply the legal rules of the place of wrong. Secondly, they hardly cover the solutions given by courts to such incidental questions as may be distinguished by means of characterization from the principal action, and to which other laws may be applied. If, for instance, the spouses A and B from country X, where no action lies between spouses, are involved in a motor car accident in country Y where such actions are allowed, and A sues B for negligent driving in the courts of country Z, where the action is barred, the court can arrive at three solutions, only one of which seems to be consistent with the "local law" and "homologous right" theories — namely a decision to the effect that the right to sue is incidental to the tort as such and accordingly governed by the *lex loci*. If, on the other hand, the courts of Z characterize the issue as a question concerning the matrimonial status of the parties, they will not allow the action; the same result is reached if the question is classified as procedural and thus subject to the provisions of the *lex fori*. In both these latter cases, the courts do not follow the law of the place of wrong, nor do they create and enforce a right similar to that which the injured spouse would have had in the courts of the *locus delicti*.[1]

If both these theories, which obviously give at least a consistent systematization of the simpler cases of international torts, fail to provide a satisfactory explanation of what is actually taking place in the courts, is it then at all possible to find a formula covering all the highly disparate phenomena known as torts in private international law? Before an attempt is made to examine possible answers to this question, some general remarks seem justified.

No deep inquiry into the nature of legal doctrine is needed to realize that owing to the particular nature of the material under discussion, two basic approaches are possible — the examination of legal problems *de lege ferenda* and the systematization of existing rules *de lege lata*. Now, it is fairly obvious that the obligation theory belongs to the first group: it is a programme of action just as much as an analysis; by using the term *obligatio*, pro-

[1] As has been pointed out by Professor Cavers, this objection has its greatest weight against the "homologous right" theory; Cavers, D. F., The two "Local Law" Theories, (1950), 63 *H. L. R.*, p. 822 (example at pp. 830 ff.).

gressive lawyers struck a familiar note in the courts, established a relationship between their new idea that the *lex loci* ought to be applied and the time-honoured principle of vested rights: that wherever a claim fulfilled the basic requirements of that convenient legal symbol, the obligation, it should be enforced. The obligation theory was the best weapon in the fight against such judicial habits as indiscriminate application of the *lex loci* or requirements of similarity between the alleged *lex loci* and the law of the court. *Why* these lawyers, Mr. Justice Holmes in the first place, considered the application of the *lex loci* desirable, is not explained by the theory as such; but this general attitude is the underlying rationale of the obligation theory, and this being so, the theory is not a theory at all in the strict sense of the word: it is a programme.

The "local law" theories, on the other hand, are clearly intended to cover actual facts; they examine *de lege lata* the solutions of courts and the rules laid down in statutes; they consequently fail, and must fail, to provide any clue as to *why* courts should behave in this way at all.

We now come to the question whether there is any formula, or symbol of legal language, which can conveniently embrace the various tort actions in private international law. In the earlier part of this chapter an attempt has been made to examine what actually happens in the *forum* in the consecutive stages of the action. The distinction between substance and procedure, the characterization of the cause of action, the choice of the place of wrong, the characterization of incidental questions as part of the tort action or as independent from it and subject to a different law — all these operations are governed by the *lex fori*. Thus the law of the court determines not only the applicable law but also the extent of its application. Whenever provisions of the *locus delicti* are allowed to operate, it is merely because they are grafted upon the *lex fori* — so far, the "local law" theories seem to be correct. On the other hand, the body of rules governing the action is hardly "local law" in any reasonable sense of that expression, for as we have tried to demonstrate above, as soon as the action is complicated either by the presence of third parties, by elements falling outside the traditional sphere of torts, or by connections with more than one jurisdiction, the ultimate decision of

the court is not likely to coincide with that which would have been rendered in accordance with any single "local" system of rules. Although it is certainly true that the conflict rules of the *forum* are not concerned with distributive justice, these rules nevertheless affect the outcome of the suit decisively by admitting or dismissing foreign provisions, and by referring certain problems to a certain foreign law according to the statutory texts, precedents, or habits of thought prevailing at the *forum*.

It is submitted that if legal "theories" are to be reduced to their proper functions — to explain objectively where objective explanation is possible and necessary, to classify legal phenomena according to objective criteria, for the convenience of learners, lawyers, and writers, and to provide, whenever possible, suitable instruments for analysis — if such a reduction is to be performed, it is hardly possible to sum up the practice of courts in conflict actions under one all-embracing formula. The considerations of policy which make courts and legislatures willing to apply foreign rules to certain actions can be made clear by historical research, *i. e.* by application of a method which is radically different from the arguments of lawyers in so far as it is free to take into consideration all those various elements which have contributed to a certain result. The lawyer sticks — and, it is submitted, must stick — to such explanations as can be summarized in the form of objective rules, even at the risk of nursing fictions. Mr. Pickwick's attorney in the action Bardell v. Pickwick could enlarge privately upon the importance of the jurors' breakfast and dining-habits, and the reader is at liberty to believe what he likes about the possible effects of these facts upon the verdict, but in court, or in legal writings, such a mode of reasoning would not be advisable. In such connections, the decision of the court must be interpreted in terms of rules. It is perhaps superfluous to add that conjectures as to the real reasons — historical, sociological, psychological or others — of a given decision may result in a "theory", but in an entirely different sense of that word, a sense which is hardly of any great interest to the lawyer (unless, of course, he happens to be a student of legal history, sociology, or psychology) precisely because it aims either at an explanation of a single event without any pretension to analyse rules, *i. e.* propositions applicable to an indefinite number of identical or basically

similar phenomena, or at an analysis in terms of statistical rules. Obviously, where legal provisions are the conscious results of legislation based upon political ideas or other considerations clearly expressed in the course of the legislative process, the lawyer is as free as anybody else to state the underlying *ratio* of such provisions, but in the conflict of laws, it would seem that the essential rule — that courts should apply foreign provisions in certain cases — has been tacitly accepted as an axiom by most civilized nations, and consequently, what confronts the student is mainly a body of precedents decided upon that axiom. A lawyer who is not willing to loose all contact with the everyday realities of courts can hardly do anything but accept the reasons given by those courts as the real grounds for their decisions.

On the other hand, whenever a legal writer puts forward suggestions concerning desirable solutions, is seems most consistent with lucidity of thought to declare openly his intention to do so, instead of comparing various possible solutions with certain "theories" and coming out in favour of that solution which conforms most closely to a "theory" which is in fact nothing but a piece of legislative policy.

What remains, then, is to collect the available material, to analyse and interpret it in the light of legal concepts — that term taken in its broadest sense as the whole arsenal of techniques which constitutes the structure of the law — and to arrange it in that order which will prove most helpful both for a proper comprehension of the system, for a discussion of its merits, and for the framing of suggestions *de lege ferenda.* If one common denominator is found to be of particular importance throughout the field of law under discussion, it may obviously lend its name to the whole complex of rules, but it should be understood that far from being an "explanation" or a "theory", this use of a certain term — whether it be *obligatio* or "local law" — amounts to no more than a matter of sheer technical expediency. In the conflict of laws, it may well happen that the *conflict rules of the forum,* which exercise such a decisive influence upon the various stages and elements of the action, constitute the only common denominator of particular importance, and that any term which pretends to embody an explanation of the decisions of courts, or the policy of legislatures, is unnecessary, if not erroneous.

Without pretending to push far into the dim departments of sociology and legislative history, we may finally venture to guess, with regard to the *real reasons* for the application of foreign provisions as opposed to *legal rules*, in which these reasons have found their technical expression, and to which the present study is devoted, that now as in the days of the great Italians and the Dutch advocates of the *comitas gentium*, the attitude of legislatures and other holders of political power is chiefly founded upon vague considerations of fairness and fear of retaliation — considerations which may or may not be robed in theoretical garments or enforced by knowledge of the historical development and existing "theories" — whereas the attitude of courts and judges depends upon the same knowledge, experience, habits of thought, and in the last resort, means of penal coercion, as secure obedience to other rules of law.

To approach the policies justifying the particular rule now under discussion — the tort rule in the conflict of laws — it seems safe to state that conflict rules being on the whole unaffected by such desires to promote specific ends in the interest of specific groups as characterize modern municipal legislation, the ultimate purpose of the tort rule, like that of all such rules, is the administration of justice. But not only must the venerable Goddess not be blind; she must be at least Janus-headed, for even more than in municipal tort actions, justice is achieved only by a delicate balancing of the interests of both parties. In contract cases, there is always some expression of the will of the parties, and justice will usually be satisfied if they are treated as they have expressed their desire to be treated. In torts, no such clue is given, and justice is consequently to be achieved by a weighing of social interests. In conflict cases, the additional processes of characterization and choice of law involve considerable risks for upsetting the system worked out in municipal laws. This risk, in itself, may be sufficient to make it highly desirable that the additional elements are allowed only a minimum of scope and that the courts endeavour to copy as closely as possible the distribution of economic losses and the prevention of wrongful acting established by one legal system. Considerations of predictability and of the social interest of the place of wrong, and last but not least, the necessity to undertake a rational choice of

some kind, all these facts contribute to make the *lex loci* more convenient than any other possible legal system. But the general rule must be modified considerably. The balance of justice created by the law of torts of a given country usually envisages typical, simple situations where both the parties involved are nationals of, or domiciled in, that country. When it is applied to the acts of foreigners, there seem to be few reasons why it should follow them longer than during their guest performance in the specific situation the *lex loci* deals with. To revert to the example of the two spouses above, there is no doubt that in country Y, they temporarily assume the roles of tortfeasor and victim as defined by Y law, but it is equally true that wherever they go, they retain their status as spouses under X law. It is for the *forum* to determine which of the two parts is the most important, and the technical device most appropriate for this task is the process of characterization and, in legal systems where that technique is admitted, renvoi.[1]

[1] An auxiliary method of arriving at equitable results in cases of this kind by distinguishing between national and territorial laws of the *locus* is suggested by Robertson, at p. 98. This solution would imply a particular kind of renvoi. Cf. Griswold, E. N., Renvoi Revisited, (1938), 51 *H. L. R.*, p. 1165, at p. 1205.

CHAPTER 3

THE NORMAL CHOICE-OF-LAW RULE

A. U. S. A. In the United States, it "is not seriously in dispute that the law governing the creation and extent of tort liability is that of the place where the tort was committed."[1] The older doctrine which required similarity between the foreign cause of action and the law of torts of the *forum* was generally rejected early in this century,[2] and is now prevailing only in a few jurisdictions.[3] Early cases show that the American courts were familiar with the *lex loci* doctrine long before Mr. Justice Holmes formulated his famous obligation theory.[4] Occasionally, a theoretical explanation of decisions based upon *lex loci* is given, normally in terms of the older "vested right" theory,[5] or by comparison with the enforcement of contractual rights.[6] The English *Phillips* v. *Eyre* doctrine,[7] as commonly understood, does not seem to

[1] *Buckeye* v. *Buckeye* (1931), 234 N. W. 342 (S. Ct. of Wis.), at p. 345. Cf. Goodrich, pp. 260 ff.

[2] *Lauria* v. *E. J. Du Pont de Nemours & Co.* (1917), 241 F. 687 (U. S. District Court, Eastern District of N. Y.), at p. 690: "I do not concede, however, the validity of the assumption that the exercise of jurisdiction in such cases is dependent upon the existence in the *forum* of a statute similar to the foreign statute under which the right of action arose." Cf. Hancock, pp. 27 ff.

[3] *London Guarantee & Accident Co.* v. *Balgowan Steamship Co.* (1931), 155 A. 334 (Court of Appeals of Md.), at p. 335; *Davis* v. *Ruzicka* (1936), 183 A. 569 (same court), at p. 569.

[4] *Smith* v. *Condry*, 1 Howard's Rep. (U. S.) 28, quoted in the *Cuczo* (1915), 225 F. 169 (U. S. District Court, District of Wash.) The case seems to have been misinterpreted in England as a support for the *lex fori* doctrine — see the pleading of Sir W. Balliol Brett, Q. C., in *The Halley* (1868), L. R. 2 P. C. 193, at p. 197.

[5] *Van Doren* v. *Pennsylvania R. Co.* (1899), 93 F. 260 (Circuit Court of Appeals, Third Circuit), *per* Bradford J., at p. 265.

[6] *Beacham* v. *Portsmouth Bridge Proprietors* (1896), 73 Am. St. Rep. 607 (S. Ct. of N. H.), *per* Chase J. at p. 608.

[7] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

have had any real influence upon American decisions,[1] and judges have even gone out of their way to condemn it.[2]

When a theoretical basis of the *lex loci* rule is discussed in modern cases, the obligation theory seems to furnish the most frequently quoted arguments. This is true, of course, in the first place, of those famous judgments in which Holmes J. expounded his theory that the tortious act gives rise "to an obligation, an *obligatio*, which, like other obligations, follow the person, and may be enforced wherever the person may be found."[3] Other great judges have followed suit,[4] and the obligation theory is still referred to, directly or indirectly, as the underlying rationale of judicial decisions.[5] Less frequently is the "local law" theory mentioned in courts,[6] and in the vast majority of modern American cases, application of the *lex loci* is considered as an axiom which needs no explanation. "The general and well-established rule seems to be that the law of the place where the tort was committed governs the right of action . ."[7]

Owing to the close relationship between the states of the Union,

[1] *Phillips* v. *Eyre* is quoted, *obiter*, with approval, in *Le Forest* v. *Tolman* (1875), 19 Am. Rep. 400 (S. Ct. of Mass), at p. 400, *per* Gray, C. J. Cf. Wharton, p. 520.

[2] *Walsh* v. *N. Y. & N. E. Ry. Co.* (1894), 39 Am. St. Rep. 514 (S. Ct. of Mass.), at p. 516, *per* Holmes J. In a similar case argued in the same court, it is not even mentioned: *Davis* v. *N. Y. & N. E. Ry. Co.* (1897), 58 Am. Rep. 938.

[3] *Slater* v. *Mexican National Ry.* (1904), 24 S. Ct. 581; 48 L. Ed. 900 at p. 903; *Davis* v. *Mills* (1904), 24 S. Ct. 692; 48 L. Ed. 1067, at p. 1070; *Western Union Tel. Co.* v. *Brown* (1914), 234 U. S. 542, at p. 547.

[4] *Loucks* v. *Standard Oil Co. of New York* (1918), 224 N. Y. 99 (S. Ct. of N. Y., Appellate Div'n), at p. 106, *per* Cardozo J.; *Salimoff* v. *Standard Oil Co. of New York* (1933), 262 N. Y. 220 (same court), at p. 223 *per* Pound C. J.

[5] *Chubbuck* v. *Holloway* (1931), 234 N. W. 314 (S. Ct. of Minn.); *Mertz* v. *Mertz* (1936), 3 N. E. 2d 597, at p. 598; *Bohenek* v. *Niedzwiecki* (1955), 113 A. 2d 509 (S. Ct. of Errors of Conn.), at p. 511.

[6] *The James McGee* (1924), 300 F. 93 (U. S. District Ct., Southern District of N. Y.), at p. 96, *per* Learned Hand, District Judge.

[7] *La Prelle* v. *Cessna Aircraft Co.* (1949), 85 F. Supp. 182 (U. S. District Court, District of Kansas), at p. 183; similarly: *Orr* v. *Ahern* (1928), 139 A. 691 (S. Ct. of Errors of Conn.), at p. 692; *Young* v. *Masci* (1933), 53 S. Ct. 599; 77 L. Ed. 1158, at p. 1161 (*per* Brandeis J.) *Ormsby* v. *Chase* (1933), 54 S. Ct. 211; 78 L. Ed. 378, at p. 380, *per* Butler J.; *Reed* v. *Barton* (1934), 73 F. 2d 359 (S. Ct. of N. Y., Appellate Div'n), at p. 361.

the exception of public policy is seldom used.[1] It is impossible to find a formula which covers the various policies considered by courts in the different American jurisdictions to be so essential that they raise an absolute bar to the application of diverging foreign law.[2]

What criticism has been directed against the American doctrine has not been concerned with the *lex loci* rule as such but with the Restatement rule on the place of wrong; it will be discussed in a following chapter. A few recent decisions have emphasized the importance of applying the law prevailing in the "social environment" of the victim and the tortfeasor,[3] but it is not permissible to infer from a small number of cases dealing with highly particular facts that the well-established *lex loci delicti* doctrine should be in any way discredited or declining.

B. *France.* It has been shown that most influential French writers on the conflict of laws have expressed strong opinions in favour of the *lex loci delicti commissi* as the most apposite standard by which to judge delicts of foreign venue, and it might be expected that the courts would follow these opinions.[4] From the point of view of the courts, however, the problem is primarily one of statutory interpretation. In the words of article 3 of the C. c., laws concerning order and safety are binding upon all those who reside within French territory.[5] There is no agreement among writers on the question whether articles 1382—1386 of

[1] Cf. the famous *dictum* of Cardozo J. in *Loucks* v. *Standard Oil Co. of N. Y.* (1918), 224 N. Y. 99, at p. 111.

[2] Holmes J. seems to have considered the limitation of liability granted to shipowners an interest of American public policy in *The Titanic* (1914), 34 S. Ct. 754; 233 U. S. 718 (at p. 732). Cf *Herzog* v. *Stein* (1934), 191 N. E. 23 (S. Ct. of N. Y., Appellate Div'n), at p. 25, where the survival of the cause of action against the tortfeasor's estate was deemed repugnant to New York public policy; a similar decision is *Hughes* v. *Fetter* (1950), 42 N. W. 2d 452 (S. Ct. of Wis.), at p. 455; cf. (1951), 49 *Mich. L. R.*, p. 756, at p. 758, and (1950), 64 *H. L. R.*, p. 327.

[3] *Schmidt* v. *Driscoll Hotel, Inc.* (1957), 82 N. W. 2d 365, at pp. 367 ff., and cases quoted at p. 368, particularly *Gordon* v. *Parker* (1949), 83 F. Supp. 40; *Clunet* 1950, pp. 312 ff.

[4] Batiffol, p. 604.

[5] *"Les lois de police et de sûreté obligent tous ceux qui habitent le territoire."* On the extension of *"habitent"* which is now interpreted as "are present", see Batiffol, p. 603.

the Civil Code belong to this group of laws. The issue is further complicated by the notion of public policy (*ordre public*). Whereas many writers and the majority of courts consider the provisions of the Code civil concerning delicts and quasi-delicts as laws of order and safety or at least as rules of a similar kind,[1] it has also been contended that these provisions concern public policy and must consequently always be considered by French courts.[2]

The difference between these theoretical standpoints does not affect the outcome of an action for a tort committed in France: they both concur in holding that French law is applicable. When an action founded upon a foreign tort is brought before the courts, however, the advocates of the *ordre public* doctrine contend that French law applies as any consideration of foreign legal provisions would be repugnant to French public policy,[3] whereas the partisans of the other theory stress the territorial validity of laws of order and safety and thus come out in favour of the *lex loci*.[4]

The hesitations expressed by writers seem to have been shared for a long time by the courts. On tort actions arising in France, French law has been universally applied, whether the provisions

[1] Batiffol, p. 603; Donnedieu de Vabres, pp. 208 ff., 588 ff; Niboyet, tome 5, pp. 147 ff.; Cour de Cassation 18. 7. 1895, *S.* 95. 1. 305 (at p. 307), *Clunet* 1896, p. 130; Cour de Cassation 24. 11. 1897, *S.* 98. 1. 311, at p. 312; Cour de Cassation 15. 2. 1905, *S.* 1905. 1. 209, at p. 212; Tribunal civil de Valenciennes 19. 12. 1935, *Revue* 1936, p. 468, at p. 469; Tribunal civil de la Seine 16. 6. 1936, *S.* 1939. 2. 1. (at p. 2), *Clunet* 1937, p. 279.

[2] Mazeaud, H., Conflits de lois et compétence internationale, *Revue* 1934, p. 377, at pp. 381 ff.; Mazeaud, tome 3, pp. 341 ff.; Tribunal civil de la Seine 28. 1. 1911, *Clunet* 1912, p. 185, at p. 186. A more liberal and — it is submitted — more rational approach to the principle of public policy is advocated in a recent monograph on this topic, P. Lagarde, *Recherches sur l'Ordre Public en Droit International Privé*, Paris 1959. The writer argues that *"la disposition étrangère n'est pas écartée parce qu'elle est contraire à un principe fondamental du droit du for. Elle est écartée parce qu'intégrée dans le droit du for, elle ne peut se combiner de façon cohérente avec les diverses dispositions de celui-ci avec lesquelles elle se trouve en relation."* (at p. 238.)

[3] Mazeaud, tome 3, pp. 343 ff.

[4] References given in note 1 above. The same result is reached by authors who define *"lois d'ordre public"* as identical with *"lois de police et de sûreté":* Pillet, p. 416; Valéry, p. 973. To complete the confusion, one learned author argues that the enforcement of the *lex loci delicti* is dictated by *international "ordre public."* Weiss, A., *Manuel de droit international privé*, 9e éd., 1925, p. 582.

of article 3 C. c.[1] or the public argument have been invoked,[2] or the application of French law as both *lex fori* and *lex loci* has been taken for granted without further explanation.[3] Actions on torts committed abroad, on the other hand, have received a varied treatment at the hands of French courts, and it is not until recently that the *Cour de Cassation* has laid down an unequivocal *lex loci* rule.[4] In an early case, foreign (Peruvian) law was allowed to influence the assessment of damages for a negligent breach of duty by a French business agent abroad,[5] but on the whole the courts have been notably reluctant to apply any other law than their own. In a famous action brought by an Englishman who had been given by the Prince of Monaco a monopoly on banking within that state, against a French citizen who had performed certain banking operations in Monaco, the courts refused to grant recovery on the ground that monopolies were repugnant to French public policy.[6] The same result was achieved in an action on a collision of ships in Danish waters on the ground that the Danish plaintiff must have submitted to the *lex fori* when sueing the owner of a French ship in a French court.[7] In a number of cases,

[1] See cases in note 1, p. 80.

[2] See cases in note 2, p. 80.

[3] Cour d'appel de Rouen 26. 6. 1907, *Clunet* 1908, p. 776; Cour de Cassation 24. 2. 1936, *S.* 1936. 1. 161; *D. P.* 1. 1936. 49; *Clunet* 1937, p. 70. One Belgian decision uses the "social purposes" test suggested by Pillet to arrive at the application of Belgian law (*lex loci* and *fori*) in Tribunal civil de Liège 4. 11. 1929, *Clunet* 1931, p. 733.

[4] Cour de Cassation 25.5.1948, *S.* 1949. 1. 21 (note Niboyet); *D.* 1948. J. 357 (note Batiffol); *Clunet* 1946—1949, p. 38; *Revue* 1949, p. 89.

[5] Cour de Cassation 9. 6. 1880, *S.* 81. 1. 449; *Clunet* 1880, p. 394. The conduct of the defendant was measured by the standard of art. 1382 C. c., not by the foreign law (*S.*, p. 451). In Cour de Cassation 16. 5. 1888, *S.* 91. 1. 509; *Clunet* 1889, p. 664, the foreign law was not proved and the court consequently proceeded on the French rules. In Cour d'appel de Paris 23. 6. 1899, *Clunet* 1901, p. 128, finally, the court applied the *lex "loci actus"*, thus evidently considering the case from a contractual point of view.

[6] Cour de Cassation 29. 5. 1894, *S.* 94. 1. 481; *Clunet* 1894, p. 862.

[7] Cour d'appel de Rennes 7. 1. 1908, *Clunet* 1908, p. 1101. In Cour d'appel d'Aix-en-Provence 23. 1. 1899, *Clunet* 1901, p. 104, on the other hand, British shipowners were not granted permission to abandon ship and freight to escape from further liability as normally provided by French maritime law.

finally, French law has been applied without any explanation.[1] A somewhat more liberal attitude seems to have been prevailing in such interprovincial conflicts as are due to the fact that German civil law was in force in the provinces conquered by the French in the first Great War.[2] After the decision of the *Cour de Cassation* in 1948,[3] it seems reasonable to expect that the courts will apply the *lex loci* principle which has been advocated for so many years by French scholars. In view of the "homeward trend" usually prevailing in French courts, the decision of the Supreme Court was particularly strong: the action was brought by the widow of a French workman killed in Spain by an explosion allegedly caused by the negligence of another Frenchman. The court refused to apply the presumption of liability established by art. 1384 C. c. against the alleged tortfeasor's employers. The implication of this is, as a writer has pointed out, that foreign law must be proved by the plaintiff in support of the right he claims and not by the alleged tortfeasor as a matter of defence.[4]

C. *Germany.* Before the BGB came into operation in 1900, the situation in the then German Empire was, for conflict purposes, similar to that prevailing in the U. S. A. Within the national and economic unity of the Reich, different legal systems — old German common law (*Gemeines Recht*), Prussian civil law, and the *Code Napoléon* being the most important — were in force, and conflict cases were therefore relatively frequent. Under the influence of Savigny and Wächter, some early decisions were based upon the *lex fori*,[5] but the *Reichsgericht* soon developed a *lex loci* doctrine which was applied in German inter-state litigations to delicts as

[1] Tribunal civil de Montpellier 13. 1. 1932, *Clunet* 1932, p. 1001. The provision of art. 792 C. c. was applied against tortfeasors in Argentine for an allegedly tortious act committed in that country. Cour d'appel de Paris 3. 12. 1937, *Clunet* 1938, p. 312; French law applied to an accident on board an English yacht.

[2] Cour d'appel de Colmar 15. 1. 1936, *Clunet* 1936, p. 626.

[3] Cour de Cassation, 15. 5. 1948, *S.* 1949. 1. 21; *D.* 1948. J. 357; *Clunet* 1946—1949, p. 38; *Revue* 1949, p. 89.

[4] Note J.-P. Niboyet in *S.* 1949. 1. 21; at p. 22. Cf., in the same sense, Cour d'appel de Paris in *Clunet* 1956, p. 1009.

[5] Lewald, p. 260; Binder, p. 407.

well as quasi-delicts.[1] To justify the enforcement of German law in cases where foreigners were involved, a doctrine similar to the French theory of the universal operation within the territory of laws of order and safety was occasionally invoked.[2]

Most of those suits concerning unlawful acts by Germans abroad which came before the courts in this early period were concerned with infringements of trade marks and trade names. The application of German law was secured by the theory that industrial property of this kind is a right closely connected with the personality of its owner (*Persönlichkeitsrecht*) and as such not territorially limited.[3] When the defendant had a legally protected right in the foreign country, however, the conflict was solved by recognition of the *lex loci* as valid in preference to all other laws within its territory.[4]

Public policy was resorted to in a case where the vicarious liability of an English shipowner for the acts of a compulsory pilot under the (Russian) *lex loci* was sought to be enforced. The court characterized this liability as "unjust and condemnable" but also went out of its way to emphasize that the decision did not constitute a *res judicata*, thereby intimating that it was open for the plaintiff to try his luck elsewhere.[5]

It seems to have been the intention of the committee of lawyers drafting the Preliminary Dispositions of the BGB to consecrate the customary *lex loci* principle by a positive rule, but for political reasons this project was abandoned, and the prevailing doctrine can only be found as the implied premise of article 12 of the Preliminary Dispositions, which lays down the rule that a German national who has committed a tort abroad will not be held liable

[1] RG 1882. 20. 9., *RGZ* 7, p. 374, at p. 378 (a case of wrongful arrest); RG 1887. 23. 9., *RGZ* 19, p. 382, at p. 383: *"Entschädigungsansprüche aus Delikten sind nach dem am Orte der That geltenden Rechte zu beurteilen."* RG 1895. 4. 11., *RGZ* 36, p. 27; *RG* 1896. 1. 7., *RGZ* 37, p. 181.

[2] RG 1888. 30. 5., *RGZ* 21, p. 136, at p. 140: *"unter deutscher Territorialhoheit"*.

[3] RG 1886. 2. 10., *RGZ* 18, p. 28, at pp. 29 ff. The fact that the defendant was a German national was mentioned in support of the application of German law; RG 1903. 12. 5., *RGZ* 54, p. 414, at p. 416.

[4] RG 1899. 7. 11., *RGZ* 45, p. 143, at p. 145.

[5] Lewald, pp. 260 ff; von Schelling, F. W., Unerlaubte Handlungen, *RabelsZ.* 3, 1929, p. 854, at p. 864. RG 1892. 25. 6., *RGZ* 29, p. 90, at p. 96. The facts are closely similar to those in *The Halley* (1868), L. R. 2 P. C. 193.

where German municipal law would not create a liability and that German rules also dictate the maximum liability incurred.[1] The *Reichsgericht* has repeatedly stated that no change of the old-established rule was effected or intended by the BGB.[2] The exception in favour of German subjects, which has been violently criticized by writers, does not mean that the *lex loci* rule is abandoned in such cases; German law is super-imposed, as it were, as an ultimate control over the material result obtained by application of the foreign rules. There is no agreement between writers as to what provisions of German law are relevant and to what extent they are to be applied.[3] A further step towards the exclusive application of German law in cases where German citizens are involved was taken during the last war, when it was enacted in a statute (*Verordnung* 7. 12. 1942) that all claims for damages arising between Germans abroad should be subject to the *lex patriae.* These rules may have had their justification at the time — most actions were presumably between members of the German armed forces — but as they still seem to be considered as valid,[4] they imply a considerable and hardly justifiable deviation from the general principle.

Upon the whole, however, German decisions after the coming into force of the BGB follow the lines already drawn up by the *Reichsgericht.* As to torts committed by foreigners in Germany, there has, of course, been no change,[5] and the empire of the *lex loci* has been acknowledged on principle in cases where recovery has been sought against Germans for delicts abroad.[6] The only

[1] Von Schelling, *op. cit.*, pp. 864 ff.

[2] RG 1904. 25. 4., *RGZ* 57, p. 142, at p. 145: *"Es ist eine deliktsähnliche Obligation, ein ein Schuldverhältnis begründender gesetzlicher Tatbestand in Frage, für den, wie für die unerlaubte Handlung, nach den für das deutsche Recht auch nach dem Inkrafttreten des Bürgerlichen Gesetzbuches, dessen Einführungsgesetz in Art. 12 den Gegenstand nur unvollständig geregelt hat und hat regeln wollen, geltenden Normen des Internationalen Privatrechts das Recht zur Anwendung kommt, in dem der zum Schadenersatz verpflichtende Tatbestand sich verwirklichte.* RG 1906. 8. 11., *Clunet* 1909, p. 212.

[3] Binder, p. 406; Lewald, pp. 268 ff.

[4] Binder, pp. 409 ff.

[5] OLG Nürnberg 1934. 4. 1., *IPRspr.* 1934, Nr. 26; Bundesgerichtshof (BGH) 1956. 21. 12., *BGZ* 23, p. 65, at p. 67.

[6] OLG Karlsruhe 1931. 28. 10., *IPRspr.* 1932, Nr. 41; OLG München 1932. 6. 2., *IPRspr.* 1932, Nr. 42.

obvious exception from the principle are cases of unfair competition and infringements of rights of industrial property. The result — application of German law to such acts committed abroad by German firms — has generally been achieved by fictitiously locating the tort to Germany; the implication of these decisions will be discussed later.

The protection of German citizens created by art. 12 of the EGBGB seems to have worked out in practice as a rule of concurrent actionability; after establishing the liability of the tortfeasor under the *lex loci*, the courts have considered such German provisions as deal with damages — not only the rules of the BGB on tortious liability.[1] Thus, in a number of cases, German statutes of limitation have been held to bar recovery for torts committed by Germans abroad.[2]

It has been shown above that the *lex loci* principle, generally advocated by writers on the conflict of laws, is equally acknowledged by courts in the U. S. A., France and Germany.[3] Where the *lex loci* coincides with the *lex fori*, the principle is almost without exception; when called upon to apply a foreign *lex loci*, on the other hand, courts in the European countries have been more reluctant, and a tendency in favour of the *lex fori* is clearly discernible; where nationals of the *forum* country have been involved, the attraction of the law of the court seems to be particularly strong. To appreciate objectively the prevailing English doctrine it is necessary to bear in mind that few countries, except the United States, can show a clear record of a majority of decisions uninfluenced by the *lex fori*.

D. England, Scotland and the British Commonwealth. (a) Early cases. As mentioned earlier, English courts had taken jurisdic-

[1] RG 1919. 30. 5., *RGZ* 96, p. 96, at p. 98. Held, *"dass aber die Ansprüche nur dann und insoweit zuerkannt werden dürfen, als sie nach beiden Rechten übereinstimmend begründet erscheinen."* OLG Karlsruhe 1929. 28. 2., *IPRspr.* 1929, Nr. 51.

[2] RG 1927. 29. 9., *RGZ* 118, p. 141, at pp. 142 ff.; RG 1930. 8. 7., *RGZ* 129, p. 385, at pp. 386 ff.; cf. a case from the Saar, where German law was in force: Tribunal supérieur de la Sarre 1930. 2. 12., *Revue* 1933, p. 146.

[3] In a few continental countries and in some non-European states the *lex loci* principle is enacted in statutes; see Schnitzer, vol. 2, p. 675. A survey of the rules prevailing in most European countries is given in Binder, pp. 418—422, 425—428, 454—457.

tion over foreign torts long before the basis of modern development was laid by Willes J. in *Phillips* v. *Eyre*.[1] In those early days, for obvious reasons, the judges were not concerned with the problems created by the intermediary stages of characterization and choice of law. The question, as seen by the courts, was a direct one: shall we or shall we not give relief to this plaintiff? It was considered and answered in terms of the English law of torts. Although it is difficult to find explicit evidence in support of this description in the laconic reports of the time, it seems fairly obvious that such suits were instituted in the then prevailing forms of action.[2]

However, the foreign origin of the action created a particular problem unknown in entirely domestic cases. The acts complained of could, in one way or another, be "justified" at the place where they were committed. In a series of cases discussed earlier in the present study — *Blad's case*, *Mostyn* v. *Fabrigas* and *Dobree* v. *Napier*[3] — such defence was admitted, not because the court made a choice of law, but because considerations of fairness to the defendant required that "whatever was law in Denmark would be law in England . ."[4] in these cases.

If, on the other hand, no justification could be found, the courts granted recovery on the same conditions as if the act had been committed in England — where, indeed, it was fictitiously presumed to have been committed.[5] Where the tort had been committed within the jurisdiction, and its only international element

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

[2] In *Skinner* v. *East India Co.* (1666), 6 State Trials 710, the action is described as "assault, trespass to chattels and trespass to land". *Blad* v. *Bamfield* (1673), 3 Swans. 604 was a suit to stay "several actions commenced at law in trespass and trover for seizing certain goods of the defendants. . . ." *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161 was an action for false imprisonment, and *Doulson* v. *Matthews* (1792), 4 T. R. 503 is reported as an action in trespass.

[3] *Blad's case* (1673), 3 Swans. 603; *Blad* v. *Bamfield* (1673), 3 Swans. 604; *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161; *Dobree* v. *Napier* (1836), 2 Bing. (N. C.) 781.

[4] *Blad's case* (1673), 3 Swans. 603, *per* Lord Nottingham.

[5] *Skinner* v. *East India Co.* (1666), 6 State Trials 710; *Madrazo* v. *Willes* (1820), 3 Barn. & Ald. 353. In *Rafael* v. *Verelst* (1775), 2 W. Black. 983, the action was not maintained, as the proved facts did not create a liability in tort under English rules. *Ekins* v. *East India Co.* (1717), 1 P. Wms. 395 is possibly also a case in point.

was the foreign nationality or domicile of either of the parties, this rule was of course, applied *a fortiori*.[1]

The practical needs now met by the process of characterization were satisfied by the particular structure of the English municipal law of torts. The established forms of action provided procedural "threshold requirements" as well as substantive rules, or, to put it more exactly, in consequence of the principle *ubi remedium, ibi jus*, the distinction between procedural and substantive law was not actual to the minds of the judges. To obtain recovery for a tort, whether English or foreign, the plaintiff had to commence a proper action at law, and once the action was instituted and its cause was proved, it automatically called for its own specific remedy.[2] That English courts admitted actions founded upon foreign torts and gave the plaintiff the relief provided by English law did not mean that foreign rules were completely disregarded. Before recovery was granted, foreign law had to be consulted in order to ascertain whether the interest or property attacked by the tortfeasor was a legally recognized interest under *lex loci*. In *Madrazo* v. *Willes*,[3] the defendant, an officer in the Royal Navy, had seized a Spanish slave-trader's ship and set the slaves at liberty. Recovery was granted, as the plaintiff had, under Spanish law, "a legal property in the slaves, of which he has, by the defendant's act, been deprived."[4] The act complained of in this action can certainly not be considered as "actionable if it had been committed in England."[5] Slavery had been expressly condemned in the strongest terms by Act of Parliament. On the other hand, the act was of "such a character"[6] — trespass to chattels — as to be actionable in England, once the legal interest in the property had been established. Foreign law did not create a liability "in respect of an act which according to its own principles (*i. e.* the principles of English law) imposes no liability

[1] *Pisani* v. *Lawson* (1839), 6 Bing. (N. C.) 90.

[2] In the assessment of damages, the court took into consideration foreign law, or at least the economic conditions prevailing at the *locus delicti*, *Ekins* v. *East India Co.* (1717), 1 P. Wms. 395.

[3] *Madrazo* v. *Willes* (1820), 3 Barn. & Ald. 353.

[4] *per* Bayley J. at p. 354.

[5] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at p. 28 *per* Willes J.

[6] *ibid.*

on the person from whom damages are claimed,"[1] but was "one of the facts upon which the existence of the tort, or the right to damages, may depend".[2]

In one early case, *Scott* v. *Lord Seymour*,[3] the Exchequer Chamber had to deal with a clear discrepancy between English and foreign law. The defendant had committed an assault against the plaintiff in Naples, and was now sued for damages in England. It was pleaded for the defendant that under the law of Naples no civil recovery could be granted until criminal proceedings had resulted in a verdict against the defendant, and that such proceedings were pending in Naples. Many interesting *obiter dicta* were delivered in this case, but the *ratio decidendi* was obviously that the defendant's plea did "not contain any averment that damages might not be recovered by the law of Naples and without such an averment ... it may be taken as against the defendant that they might be recovered."[4] Thus the question of choice of law was not ultimately raised, and the presumption of identity between English and foreign law was applied. The contention that no recovery could be granted without a criminal conviction was treated as "an objection to procedure merely, which must be determined by the *lex fori*."[5]

The first time English courts were confronted with a foreign tortious liability unknown as such in their own legal system was in *The Halley*,[6] where recovery was sought against a British shipowner for damage done to a Norwegian ship in Belgian waters. At the time of the collision, a Belgian compulsory pilot was in charge of the British ship. Under English law as it stood at the time, shipowners were exempted from liability for the acts of compulsory pilots whereas such liability existed under Belgian law. In the Court of Admiralty, Sir R. Phillimore allowed

[1] *The Halley* (1868), L. R. 2 A. C. 193, *per* Selwyn L. J. at pp. 203 ff.

[2] *ibid.*

[3] *Scott* v. *Lord Seymour* (1862), 1 H. & C. 219.

[4] *per* Wightman J., speaking for the Court, at p. 234.

[5] *ibid.*, at p. 233. Another case in point is *Cope* v. *Doherty* (1858), 4 K. & J. 369, where the Vice-Chancellor, Sir W. Page Wood, held, *obiter*, that he should "be competent to administer American law between Americans coming here for relief." (at p. 391.). American law was not proved, however, and English law was applied.

[6] Cf. the German case RG 1892. 25. 6., *RGZ* 29, p. 90,

the plaintiff to recover; the judgment was reversed in the Privy Council. The principal question was, in the words of Selwyn L. J., "whether an English Court is bound to apply and enforce that law (*i. e.* the foreign *lex loci*) in a case, when according to its own principles, no wrong had been committed by the defendant, and no right of action against him exists."[1] The learned Lord Justice distinguished between two groups of cases in which foreign law was pleaded. Choosing as an example of the first group a collision on a road in a foreign country where the rule of the road at the place of collision may be an indispensable element in the determination of the question whether fault or negligence can be found, Selwyn L. J. held that in cases of this type the English Court admits the proof of foreign law as one of the facts upon which the existence of the tort, or the right to damages may depend, and it "then applies and enforces its own law so far as it is applicable to the case thus established."[2] The other group of cases consists, in the opinion of the Lord Justice, of acts which according to the principles of English law create no liability. The case under consideration was referred to this latter category and recovery was consequently refused.

(b) Phillips v. Eyre. *Phillips* v. *Eyre*[3] was a case of the same character as those early cases where a defendant pleaded a particular justification under the *lex loci*, in defence of an act which would otherwise have been tortious. The facts were strikingly similar to those in *Mostyn* v. *Fabrigas*.[4] The defendant, acting as Governor of Jamaica, had ordered the plaintiff to be arrested and deported under circumstances normally amounting to false imprisonment. However, the incriminated acts were committed in the course of quenching a rebellion in the island, and after peace had been restored, the Jamaican legislature passed an Act of Indemnity specifically exempting the Governor and other officers of the Crown from any liability for such acts as had been committed in good faith towards the quenching of the rebellion. The pleadings concentrated upon the validity of this

[1] *The Halley* (1868), L. R. 2 P. C. 193, at p. 202.
[2] At p. 204.
[3] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.
[4] *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161.

Act which was contested by the plaintiff.[1] In the Exchequer Chamber, Willes J. upheld the validity of the Act. He could have left it at that — once the justification was recognized, the plaintiff was barred from recovery — but he went out of his way to formulate a general rule concerning foreign torts in English courts. Writers have shown that the learned judge took a particular interest in this topic and that he was familiar with Continental theories of the conflict of laws; he may have seen an opportunity to forward his views in this case.[2]

After dealing with the plaintiff's contention that even if the Act of Indemnity was valid in Jamaica, it could not deprive the victim of a tort of his vested right of action in England, Willes J. set forth a theory of the legal nature of tortious rights of action. "The obligation," said the learned judge, "is the principal to which a right of action in whatever court is only an accessory, and such accessory, according to the maxim of law, follows the principal, and must stand or fall therewith . . ., the civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law."[3] He then proceeded to analyse the law of England in respect of foreign torts: "Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country; but there are restrictions in respect of locality which exclude some foreign actions altogether, namely those which would be local if they arose in England, such as trespass to land: *Doulson* v. *Matthews*, and even with respect to those falling within that description our courts do not undertake universal jurisdiction. As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England; therefore, in *The Halley*, The Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium

[1] The problem created by the retrospective character of the Act is discussed in Mann, F. A., The Time Element in the Conflict of Laws, (1954), 31 *B. Y. I. L.*, p. 217, at p. 235 and p. 242 f.

[2] Smith, C., Torts and the Conflict of Laws, (1957), 20 *M. L. R.*, p. 447, at pp. 451 ff.

[3] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at p. 28.

for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law. Secondly, the act must not have been justifiable by the law of the place where it was done. Therefore, in *Blad's case*, . . . Lord Nottingham held that a seizure in Iceland, authorized by the Danish government and valid by the law of the place, could not be questioned by civil action in England."[1]

The key words of the twofold rule in *Phillips* v. *Eyre*[1] are "actionable" and "justifiable", and there is litte agreement between courts and writers as to the meaning of these expressions.[2]

"Actionable", in the first place, can mean "such that an action would lie in respect of the tort, if proved". This is the traditional interpretation.[3] Professor Yntema has contended that the word can also refer to a "threshold requirement" and thus be synonymous with "cognizable" or "triable".[4] It is submitted, finally, that crossing the clearcut distinction of modern conflict terminology between substance and procedure, the expression can be intended to serve, in a rough and approximative way, what we would now call purposes of characterization. The means at our disposal for finding out the correct meaning of Willes J.'s expression are an analysis of the normal meaning of the words in contemporary usage and a careful examination of such elements in the context as may provide a clue.

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at p. 28.

[2] The literature on *Phillips* v. *Eyre* is considerable. Apart from English and American textbooks, the case has been discussed extensively in articles by Robertson, A. H., in (1940), 4 *M. L. R.*, p. 27; Hancock, M., in (1940), 3 *U. of Tor. L. J.*, p. 400; Falconbridge, J. D., in (1945), 23 *Can. Bar R.*, p. 311; Yntema, H. E., in (1949), 27 *Can. Bar R.*, p. 116 and (1955), 4 *I. C. L. Q.*, p. 1; Spence, D. B., in (1949), 27 *Can. Bar R.*, p. 661; Schmitthoff, C. M., in (1949), 27 *Can. Bar R.*, p. 816; Falconbridge, J. D., in *Essays on the Conflict of Laws*, 2d ed., 1954, at pp. 809 ff; Thomas, J. A. C., in (1954), 3 *I. C. L. Q.*, p. 651; Smith, C., in (1957), 20 *M. L. R.*, p. 447.

[3] Dicey, pp. 941 ff.

[4] Yntema, H. E., in Essays on the Conflict of Laws (review), (1949), 27 *Can. Bar R.*, p. 116, at pp. 117 ff.; same author in Dicey, an American Commentary, (1955), 4 *I. L. Q.*, p. 1, at pp. 8 ff. This is presumably also the opinion of Professor Hancock in Torts in the Conflict of Laws, (1940), 3 *U. of Tor. L. J.*, p. 400 and of Spence, D. B., in Conflict of Laws in Automobile Negligence Cases, (1949), 27 *Can. Bar R.*, p. 661.

It is submitted that the word "actionable" in the mouth of a mid-Victorian judge cannot be understood without some reference to the traditional forms of action in tort. It is true that the reform acts of 1832 and 1833 and the Common Law Procedure Act, 1852, had diminished the importance of the forms of action and initiated the development which led to their abolition in 1873, but as late as 1913 Maitland could write that "the forms of action we have buried, but they still rule us from their graves,"[1] and it is likely that this posthumous ascendancy was even stronger at the time when Willes J. delivered his famous judgment. In Tomlins' *Law Dictionary*, the word "actionable" is defined by a long series of examples, most of which seem to convey the meaning "of such a nature that the plaintiff would recover", but there is at least one example where the word has an obvious bearing upon the procedural question of the competence of courts.[2] Thus even a very superficial inquiry into the proper meaning of "actionable" as an isolated dictionary item gives sufficient material for the negative conclusion which might be expected. Under the system of forms of action, substance and procedure were so closely interwoven that the adjective derived from "action" stands for both "triable", "cognizable" and for "creating a liability."

Can the verbal context of the judgment provide any clues more conclusive than an analysis of contemporary semantics? It has been contended that before laying down the famous rule, Willes J. gave it a theoretical explanation which went almost as far as the American obligation theory, and that it is impossible that he immediately abandoned his position to enunciate a rule which seems to come nearer to an unmitigated *lex fori* theory. The "wrong", in this interpretation, means the tort as legally defined by the foreign *lex loci*, and the word "actionable" would have a procedural meaning and refer to the preliminary problem of

[1] Maitland, F. W., *Equity, also the Forms of Action at Common Law*, 1913 at p. 296.

[2] Tomlins' *Law-Dictionary*, 1835, article Action II: 1, "these words, spoken of a preaching parson, *Parratt is an adulterer* . . .; not actionable, for it is a spiritual defamation, and punishable in that court. Cro. Eliz. 502." But cf. other examples and Cockburn, C. J. in *Wason* v. *Waller* (1869), L. R. 4 Q. B., at p. 82: ". . . whether a faithful report in a public newspaper of a debate in either house of parliament . . . is actionable at the suit of the party . . .".

cognizability at the *forum*.[1] The argument is, of course, far from conclusive. The "obligation theory" expounded by Willes J. is an answer to the contention, put forward by counsel for the plaintiff, that the vested right of action created by the wrong was universal, and that the Jamaican Act of Indemnity could avoid it only in Jamaica, not in jurisdictions where the act was not in force. The learned judge, with his interest in the conflict of laws, may have seen fit to clarify this issue *en passant*, and it is by no means necessary that he allowed his opinion of what is theoretically correct to interfere with his construction of what he considered, upon the authorities, to be the law of England. In earlier parts of his judgment,[2] he expresses doubts as to the justice of legislation *ex post facto*, and yet he submits to what is proved to be positive law. There are, however, other expressions in the judgment which support the contention that "actionable" means "triable" or "cognizable". The paragraph containing the famous rule begins with a statement on the willingness of English courts to "admit" actions founded upon foreign transactions — "admit to trial by the courts" seems a more probable meaning than "allow recovery." Furthermore, non-fulfilment of the two conditions seems to be ranged with trespass to foreign land in the group of cases where the courts do not "undertake . . . jurisdiction." Put together, these scattered hints make a very strong case for Professor Yntema's interpretation.

In the rule itself, one expression which might have some bearing upon the problem appears to have passed unnoticed: "to found a suit." And yet these words denote the result obtained where the two conditions "actionability" in England and the absence of "justification" under the *lex loci*, are both fulfilled. It seems fairly obvious that if "to found a suit" only means "to institute proceedings", "actionable" can hardly be more than a requirement of cognizability; if, on the other hand, it means "to recover", it follows with equal probability that the condition of actionability is a substantive requirement. Unfortunately, the exact meaning of this auxiliary element of interpretation is almost as uncertain as that of "actionable". Curiously enough, none of the learned judges

[1] Yntema, in (1949), 27 *Can. Bar R.*, p. 116, at pp. 117 ff. — On the interpretation of "wrong", see Hancock in (1939), 3 *U. of Tor. L. J.*, p. 400, at p. 403.
[2] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at pp. 23 ff.

who have quoted Willes J. in their opinions have used this expression. In *The Mary Moxham*[1] Mellish L. J. held that "no action can be maintained" in the English courts if the two conditions are not fulfilled, in *Carr* v. *Fracis Times*,[2] Lord Macnaghten considered the conditions as necessary "to found an action", and in *Walpole* v. *Canadian Northern Railway Co.*,[3] it was held by Viscount Cave that "an action would not lie" unless the two requirements were fulfilled. The fact that so many judges of the highest authority have considered Willes J.'s words "to found a suit" equivalent with "to maintain an action" would no doubt be conclusive, if there were any reason to suppose that their choice of language were the result of careful consideration of this particular detail. As there is at least some judicial authority for the view that the verb "to found" in this connection can be interpreted as "commence" or "institute",[4] and as it is more probable that the learned judges had made up their minds as to the correct meaning of the expression in Willes J.'s judgment in *Phillips* v. *Eyre*[5] on other grounds, and accordingly chosen a less ambiguous expression, the outcome of this part of our analysis must be, again, a *non liquet.* There is, however, at least a hint of the true meaning of the expression in Willes J.'s judgment itself. Referring to *the Halley*[6] the learned judge states that in that case, the Privy Council "pronounced against *a suit* in the Admiralty *founded upon a liability* by the law of Belgium" (italics supplied). Although the words are not used in exactly the same sense in both these places, it seems to be possible to construe the correct meaning of Willes J. It is submitted that speaking in terms of the old-established forms of action,

[1] *The Mary Moxham* (1876), 1 P. D. 107, at p. 111.

[2] *Carr* v. *Fracis Times & Co.* [1902] A. C. 176, at p. 182.

[3] *Walpole* v. *Canadian Northern Railway Co.* [1923] A. C. 113, at p. 119. Similarly, in *O'Connor* v. *Wray* [1930] 2 D. L. R. 899, at p. 900, a case before the Supreme Court of Canada, Anglin C. J. used the expression "to establish liability", and in *Koop* v. *Bebb* [1951] 84 C. L. R. 629, the High Court of Australia held (at p. 642) that "an action of tort will lie" if the conditions are fulfilled.

[4] Cf. *Hunter's case* [1925] 2 K. B. 493, at p. 502, per Pollock, M. R.; "I am of opinion that proceedings in the present arbitration have been properly founded, and that the objection to the jurisdiction fails."

[5] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

[6] *The Halley* (1868), L. R. 2 P. C. 193.

the learned judge used an expression which in modern terms would be characterized as both procedural and substantive: "to introduce a proper action at law", *i. e.* an action known as such to the *lex fori*.

So far, the interpretation suggested by Professor Yntema is at least as probable as the traditional construction of the rule, according to which the condition of actionability implies that strict identity with a tort in English law is required. There is, however, one major objection which seems difficult to explain away.[1] When Willes J. went out of his way to lay down the twofold rule, there does not seem to be any reason to assume that he intended to introduce an innovation into English law. He only purported to summarize and explain earlier authorities, and the rule of actionability clearly refers to *The Halley*.[2] And whatever was the theory underlying that decision of the Privy Council, it is obvious that actionability under the law of England was not considered as a "threshold requirement" in the sense that the non-fulfilment of this condition would prevent the court from taking jurisdiction and considering the merits of the case. The word "actionable" is not mentioned either in the pleadings or in the judgment of *The Halley;*[2] it is obviously the result of Willes J.'s attempt to translate into a formula the holding of Selwyn L. J. that it is "alike contrary to principle and to authority that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom damages are claimed."[3] A refusal to enforce the foreign liability, not a refusal to take cognizance of the action is the answer of the court when the condition of actionability under English law is not fulfilled.

Does this, in terms of modern conflict law, amount to a "choice of law"? It is submitted that it does not. The decision of the Privy

[1] Falconbridge, pp. 812 ff. Dean Falconbridge contends that Willes J. may have considered *The Halley* as an exceptional case, and that he did not purport to lay down any rule for the question of vicarious liability raised in *The Halley*. It is submitted, with respect, that such a construction is hardly compatible with the language used by Willes J.

[2] *The Halley* (1868), L. R. 2 P. C., p. 193.

[3] *ibid.*, at p. 203.

Council in *The Halley*[1] goes as far as to state that a foreign tortious liability unknown in English law will not be enforced by the courts, and Willes J. certainly does not go any further. When interpreting these decisions, it is necessary to bear in mind that they were delivered in the formative stage of English, or, for that matter, Continental, private international law, and that the apparatus of legal concepts now at the disposal of courts for dealing with these questions was largely non-existant. Notably one of the processes which an action on a foreign tort must now undergo before reaching the stages of choice of law and judgment was still unknown to the judges or at least not consciously undertaken — the process of characterization. As characterization is made necessary only by the decision of the court to consider some legal system other than the *lex fori,* the problem had not been raised in those earlier cases where foreign actions had, in all probability, been instituted in the English forms of action and consequently, as it were, already characterized by the plaintiff. In *The Halley*[1], the choice-of-law problem, and thus also the characterization question, was raised for the first time, and it is submitted that whatever the Privy Council did, it was certainly far from the idea of establishing a choice-of-law rule based upon the principle of concurrent actionability. There is undoubtedly a strong element of public policy in the decision, although it is not expressly stated. It may also be suggested, however, that the judgment was founded upon a very narrow characterization. Confronted by a foreign claim entirely unknown to the *lex fori,* the court found itself unable to administer any of the remedies of English law. When Selwyn L. J. said that the English court "applies and enforces its own law so far as it is applicable *to the case thus established,*"[1] (italics supplied), it is submitted that he referred to the remedy only. Earlier in his judgment he had admitted that proof of foreign law may be necessary to determine the basic question of fault or negligence and that it was one of the facts upon which the existence of the tort, or the right to damages, may depend. What remains for English law? To grant the remedy normally administered by English courts to *the case thus established* — established, *i. e.*, on the basis of foreign law. That foreign law was considered as a fact to be proved, not as a matter

[1] *The Halley* (1868), L. R. 2 P. C., 193, at p. 203.

of law to be decided by the court, does not invalidate the present submission. This has been the practice of English courts in all conflict cases, and there is no reason why there should be an exception for torts. Willes J., in *Phillips* v. *Eyre*,[1] was conscious of the choice-of-law problem, and laid down, in that part of his judgment where he describes the obligation as a creature of the *lex loci*, the general rule as to the applicable law. On the other hand, he was aware of the question, raised in *The Halley*,[2] of foreign torts unknown to English law, and that question he purported to solve in his "actionable" rule. His approach, however, seems to be more liberal; for the foreign tort is not required to be strictly such as to be actionable in England, only to be "of such a character" — an expression which is obviously broader and does not demand complete identity.

It may be asked whether there is any material difference between the present submission and the interpretation proposed by Professor Yntema. It is submitted, with the greatest respect, that there is in Professor Yntema's suggestion a logical inconsistency which is avoided by the present construction. For the expression "threshold requirement" used by the learned writer is exemplified by the refusal of the courts to entertain actions for trespass to foreign land, and consequently must refer to the assumption of jurisdiction. However, it is incontestable that in *The Halley*[2], the other example of non-actionability given by Professor Yntema, the courts did take jurisdiction.

While it avoids the irreconcilable opposition between Professor Yntema's construction and the opinion of the Privy Council in *The Halley*[2], the present submission defeats the objection raised by the classical interpretation of the *Phillips* v. *Eyre*[1] formula as a choice-of-law rule. Considered as such, it would bind the English courts to a rigid system of concurrent actionability which has been criticized often, and, it is submitted, rightly, for the undue importance it gives the *lex fori*. Characterization, unlike choice of law, is not the expression of a policy and as such bound by strict legal rules: it is a technical device, invented by conflict lawyers in order to facilitate the ultimate choice of law, and as such can be

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at p. 28.
[2] *The Halley* (1868), L. R. 2 P. C. 193.

used with considerably greater discretion by the courts. Under the present submission, *Phillips* v. *Eyre*[1] is no obstacle for the English courts to adopt a choice-of-law rule consistent with fairness and logic.[2] The forms of action had to be abolished by law, but there is no need to use legislative measures to change the conflict technique created under the system of forms of action.

There seems to be little need to deal at length with the proper meaning of "justifiable". No reason has been found to suppose that by adding the second part of the rule Willes J. purported to do more than cover the exceptional cases — *Phillips* v. *Eyre* being one of them — where some special circumstance made an otherwise tortious act unquestionable and lawful.

c) Actionability in later cases. It remains to examine whether, in the light of later cases, the present construction of *Phillips* v. *Eyre*[1] can still be considered as a valid interpretation of English law. As the condition "not justifiable" has undergone a development certainly not foreseen by Willes J., it seems apposite to discuss the two branches of the rule separately.

The essential question to be answered by the examination of those cases where the condition of actionability under English law has been of importance must be the following: has this branch of the rule, interpreted as a strict requirement of concurrent actionability, and thus as a choice-of-law rule, served as *ratio decidendi* for refusing to enforce a liability recognized by the foreign *lex loci?* There are few English decisions in point, and in most of these, justification under the law of the place of wrong has presented the real problem. It has been shown above that in a number of cases the rule in *Phillips* v. *Eyre*[1] has been quoted with approval, but in none of these cases was the first branch of the rule referred to but as an *obiter dictum.*[3]

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at p. 28.

[2] The present submission, in its practical results, comes near the interpretation given by Professor Hancock in (1939), 3 *U. of Tor. L. J.*, p. 400, at pp. 403 ff. The main objection to that construction of the English leading cases is that it fails to find a rational principle covering also *The Halley.* Cf. criticism by Dean Falconbridge in (1940), 18 *Can. Bar R.*, p. 308, at pp. 310 ff.

[3] In *Carr* v. *Fracis Times & Co.* [1902] A. C. 176, the House of Lords decided an action for an alleged foreign tort, and the *Phillips* v. *Eyre* formula was held by Lord Macnaghten to be well settled by a series of authorities (at p.

To the knowledge of the present writer, there are only a few cases, all decided in Dominion courts, where actionability under *lex fori* has been a stumbling block for a plaintiff with a clear right of action under the *lex loci*. In *Potter* v. *Broken Hill Proprietary Co.*[1] the Supreme Court of Victoria refused to grant recovery to a plaintiff for a patent infringement, although it was a wrong under *lex loci;* the act had been committed in New South Wales where the plaintiff's patent was registered. It is submitted, with respect, that the reasoning of the court in this case was highly unfortunate. Recovery was denied on two grounds: firstly because the infringement would not have been a wrong if committed in Victoria, where the plaintiff had no patent; secondly, because the wrong could not have been done in any other state than New South Wales, being only an infringement of a purely local law; the action was thus considered as local and not transitory. The decision, it is submitted, is directly opposed to the opinion of Selwyn L. J. in *The Halley*,[2] where the learned Lord Justice held that local laws, as *e. g.* traffic regulations, must be considered in determining tortious liability. If the Supreme Court of Victoria were right, the high way code of France could never be pleaded in an English court, as infringements of that law could only take place in France and would thus be purely local. It is submitted, therefore, that the Australian decision, which, of course, is binding only on the courts of Victoria, can be disregarded as erroneous. In the Canadian case *Simonson* v. *Canadian Northern Railway Co.*[3], it was held that a tort actionable at the *locus delicti* (Saskatchewan) could not give a right of action at the

182). The question raised in *Carr* v. *Fracis Times & Co.* turned upon the second proposition of Willes J. In *The Mary Moxham* (1876), 1 P. D. 107, the parties had agreed to submit to English law, and the principal question turned upon the actionability of the tort in the foreign (Spanish) *lex loci.*

[1] *Potter* v. *Broken Hill Proprietary Co.* (1905), V. L. R. 612. Criticism by Falconbridge in (1940), 18 *Can. Bar R.*, p. 308, at p. 312.

[2] *The Halley* (1868), L. R. 2 P. C. 193, at p. 203 f.; cf. Smith, C., Torts and the Conflict of Laws, (1957), 20 *M. L. R.*, p. 447, at p. 450.

[3] *Simonson* v. *Canadian Northern Ry. Co.* (1914), 24 Man. Rep. 267; Similarly: *Jones* v. *Canadian Pacific Ry. Co.* (1919), 49 D. L. R. 335; cf. Falconbridge, J. D., in (1940), 18 *Can. Bar R.*, p. 308, at pp. 312 ff.; Heighington, A. C., Conflict of Laws in Automobile Negligence Cases, (1936), 14 *Can. Bar R.*, p. 389, at p. 395. *Contra, semble, Story* v. *Stratford Mill Building Co.* (1913), 30 Ont. L. R. 271, at p. 277 f.

forum (Manitoba) where the doctrine of common employment would have barred an action. If the accident which gave rise to the action had occurred in Manitoba, the plaintiff would have been entitled to an award under the local Employers' Liability Act, but the majority of the court held that this statutory liability was "not a tort in the ordinary common law meaning as contemplated by" the rule in *Phillips* v. *Eyre*,[1] and that, furthermore, the Manitoba Act only applied to accidents within that province.[2] Judged according to its premises, this reasoning seems flawless. Apart from the purely local importance of the decision, its scope has been largely diminished by the almost universal adoption of Workmen's Compensation Acts and of international and interprovincial conventions concerning such acts.

Another Canadian case, *O'Connor* v. *Wray*,[3] a decision by the Supreme Court of Canada on appeal from the Superior Court of Quebec, is more important.[4] The defendant had lent his car to an employee in Quebec and permitted him to take the vehicle into Ontario. While driving in the latter province, the employee negligently killed the plaintiff's wife. Under the law of Ontario the owner of the vehicle was civilly responsible whereas Quebec law required fault on the part of the owner to make him liable. The plaintiff's action failed, but the *ratio decidendi* is not absolutely clear. One consideration which seems to have weighed heavily with the court was that the owner never actually came under Ontario jurisdiction,[5] but in the final part of the judgment it was held that in consideration of the actionability rule in *Phillips* v. *Eyre*,[1] "a decision that the courts ... (of Quebec) ... are to administer the *lex loci delicti commissi*, irrespective of the law of the

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

[2] *Simonson* v. *Canadian Northern Ry. Co.* (1914), 24 Man. Rep. 267, at p. 280, *per* Richards J. A.

[3] *O'Connor* v. *Wray* [1930] 2 D. L. R. 899.

[4] Cf. Hancock, M., Torts in the Conflict of Laws, (1939), 3 *U. of Tor. L. J.* p. 400, at p. 408; Heighington, A. C., Conflict of Laws in Automobile Negligence Cases, (1936), 14 *Can. Bar R.*, p. 389, at p. 399; Johnson, vol. 3, p. 357; Dicey, p. 941.

[5] The court does not seem to have noticed that this question was answered, *obiter*, in favour of the law of the place where the employee or servant acted, by James L. J. in *The Mary Moxham* (1876), 1 P. D. 107, at p. 110.

forum, would introduce a distinction which might be attended with inconvenient results."[1] It is submitted that the case can be distinguished on account of the special problems raised by the vicarious liability of an automobile owner who had never entered the jurisdiction of the *lex loci:* in similar circumstances even American courts have left the orthodox *lex loci* rule in favour of the law of the owner's domicile.[2]

Apart from these cases, of local scope and attended with special circumstances, there is no obstacle for British courts to adopt the view that the "actionable" branch of the rule laid down in *Phillips* v. *Eyre*[3] is merely a rule of characterization, not one of choice of law. That part of the rule which deals with justification under the *lex loci* has undergone a far more radical change, and although it is still possible for the House of Lords to modify, or restate in its original meaning, the second proposition of Willes J., there is hardly any doubt that as the law of England now stands, it has adopted a construction of that rule which was certainly not foreseen by the learned judge in *Phillips* v. *Eyre*[3] and which has been condemned in the strongest terms by courts and writers.

(d) "Justifiable" in later cases. Before dealing with the "justification" branch of the rule in *Phillips* v. *Eyre*,[3] it must be noted that the interpretation of that rule in the much-criticized decision of the Court of Appeal in *Machado* v. *Fontes*,[4] as traditionally understood, would not be possible without a construction of the "actionability" condition incompatible with the correct meaning of that requirement as submitted in the present study. In *Machado* v. *Fontes*[4] the court laid down the rule that an act, actionable as a tort if committed in England, is not "justifiable" unless it is innocent or unquestionable under the *lex loci*. The second branch of Willes J.'s rule thus assumed a far broader scope than it had originally had. If the courts had proceeded along the lines suggested above, they would first have characterized the act under the English *lex fori*, and subsequently examined the provi-

[1] *O'Connor* v. *Wray* [1930] 2 D. L. R. 899, at p. 913.

[2] *Scheer* v. *Rockne Motors Corp.* (1934), 68 F. 2d 942. There is not perfect identity between the cases: in the American action it was not proved that the owner had authorized the driver to go into the state where the accident happened. Cf. Falconbridge, J. D., *Essays on the Conflict of Laws*, p. 814.

[3] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

[4] *Machado* v. *Fontes* [1897] 2 Q. B. 231 (Court of Appeal).

sions of the *lex loci*. The question of justification would have been raised only in those exceptional cases from which it originated as a special defence for acts otherwise tortious under both *lex loci* and *lex fori*. Only by considering the first condition exclusively from the point of view of English law could the courts arrive at a situation where all the defences available under the law of the *locus delicti* were examined only in the light of the second branch of the *Phillips* v. *Eyre*[1] formula, and where the judge had to decide whether an act engendering criminal but not civil liability was "justifiable" in the sense of Willes J.

In the first case where a justification under *lex loci* was pleaded, *The Mary Moxham*,[1a] the problem was not brought to a head. Both parties had submitted, by agreement, to English law, and the decision was founded on the fact that the defendant had committed no tort, and, indeed, no wrongful act at all, in Spain where the alleged cause of action arose.[2] However, the *dicta* delivered by the court are of great interest. James L. J. seems to have espoused a *lex loci* theory in matters of vicarious liability,[3] and Mellish L. J., in quoting the rule in *Phillips* v. *Eyre*,[1] used the same expression, "wrongful", for both the branches of Willes J.'s formula.[4] The same construction of the famous rule appears in a *dictum* by Brett L. J. in *The Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co. Ltd.*,[5] a case which has little bearing upon the present problem in other respects. *Carr* v. *Fracis Times & Co.*[6] was a case of the classical pattern where a

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

[1a] *The Mary Moxham* (1876), 1 P. D. 107.

[2] Robertson, A. H., The Choice of Law for Tort Liability in the Conflict of Laws, (1940), 4 *M. L. R.*, p. 27, at p. 34 f.; Dicey, p. 944.

[3] *The Mary Moxham* (1876), 1 P. D. 107, at p. 110 f.

[4] *ibid.*, at p. 113. Cf. Yntema, H. E., Essays on the Conflict of Laws, (1949), 27 *Can. Bar R.*, p. 116, at p. 120.

[5] *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co. Ltd.* (1883), 10 Q. B. D. 521, at p. 536: " . . . for any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country and also would be a cause of action in this country."

[6] *Carr* v. *Fracis Times & Co.* [1902] A. C. 176, at p. 182, *per* Lord Macnaghten. His Lordship's *dictum* is *obiter*, so far as the "actionable" rule is concerned, but it may be noted that in quoting Willes J., he chose the cautious expression "to found an action in this country" etc. A similar case, of no particular interest, was *Isaacs & Sons* v. *Cook* [1925] 2 K. B. 391.

tortious act was held justifiable in virtue of subsequent authorization by a foreign sovereign. The decision is important because it is the first case where the House of Lords recognized the rule of Willes J. as the law of England.

It was in *Machado* v. *Fontes*[1] that the doctrine of justification under *lex loci* was for the first time used as a general test of the defendant's conduct in the foreign country. The plaintiff here sought redress for a libel, published by the defendant in Brazil; both parties were British subjects. The defendant contended that under Brazilian law no damages could be recovered in a civil action for libel, and the court seems to have accepted this contention.[2] The action succeeded, however, on grounds which are not completely clear. Both Rigby and Lopes LL. J. emphasized two elements in the case and in Willes J.'s rule. In the first place they held that the change from "actionable" to "justifiable" in the language of Willes J. was deliberate and intended to establish two conditions of a different order — civil actionability under *lex fori* and the absence of "innocence" or "lawfulness", whether civil or criminal, under *lex loci*. This reasoning, however, was based on a characterization of the distinction between civil and criminal liability as a remedial question, to be answered by the procedural rules of the *lex fori*.[3] The course of reasoning followed by the court is succinctly stated by Rigby L. J.: "We start, then, from this: that the act in question is *prima facie* actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent, or excused in the country where it was committed."[4]

[1] *Machado* v. *Fontes* [1897] 2 Q. B. 231 (Court of Appeal).

[2] *Per* Lopes L. J., at p. 232 f. Rabel has pointed out, in vol 2, p. 239, that all the trouble caused by this decision might have been avoided if the court had examined more closely the alleged provisions of Brazilian law, as it would have been found that civil liability was part of that law as much as of the law of England. It is submitted, however, that such examination would not necessarily have changed the result. Lopes L. J. does not seem to have considered the state of Brazilian law as of immediate importance for the rule he laid down — he only "assumed" the law of Brazil to be such as the defendant contended.

[3] *Machado* v. *Fontes* [1897] 2 Q. B. 231, *per* Lopes L. J., at pp. 232 ff.; *per* Rigby L. J., at pp. 234 ff.

[4] *ibid.*, at pp. 235 ff.

Machado v. *Fontes*[1] has been criticized for its allegedly erroneous interpretation of the "justifiable" rule,[1a] for its incompatibility with current legal doctrine[2] or, indeed, with natural justice.[3] Earlier editions of Dicey's *Digest* embodied the *Machado* v. *Fontes*[1] rule into the second branch of the formula of Willes J., and in that form it came to influence the courts.[4] The decision has not lacked defenders: Professor Lorenzen finds it "entirely defensible from the standpoint of the fundamental theory of the conflict of laws;"[5] Sir Frederick Pollock,[2] Professor Gutteridge,[6] and Dean Falconbridge[7] recognize that *Machado* v. *Fontes*[1] was decided upon an erroneous interpretation of the *Phillips* v. *Eyre*[8] formula but consider the result as just and equitable, since both parties were British subjects. A third group of writers try to minimize the scope of the decision by contending that the *ratio decidendi* of the Court of Appeal was the remedial character of the Brazilian law which allegedly only enforced criminal liability for libel.[9] There are three questions to be considered in the decision of the Court of Appeal. In the first place: what was the *ratio decidendi*? The fact that both parties were British subjects may have carried some weight, but there is hardly any reference to it in the opinions of the court. Against the theory that Brazilian law was disregarded as merely procedural, it has been contended that criminality and civil liability are two entirely different concepts, "not merely matters of a varia-

[1] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[1a] Cheshire, p. 262; Robertson, A. H., The Choice of Law for Tort Liability in the Conflict of Laws, (1940), 4 *M. L. R.*, p. 27, at pp. 35 ff.; Yntema, H. E., Essays on the Conflict of Laws, (1949), 27 *Can. Bar R.*, p. 116, at pp. 120 ff.

[2] Notes in (1898), 11 *H. L. R.*, p. 261, and (1898), 13 *L. Q. R.*, p. 233 (by Sir Frederick Pollock).

[3] Spence, D. B., Conflict of Laws in Automobile Negligence Cases, (1949), 27 *Can. Bar R.*, p. 661, at p. 671.

[4] *McLean* v. *Pettigrew* [1945] 2 D. L. R. 65, *per* Taschereau J., at p. 76.

[5] Lorenzen, E. G., Tort Liability and the Conflict of Laws, (1940), 47 *L. Q. R.*, p. 483, at p. 487. The "fundamental theory" referred to is the "local law theory".

[6] Gutteridge, H. C., A New Approach to Private International Law, (1938), 6 *Cambr. L. J.*, p. 16, at p. 20.

[7] Falconbridge, J. D., The Conflict of Laws, (1949), 87 *Can. Bar R.*, p. 375, at p. 376; same author, *Essays on the Conflict of Laws*, pp. 815 ff.

[8] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

[9] Schmitthoff, p. p. 155 ff.; Graveson, p. 429 f.

tion of remedial process."[1] It is submitted that this difference, however important, is not sufficient to defeat the possibility of a decision where recovery for an act characterized as a tort by the *lex fori* is granted although in the *lex loci* the incriminated act is primarily dealt with in criminal proceedings. Indeed, such a decision is to be found in *Scott* v. *Lord Seymour*.[2] To understand the reasoning of the Court of Appeal, it may be helpful to compare *Machado* v. *Fontes*[3] with the earlier decision. In *Scott* v. *Lord Seymour*[2] such damages as were provided by English law were granted for an act which was primarily a criminal offence at the *locus delicti*. The difference between the two cases is that in the earlier case, the court refused to assume that no civil liability existed under the foreign law, and consequently made use of the established presumption of identity between English and foreign law. It is submitted that this result was obtained by a characterization of the action as a tort and that, untroubled by questions of choice of law, the court, in characterizing the action, considered it to be a tort also under the foreign *lex loci delicti*. On the basis of this reasoning, the judges could obviously disregard the foreign rules on criminal liability as procedural only: the criminal proceedings were merely incidental to the enforcement of liability for the tort.

In *Machado v. Fontes*[3] the Court of Appeal followed a different course of reasoning. None of the learned Lords Justices made an attempt to characterize the action in any way. They confronted the facts with English rules on libel and found them sufficient for an action to lie; the next step was to investigate whether foreign law barred their assumption of jurisdiction. As that was not the case, they proceeded to adjudicate upon *the English tort*. The notion of *a foreign tort*, an act legally defined by the *lex loci*, was never present to their minds. Therefore, the way in which the foreign legal system reacted to the wrong was considered of no material importance.

It has been shown conclusively by writers[4] that the result obtained in *Machado* v. *Fontes*[3] is inconsistent with *Phillips* v. *Eyre*[5]

[1] Thomas, J. A. C., Damages and the Tort Rule in the Conflict of Laws, (1954), 3 *I. C. L. Q.*, p. 651, at p. 653 f.
[2] *Scott* v. *Lord Seymour* (1862), 1 H. & C. 219.
[3] *Machado* v. *Fontes* [1897] 2 Q. B. 231.
[4] See page 104, note 1a.
[5] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

and *The Mary Moxham*.[1] Is it possible to attribute this opposition to the opinion of the Court of Appeal that the difference between civil and criminal liability was a matter of remedy wholly governed by the *lex fori?* It is submitted that such an explanation would be incorrect. The court reached its decision not because it considered the punishment of a foreign tort as a procedural incident but because it found an actionable English tort incidentally committed abroad, where it was not justifiable. It may furthermore be asked whether the construction of *Machado* v. *Fontes*[2] as an example of the unwillingness of English courts to consider foreign remedial rules would remove any of the regrettable implications of the decision.

The second important question raised by *Machado* v. *Fontes*[2] refers to the consequences of that decision. Until modified by the House of Lords, the "justifiable" rule as interpreted by the Court of Appeal must be considered as part of the law of England. In terms of practical results, this may not necessarily be regrettable. As shown in an earlier part of this paper, the English law of torts is more casuistic than any of the great Continental systems, and the only conflict which seems likely to occur will take place in those cases where an act is primarily a tort under English law whereas foreign law characterizes it as a criminal offence. As damages are granted in the vast majority, if not all, of these criminal offences, it is difficult to see how any real hardship can be caused to the defendant by the *Machado* v. *Fontes*[2] rule.[3]

It has been argued that the Privy Council, in a series of decisions on Canadian appeals, has established a rule of concurrent actionability superseding the twofold *Phillips* v. *Eyre*[4] formula as constructed by the Court of Appeal.[5] Both the relevant decisions of the

[1] *The Mary Moxham* (1876), 1 P. D. 107.

[2] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[3] It may be pointed out, finally, that Rigby L. J., at p. 235, characterized a justification under *lex loci* as a "peremptory bar to our jurisdiction". This procedural classification of the second condition laid down by Willes J. seems erroneous in the light of earlier cases. It has not been followed; cf., *e. g.*, *Carr* v. *Fracis Times* [1902] A. C. 176.

[4] *Phillips* v. *Eyre* (1870), L. R. 6. Q. B. 1.

[5] Schmitthoff, p. 153 f.

Privy Council deal with Workmen's Compensation Acts,[1] and the special character of such legislation must be borne in mind when considering the third essential question connected with *Machado* v. *Fontes:*[2] is that decision still part of the law of England? In *Walpole* v. *Canadian Northern Railway Company*[3] the appellant had instituted an action in Saskatchewan to obtain damages for the death of her husband in British Columbia. The deceased had been employed by the respondent company and his death had been caused by the negligence of his fellow servants. The action was brought under the Saskatchewan Fatal Accidents Act, which contained a provision to the effect that in order to recover, the plaintiff must show that the deceased would have been able to maintain the action, if alive. At the *locus delicti*, an award granted by a Board under the British Columbia WCA was the exclusive remedy in cases of this kind. The *ratio decidendi* of the Judicial Committee for refusing to grant recovery seems to have been twofold: in the first place, the plaintiff's deceased husband would not have been able to maintain the action, as the WCA of the *locus delicti* constituted a peremptory bar; secondly, "the negligence of the company was not actionable in British Columbia; for under the WCA of the Province, no action would lie against the company but only against the Board for compensation."[4] As no criminal negligence had been alleged or proved, the court could not assume its existence.

In *Mcmillan* v. *Canadian Northern Railway Company*,[5] the facts were closely similar, except that the accident, which was not fatal, took place in Ontario where the common employment doctrine

[1] A third case, *Canadian Pacific Ry. Co.* v. *Parent* [1917] A. C. 195 is hardly in point. The question turned upon the validity of a contract by which the railway company had exempted itself from civil liability for the negligence of its employees. Once the validity was recognized, the action was barred under the *lex loci;* and there could not, of course, be any vicarious criminal liability on the part of the company. In his judgment, Viscount Haldane expressed some doubts as to the precision of the language used by the Court of Appeal in *Machado* v. *Fontes* (at p. 205). Cf. Yntema in (1949), 27 Can. Bar R., p. 116, at p. 120.

[2] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[3] *Walpole* v. *Canadian Northern Ry. Co.* [1923] A. C. 113.

[4] *Per* Viscount Cave, at p. 119.

[5] *Mcmillan* v. *Canadian Northern Ry. Co.* [1923] A. C. 120.

applied and where the local WCA contained slightly different provisions: claims under the act had to be made against the employer and were granted by a Board with exclusive jurisdiction. The decision of the court was based entirely upon Willes J.'s double rule: "No action for the negligence in question could have been brought against the company in Ontario apart from the statute; and the claim given by the statute is not a claim for damages in tort, but a claim (strictly limited in amount) for compensation for the accident. The statute, therefore, does not make the negligence of the fellow servant not justifiable by the employer. There is not question of criminal liability."[1]

Both these decisions, which have been generally acclaimed as eminently sound,[2] have been explained in several ways. They have been considered as expressions of a doctrine of concurrent actionability,[3] and distinguished as dealing with the administrative technicalities of WCA, not with the law of torts.[4] It has been argued, finally, by an author advocating the application of English law as the proper law of tort actions brought in the English courts, that the real meaning of "justifiable" as interpreted by the Privy Council, is "legally cognizable", *i. e.* concerning "a legal relation with which the courts of the *locus delicti* would deal."[5]

It is submitted that the two decisions can be reconciled with *Machado* v. *Fontes*[6] without great difficulty. The test applied by the Court of Appeal in that case was that of "innocence."[7] This sweeping term, must, of course, be understood as legal innocence,[8]

[1] *Mcmillan* v. *Canadian Northern Ry. Co.* [1923] A. C. 120, at p. 125, *per* Viscount Cave.

[2] Robertson, A. H., The Choice of Law for Tort Liability in the Conflict of Laws, (1940), 4 *M. L. R.*, p. 27, at p. 36.

[3] Schmitthoff, pp. 153 ff. As the author holds that the decision in *Machado* v. *Fontes* was based on concurrent actionability — Brazilian penal law being disregarded as merely procedural — he finds no discrepancy between the Privy Council judgments and the decision of the Court of Appeal.

[4] Wolff, pp. 490 ff.

[5] Thomas, J. A. C., Damages and the Tort Rule in the Conflict of Laws, (1954), 3 *I. C. L. Q.*, p. 651, at p. 657.

[6] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[7] *Per* Lopes L. J., at p. 233; *per* Rigby L. J., at p. 236.

[8] Cf. *dictum per* Sir Lyman Duff, C. J. in *Canadian National S/S Co.* v. *Watson* [1939] 1 D. L. R. 273, at p. 274.

and the only two groups[1] of acts where a test of legal innocence is apposite, are crimes and torts. Now it is obvious that no tortious liability under the *lex loci* was held to exist in either of the two Canadian cases. A tort can be considered only *in concreto:* where the law does not establish a liability of the kind known as tortious, the act is innocent. With respect to injuries inflicted upon employees by their fellow servants, the employer is, from the point of view of the law of tort, innocent in jurisdictions where the doctrine of common employment exists. In *Machado* v. *Fontes*[2] the test was not applied to a tortious act but to a criminal offence, and the real problem is whether the Judicial Committee rejected the test in favour of a rule of concurrent actionability. It is obvious that it did not. Viscount Cave went out of his way to emphasize that this question had not been raised.[3] What remains of the two Privy Council decisions? Only this, it is submitted, that the right to claim an award under a WCA, whether from the employer himself or from an administrative authority, does not constitute a right of action in tort. *Machado* v. *Fontes*[2] so far remains unquestioned in the English courts.

The current interpretation of "justifiable" has been severely criticized by Australian courts, but there does not seem to exist any decision where it has been actually rejected.[4] *Koop* v. *Bebb*[5] is not really a case in point, as the negligence of the defendant was clearly actionable both under the *lex loci* and *lex fori*, but it was said, *obiter*, *per curiam*, that the true view may be "that an act

[1] Cf. Thomas, *op. cit.* (note 5 above), at p. 657.

[2] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[3] *Walpole's* case at p. 119, *Mcmillan's* case at p. 125.

[4] In *Varawa* v. *Howard Smith & Co. Ltd.* (1910), V. L. R. 509, the action — for malicious arrest in New South Wales — failed in the Supreme Court of Victoria on the ground that the proceedings in N. S. W. in pursuance of which the arrest had been made were not terminated in favour of the plaintiff when the action was brought. *Obiter*, Hodges J. (at p. 523) and Cussen J. (at pp. 529 ff.) expressed grave doubts as to the compatibility of *Machado* v. *Fontes* with the original rule in *Phillips* v. *Eyre*. In *Musgrave* v. *Commonwealth* [1936—37] 57 C. L. R. 514, an action for libel in the High Court of Australia, Latham C. J. held (at p. 532) that he was bound by the decisions in *Phillips* v. *Eyre* and *Machado* v. *Fontes*, and used the expression "unlawful" instead of "not justifiable."

[5] *Koop* v. *Bebb* [1951] 84 C. L. R. 629 (High Court of Australia). Cf. Cowen, Z., Torts in the Conflict of Laws, (1952), 68 *L. Q. R.*, p. 321.

done in another country should be held to be an actionable wrong in Victoria (*forum*) if, first, it was of such a character that it would have been actionable if it had been committed in Victoria, and, secondly, it was such as to give rise to a civil liability by the law of the place where it was done."[1]

Canadian courts have shown less hesitation in adopting the innocence test established by the Court of Appeal in *Machado* v. *Fontes*.[2] In an early decision, where the alleged tort had been committed in the U. S. A. by officials of that Union in pursuance of their duties, it was held that the case "should be disposed of as it should be disposed of if it were being tried in a U. S. court."[3] Some criticism was directed against the English rules in *Lieff* v. *Palmer*[4] in which the plaintiff sued in a Quebec court for injuries suffered while riding as a gratuitous passenger in the defendant's automobile in Ontario, where such passengers had no civil remedy against the owner or driver of the vehicle. Against the plaintiff's contention that negligent driving was *in abstracto* punishable in Ontario, it was held by all the three judges of the Court of the King's Bench that no criminal offence was proved, and the action consequently failed. *Young* v. *Industrial Chemicals Co. Ltd.*[5] would be a strong case in favour of a doctrine of concurrent actionability if it had not been emphasized by the court that criminal responsibility was not proved and could not be assumed to exist under the *lex loci* (the State of Washington, U. S. A.)[6] The action failed because the plaintiff, appointed administratrix of the victim of the accident by the courts of British Columbia, had no civil right in

[1] At p. 643.

[2] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[3] *Papageorgiow* v. *Turner* (1906), 37 N. B. R. 449, at p. 468, *per* Barker J. In support of his decision the learned judge quoted the paragraph in Willes J.'s judgment in *Phillips* v. *Eyre* where civil rights are described as deriving their birth from the *lex loci*. Criticism by Dean Falconbridge in (1940), 18 *Can. Bar R.*, p. 308, at p. 313. A similar decision is *May* v. *Smith* (1894), 32 N. B. R. 474.

[4] *Lieff* v. *Palmer* (1937), 63 Qu. K. B. 278. The *Machado* v. *Fontes* doctrine was considered *"contraire à la doctrine la plus généralement admise", per* Rivard J., at p. 285.

[5] *Young* v. *Industrial Chemicals Co. Ltd.* [1939] 4 D. L. R. 393 (Supreme Court of British Columbia).

[6] At pp. 397 ff.

Washington, where she had not taken out letters of administration.[1] *Canadian National Steamship Co.* v. *Watson*[2] follows closely the decisions of the Judicial Committee in *Walpole's* and *Mcmillan's* cases.[3]

A few Canadian cases have followed, and, it is submitted, vastly extended the "innocence" rule of *Machado* v. *Fontes*:[4] *Story* v. *Stratford Mill Building Co.*,[5] where the negligence of employees causing injuries to a fellow-servant in Quebec — where the doctrine of common employment is unknown — was held a non-justifiable tort in an action against the employer, may still be within the scope of the rule in *Machado* v. *Fontes*,[4] but this can hardly be said about the decision of the Supreme Court of Canada in *McLean* v. *Pettigrew*.[6] The plaintiff, a citizen of Quebec, had been riding as a gratuitous passenger in the automobile of the defendant, equally domiciled in Quebec. While in Ontario, the car was involved in an accident and the plaintiff was injured. Under Ontario law, gratuitous passengers had no right of action against the driver or owner of the automobile. Negligent driving, on the other hand, was punishable, but the defendant had been acquitted by a magisterial court in Ontario. The action was maintained on the ground that the driving of the defendant was, *in abstracto*, punishable and thus "non-justifiable", within the meaning of the authorities.[7] The case has been held up as an example of the disastrous consequences of the interpretation given in *Machado* v. *Fontes*[4] to the "justifiable" rule of Willes J.[8] On the other hand, it has been praised as an

[1] That "actionable" means "actionable at the suit of the plaintiff" both in *lex loci* and *lex fori* seems to be confirmed by other British cases; cf. Dicey, pp. 954 ff.

[2] *Canadian National S/S Co.* v. *Watson* [1939] 1 D. L. R. 273: ". . . an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than innocent within the meaning of the rule." (at p. 274).

[3] *Walpole* v. *Can. Northern Ry. Co.* [1923] A. C. 113; *Mcmillan* v. *Can. Northern Ry. Co.* [1923] A. C. 120.

[4] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[5] *Story* v. *Stratford Mill Bdg Co.* (1913), 30 Ont. L. R. 271.

[6] *McLean* v. *Pettigrew* [1945] 2 D. L. R. 65.

[7] At p. 80, *per* Taschereau J.

[8] Cheshire, p. 263 f.; Cowen, Z., Torts in the Conflict of Laws, (1952), 68 *L. Q. R.*, p. 321, at p. 322; Spence, D. B., Conflict of Laws in Automobile Negligence Cases, (1949), 27 *Can. Bar R.*, p. 661, at pp. 675 ff.

application of the "proper law" of the tort[1] or at least defended as an equitable result.[2] It is submitted, with respect, that whether the result is just or unjust, it was reached by reasoning which can only be considered as regrettable and as an extension of the rule in *Machado* v. *Fontes*[5] completely unwarranted by that authority. If an acquittal by a competent court in the *locus delicti* is not considered a sufficient justification, it may well be wondered how a defendant can ever manage to justify himself. If the common domicile of the parties was of decisive importance in the view of the court, this should have been said in the judgment; if it was not, the justice of the result was only fortuitous and could easily turn into gross injustice in a case where either of the parties was domiciled in another jurisdiction than that of the *forum*.[3]

In those parts of the Commonwealth where English common law does not prevail, the *Phillips* v. *Eyre* rule has been generally accepted,[4] whereas the development of the "justifiable" rule in *Machado* v. *Fontes*[5] has been less favourably received.[6] Notably, the courts of Scotland have refused, in a series of decisions, to maintain actions where the plaintiff could not prove a civil right of action under the foreign *lex loci*. It would seem that the rule of concurrent actionability was introduced into Scots law by mistake: in *Goodman* v. *London and Northwestern Railway Company*,[7] Lord Shand made actionability under *lex loci* a condition of recovery,

[1] Dicey, p. 937.

[2] Falconbridge, J. D., Torts in the Conflict of Laws, (1945), 23 *Can. Bar R.*, p. 308, at p. 315. Dean Falconbridge finds the decision indistinguishable from *Machado* v. *Fontes*.

[3] *McLean* v. *Pettigrew* was followed in a similar case, *Morris and Stulback* v. *Angel* [1956] 5 D. L. R. 2d, 30 (Supreme Court of Br. Columbia). The "non-justifiable" character of the defendant's driving was established by the court upon the facts; no verdict of the courts of the *locus delicti* was alleged.

[4] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. p. 1.

[5] *Machado* v. *Fontes* [1897] 2 Q. B. 231.

[6] Cf., however, a *dictum* per Herbstein J. in *Rogaly* v. *General Imports (Property) Ltd.* (1948), 1 S. A. L. R. 1216, (S. Court of S. Africa), at p. 1223: "No authority was quoted and I have not been able to find any that in Roman-Dutch law, in order to succeed it would be necessary for the plaintiff to establish the two conditions required in English law."

[7] *Goodman* v. *London and N. W. Ry. Co.* (1877), 14 S. L. R. 449.

quoting *Phillips* v. *Eyre*[1] in support of his judgment.[2] The principle was not followed in *M'Larty* v. *Steele*,[3] an action for libel committed by one Scotchman against another in the Straits Settlements. The learned Lords of the Court of Session there held, without further explanation, that "the case must be tried according to the law of Scotland."[4] Later cases resumed the double actionability doctrine, however, and as early as 1891, in *Ross* v. *Sinhjee*,[5] the condition of concurrent actionability seems to have been understood as a requirement not only for actionability *in abstracto* but for a right of action which can be entertained by the same plaintiff under both *lex loci* and *lex fori*.[6]

A particular problem in actions for foreign torts in Scots courts is presented by the assessment of damages. Under Scots law, damages of a particular kind known as *solatium* are given to the victim of a tort; in cases of bodily injuries, it seems to correspond to the "general damages" of English law; where recovery is granted for fatal accidents, its historical function appears to be the "assythment" of the deceased's relatives.[7] In an early case, *Horn* v. *North British Railway Co.*,[8] *solatium* was treated as part of the remedy and was accordingly given under the Scots *lex fori*.[9] This decision

[1] *Philip* v. *Eyre* (1870), L. R. 6 Q. B. p. 1.

[2] Ehrenzweig, A. A., Alternative Actionability in the Conflict of Laws of Enterprise Liability, (1951), 63 *Jur. R.*, p. 39, at p. 42; Walker, D. M., Delicts and Conflicts of Laws, (1950), *S. L. T.*, p. 209, at p. 210.

[3] *M'Larty* v. *Steele* (1881), R. 435.

[4] *Per* Lord Young, at p. 436. The Lord Justice-Clerk, at the same p., laid down a rule which comes very near the principle followed in *Machado* v. *Fontes*. In *Ross* v. *Sinhjee*, however, the decision of the Court of Appeal was constructed as an example of concurrent actionability, ((1891), 19 R. 31, at p. 35, *per* Lord Stormonth Darling); in *M'Elroy* v. *M'Allister* [1949] S. C. 110, *Machado* was rejected (at p. 125). O'Riordan, F. E., Choice of Law in Actions *ex delicto* under Scots law, (1940), 4 *M. L. R.* 214; Walker, *op. cit.* (in note 2), at p. 210.

[5] *Ross* v. *H. H. Sir Bhagvat Sinhjee* (1891), 19 R. 31.

[6] At p. 36, *per* Lord Justice-Clerk. Walker, *op. cit.* (in note 2), p. 210. Another case in point is *J. Evans & Sons* v. *J. G. Stein & Co.* (1904), 7 F. 65.

[7] Note signed D. M. W(alker), (1955), 71 *S. L. R.*, p. 245, at p. 247.

[8] *Horn* v. *North British Ry. Co.* (1878), 5 R. 1055.

[9] At p. 1064, *per* Lord Justice-Clerk. The action was originally in contract, and there was some hesitation in the court whether the Scottish *lex contractus* or the English *lex loci delicti* ought to be applied. O'Riordan, F. E., Choice of Law in Actions *ex delicto* under Scots law, (1940), 4 *M. L. R.* p. 214, at p. 215.

was overruled, however, in *Naftalin* v. *London, Midland and Scottish Railway Co.*[1] where the pursuer claimed *solatium* for the death of his son in a railway accident in England caused by the negligence of the defender's servants. *Solatium* was here characterized as "a substantive *jus* or right for which a basis must be found in the *lex loci delicti.*"[2]

From the point of view of Scots law, *M'Elroy* v. *M'Allister*[3] was only the logical outcome of the previous development. However, as the case raised considerable attention in England, it may be justified to analyse it in some detail. M'Elroy, the pursuer's husband, and the employee of a Glasgow company, was killed in an automobile accident in England, allegedly due to the negligence of the defender who was in charge of the vehicle in which the deceased was travelling. The concurrent actionability rule here worked to defeat all the claims put forward by the pursuer, with the exception of funeral expenses which were actionable under both laws. The *solatium* claim failed on the principle laid down in *Naftalin's* case;[1] the claim for damages for loss of expectation of life under the English Law Reform (Miscellaneous Provisions) Act, 1934, failed because it was not actionable in Scotland;[4] finally, on the authority of *Goodman's* case,[5] the cause of action founded on the English Fatal Accidents Act was not maintained, as the lapse of time, considered as substantive in Scots law, had extinguished its actionability under the *lex loci delicti.* In refusing to grant recovery under the last-mentioned head of claim, the Scottish Court obviously disagreed with the English Court of Appeal in *Machado* v. *Fontes.*[6] The rule applied by the House of Lords has been generally ac-

[1] *Naftalin* v. *London, Midland and Scottish Ry. Co.* (1933), S. L. T. 193, at p. 196, *per* Lord Hunter and Lord Anderson. O'Riordan, *op cit.*, p. 214.

[2] *ibid.*, *per* Lord Anderson.

[3] *M'Elroy* v. *M'Allister* [1949] S. C. 110.

[4] Under the rule laid down by the House of Lords in *Stewart* v. *London, Midland and Scottish Ry. Co.* [1943] S. C. 19, that by Scots law all rights of action for negligent personal injuries abate with the death of the victim.

[5] *Goodman* v. *London & N. W. Ry. Co.* (1877), 14 S. L. R. 449.

[6] *Machado* v. *Fontes* [1897] 2 Q. B. 231. Cheshire, p. 260; Ehrenzweig, A. A. Alternative Actionability in the Conflict of Laws of Enterprise Liability, (1951), 63 *Jur. R.*, p. 39, at pp. 39 ff.; Walker, D. M., Delicts and the Conflict of Laws, (1950), *S. L. T.*, p. 209, at pp. 210 ff.

claimed as sound,[1] although it has been observed that in the case at bar it caused considerable hardship to the pursuer.[2]

It has been argued that *M'Elroy* v. *M'Allister*[3] is a powerful support of the "remedial" interpretation of *Machado* v. *Fontes*,[4] and contributes to clarify the meaning of the English tort rule as one of concurrent actionability.[5] It is submitted that such a conclusion is hardly warranted by the facts. The Scots court decided the case in accordance with an old rule which had been laid down in *Goodman's case*[6] before *Machado* v. *Fontes* was decided, and there is at least one *dictum* in the modern Scottish decision to the effect that the court considered its decision as opposed to the judgment of the English Court of Appeal.[7] If *Machado* v. *Fontes*[4] cannot be explained away on procedural grounds, and it has been submitted earlier that it cannot, *M'Elroy* v. *M'Allister*[8] does not shred any light upon the present state of the law of England.[9]

It was submitted earlier in the present study that the criticism directed against the choice-of-law rules normally followed by courts is mainly concerned with two groups of cases: those where the real problem is raised by the difficulty of finding a place where the tort can be said to have taken place; and those where doubtful decisions are due not to the *lex loci* rule as such, but to its extensive application.[10] To these two groups must be added a third: cases where the parties were at the time of the tort in contractual relations with each other. It has been suggested that in cases of this kind the law governing the contract may also be applied to the wrongful act.[11] In the following chapters each of these groups will be studied more closely.

[1] Cheshire, Ehrenzweig and Walker, *op. cit.* (in note 6 above).
[2] Gow, J. J., Delict and Private International Law, (1949), 65 *L. Q. R.*, p. 313, at p. 317; Morris, J. H. C., Torts in the Conflict of Laws, (1949), 12 *M. L. R.*, p. 248.
[3] *M'Elroy* v. *M'Allister* [1949] S. C. 110.
[4] See note 6 at p. 114.
[5] Gow, *op. cit.*, at p. 315; Schmitthoff, C. M., in (1949), 27 *Can. Bar R.*, p. 816.
[6] *Goodman* v. *London & N. W. Ry* (1877), 14 S. L. R. 449.
[7] *Per* Lord Thomson, at p. 118.
[8] *M'Elroy* v. *M'Allister* [1949] S. C. 110.
[9] *McKinnon* v. *Iberia Shipping Co.* (1955), S. L. T. 49, follows *M'Elroy*. Smith, C., Machado v. Fontes Revisited, (1956), 5 *I. C. L. Q.*, p. 466; (1955), 71 *S. L. R.*, p. 245.
[10] *supra*, at pp. 37 ff.
[11] Binder, p. 463; Neuhaus, P. H., The Proper Law of a Tort (review), *RabelsZ.* 16, 1951, p. 651.

CHAPTER 4

PLACE OF WRONG PROBLEMS

A. *Statement of the Problem.* When it is stated that the courts of a certain state have adopted the *lex loci delicti* rule in dealing with international torts, this is a meaningful statement only if completed with information about the place which is considered as the *locus delicti* in cases where the tort is connected, in one way or another, with several jurisdictions. In the vast majority of tort actions, the location of the wrong presents no problem at all: both the act and its injurious effect take place within one and the same jurisdiction.

On the other hand, the practical situation arising in those cases where the constitutive elements of the cause of action are connected with two or more states must be examined in the light of rules governing the jurisdiction of courts. The effect of such rules is normally that the *lex fori* is in one way or another interested in the action: as the law of the domicile of either party or as the law prevailing at the place of acting, or at the place where the act took effect. Thus, there are two distinct situations to be considered: where the *forum* is, as it were, "neutral", and where its own rules, or the social interests it protects, are engaged. As will be shown *infra*, there is a very strong tendency in the courts of at least some countries to locate the tort in such a way that the *lex fori* can be applied; to obtain reliable evidence as to whether a certain country has adopted the theory that a tort is committed at the place where the act of the tortfeasor took place or the other, more common, doctrine that the place of the injurious effect is decisive for the location of the wrong, it would be necessary to consider in the first place the "neutral" cases.

The bias in favour of the *lex fori* is particularly strong in cases where a wrongful act has been committed in the jurisdiction of the *forum*. In this situation, local penal law often intervenes, and it may be asked whether the courts consider the case as a matter for

private international law at all, even if damage is done in a foreign jurisdiction.

Where harm has been done within the *forum* country as the result of a wrongful act abroad, the problem of the place of wrong is normally envisaged at the preliminary stage when the court has to decide whether to take jurisdiction or not.[1] Under the usual jurisdiction rules, courts are competent where a wrong has been committed within their territory, and assumption of jurisdiction therefore implies not only a location of the tort but also, *ipso facto*, a choice of law. As there is a tendency in many courts to protect the interests of residents as far as possible, jurisdiction is often taken whenever possible.

B. *Solutions of the Courts.* (a) France. The present writer has found no reported decision where French courts have been called upon to decide, as a *forum* neutral to the litigation, whether the *locus delicti* is the place of the wrongful act or the place where its injurious effect occurred. The sympathies of writers of the older generation seem to have been for the law of the place of acting,[2] whereas most modern theorists advocate the *lex loci injuriae*.[3]

Where courts have had to deal with torts exclusively connected with one jurisdiction there has, for obvious reasons, been no hesitation.[4] In a number of cases dealing with unfair competition directed against foreign business competitors, the courts have considered the tort as an entirely French concern whenever the acting has been proved to have taken place in France.[5] This is probably due to the fact that such acts of unfair competition as constitute fraud against the general public are primarily penal offences, and the civil aspects are subordinated to the application *ex officio* of French criminal law. However, the result was the same in a clearly civil action brought by the Italian FIAT company

[1] *George Monro Ltd.* v. *American Cyanamid and Chemical Corp.* [1944] 1 K. B. 432.

[2] Bartin, tome 2, p. 416.

[3] Niboyet, tome V, p. 151; Batiffol, p. 607.

[4] See e. g. Cour d'appel de Paris 23. 6. 1899, *Clunet* 1901, p. 128 (tort in Germany); Tribunal civil de la Seine 28. 1. 1911, *Clunet* 1912, p. 185 (tort between Germans in France).

[5] Cour d'appel de Bordeaux 22. 5. 1928, *Clunet* 1929, p. 418; Cour de Cassation 23. 6. 1954, *Revue* 1954, p. 536; Cour de Cassation 1. 6. 1954, *Revue* 1954, p. 534.

against patent infringements in France which had economic repercussions in Italy,[1] and in an early case, French rules on unfair competition were applied to the sale in England of Saumur wines under the name of champagne. In its judgment the court stresses two facts, namely that French commerce was affected, and that English newspapers, containing the defendant's advertisements, might find their way back to France.[2]

A second group of cases, in which the acts of the tortfeasor had all taken place abroad, but the injurious effect was suffered in France, show that the courts have not been strangers to the *lex loci injuriae* theory. An action for slander — which is primarily a criminal offence in French law, but also gives a right to damages — offers a classical example of a tort connected with two jurisdictions. A person standing on the Belgian side of the frontier had uttered injuries against a French official on French territory. The delict could, in the opinion of the court, be considered as having taken place in France where the outrageous words had been heard by the civil plaintiff.[3] Similarly, where a promise of marriage had been broken by a resident of Cambodia in a letter to the plaintiff in Paris, France was held to be the *locus injuriae* and French law was consequently applied.[4] In a recent decision, a French girl who had been seduced and undergone abortion in Portugal was considered to have suffered the injury at her French domicile; jurisdiction was assumed and the choice of law determined by the place of injury.[5]

It has been contended that the principle followed by French courts is the location of the tort to the place of the tortfeasor's acts,[6]

[1] Cour d'appel de Rennes 19. 11. 1924, *Clunet* 1925, p. 386. Here again, the specific character of patent legislation as affording a statutory protection within a limited territory may have contributed to the outcome.

[2] Cour d'appel d'Angers 15. 12. 1891, *Clunet* 1892, p. 444. Cf. Binder, p. 423.

[3] Tribunal correctionnel d'Avesnes 6. 11. 1934, *Revue* 1935, p. 432.

[4] Tribunal civil de la Seine 16. 6. 1936, *S.* 1939. 2. 1 (with approving note by Professor Niboyet); *Clunet* 1937, p. 279.

[5] Cour d'appel de Paris 18. 10.1955, *Revue* 1956, p. 484 (note Batiffol); but cf. Tribunal civil de Valenciennes 19. 12. 1935, *Revue* 1936, p. 468 where the (French) place of acting determined the choice of law and the German nationality and — it would seem — domicile of the seduced woman was expressly disregarded.

[6] Binder, p. 423.

but in the light of the cases, it would seem that the only rule which can be established with any certainty is that French courts apply French law as soon as a case has any substantial connection with France. Whether, in a case where a tort has contacts with two foreign legal systems, the French tribunals would follow the "place of acting" or the "place of injury" rule, is so far impossible to predict.

(b) Germany. Before the coming into force of the German Civil Code, the situation in the German Empire was similar to that prevailing in the U. S. A. Several jurisdictions with often very different legal systems existed within the country, and no national or nationalistic interest likely to bias the decisions was engaged. After the unification of German civil law, there have been few decisions on international torts outside the sphere of unfair competition, and in cases belonging to this later group, German courts have never decided as "neutral" *fora.*

The doctrine most commonly adopted by writers is a rationalization of a number of decisions of the *Reichsgericht:* when a tort is substantially connected with more than one jurisdiction, the plaintiff is free to choose under which of the legal systems concerned he will bring the action.[1] Early writers to whom the law of torts was closely connected with penal law usually stressed the wrongful act as such, and consequently were led to advocate a "place of acting" theory.[2]

The *Reichsgericht* rule is based upon a conception of the character of torts developed in municipal law. In an instructive case from the beginning of this century, the United Civil Senates of the Reichsgericht laid down the rule that a tort is committed in all those places where an essential part of the necessary facts have materialized. The place of a tort is *"jeder Ort wo sich der rechtserhebliche Tatbestand entweder in seiner Totalität — oder bei Fortsetzung über*

[1] Frankenstein, vol. II, p. 370; von Schelling, F. W., Unerlaubte Handlungen, *RabelsZ.* 3, 1929, p. 854, at p. 866; Binder, p. 408. It has been observed, by Kuratowski, R. K., in Torts in Private International Law, (1947), 1 *I. L. Q.*, p. 172, at p. 183, that in a special category of torts, namely, wrongful omissions to act, only the law imposing the legal duty to act seems to be eligible for application, even if the consequences of the omission materialize in another jurisdiction; cf. Lewald, 1931, p. 262, and German decisions cited there.

[2] Von Bar, vol. II, pp. 119 ff.

mehrere Gerichtsbezirke — in einem wesentlichen Stücke zugetragen hat."[1] When all the relevant facts point towards one jurisdiction, the problem is obviously not raised.[2] For the examination of more complex cases it may be justified to discuss separately decisions where the courts have been "neutral" and actions with a substantial German element.

Within the first group, the *Reichsgericht* rule was applied in a decision on that very uncommon situation illustrated in the American Restatement,[3] — a rifle exercise was conducted by the Imperial Army in Baden, and a man rowing a canoe on the Rhine was hit, probably on the Alsatian side of the river. However, the first time the German principle was explicitly formulated was in a case of a different character: the plaintiff, a Zurich merchant, received incorrect information on the solvency of a customer in a letter from the defendant in Lyons. The plaintiff was allowed to invoke the liability rules of French law.[4] Later decisions affirmed the standpoint taken by the court in this case.[5]

The "non-neutral" decisions are almost entirely concerned with unfair competition. In a long series of judgments, the *Reichsgericht* has applied German law to competitive practices performed abroad by German firms or businessmen.

In the vast majority of cases, both parties to the action have been Germans, and in the light of this fact it may be possible to reconcile these decisions with the normal *Reichsgericht* rule.[6] Although not explicitly mentioned in the reports, it seems highly probable that the application of the national law of both parties is the result of a choice in favour of German law by the German

[1] RG (Vereinigte Zivilsenate) 1909. 18. 10., *RGZ* 72, p. 41 (at p. 44).

[2] Cf. for instance RG 1882. 20. 9., *RGZ* 7, p. 374; RG 1895. 4. 11., *RGZ* 36, p. 27.

[3] *Restatement of the Law of Conflicts of Laws*, 1934 (revised in 1948), under § 377.

[4] RG 1888. 20. 11., *RGZ* 23, p. 305 (at p. 306). The court had to distinguish an earlier decision (1887. 23. 9., *RGZ* 19, p. 382), in which it had applied the law of the place where a letter with negligently given information of the same character had arrived.

[5] RG 1891. 15. 5., *RGZ* 27, p. 418. An exception seems to have been made in RG 1906. 8. 11., *Clunet* 1909, p. 212, but the report is so laconic that it is impossible to determine the implications of the case.

[6] Cf., however, the criticism of Raape, p. 365.

plaintiff. This, however, is not sufficient to explain how, by often very artificial reasoning, the courts have arrived at considering Germany as one of the places where the tort has been committed. In a number of cases this argument has not even been invoked, but the application of German law has been explained on other grounds.

In a series of earlier decisions, all concerned with the infringement of German business names and trade marks, committed by Germans on foreign markets,[1] judgments based on provisions in the national law of the parties were explained by one or more of the following arguments: that the protection of business names and trade marks is not territorially limited by virtue of its specific character,[2] that the defendant, as a German, is subject to his national law in all his dealings,[3] that parts of, or at least preparations for, the tortious acts had taken place in Germany;[4] that the ultimate effects of the unlawful practices were felt within the jurisdiction.[5]

In 1930, it was decided by the *Kammergericht* that business names and trade marks are protected only within the jurisdiction where they have been registered,[6] but although the courts thus found themselves deprived of one argument in favour of the application of German law, the trend of decisions was, and is, still the same.[7] The reasons given for the extension of the sway of German law are based upon the fact that some preparatory element, or at least

[1] RG 1886. 2. 10., *RGZ* 18, p. 28; RG 1903. 12. 5., *RGZ* 54, p. 414; RG 1903. 16. 6., *RGZ* 55, p. 199; RG 1923. 19. 6., *RGZ* 108, p. 8; RG 1925. 10. 2., *RGZ* 110, p. 176.

[2] RG 1886. 2. 10., *RGZ* 18, p. 28 (at p. 29 f.); RG 1903. 12. 5., *RGZ* 54, p. 414 (at p. 416); RG 1923. 19. 6., *RGZ* 108, p. 8 (at pp. 9 and 14).

[3] RG 1886. 2. 10., *RGZ* 18, p. 28 (at p. 36); RG 1903. 12. 5., *RGZ* 54, p. 414 (at p. 416).

[4] RG 1923. 19. 6., *RGZ* 108, p. 8 (at p. 9); RG 1925. 10. 2., *RGZ* 110, p. 176 (at p. 178).

[5] RG 1903. 16. 6., *RGZ* 55, p. 199 (at p. 200).

[6] Kammergericht 1930. 8. 5., *IPRspr.* 1931, Nr. 105. 4. RG 1933. 17. 2., *RGZ* 140, p. 25, at p. 26 f.

[7] RG 1931. 31. 3., *IPRspr.* 1931, Nr. 42; RG 1933. 17. 2., *RGZ* 140, p. 25, *IPRspr.* 1933, Nr. 67; RG 1936. 14. 2., *RGZ* 150, p. 265. Bundesgerichtshof (BGH) 1954. 13. 7., *BGHZ* 14, p. 286; BGH 1956. 13. 7., *BGHZ* 21, p. 266; BGH 1956. 2. 10., *BGHZ* 22, p. 1.

some planning, of the tort has been effected within the jurisdiction,[1] that Germany is the place of the ultimate effect of the unfair competition,[2] or, finally, that the German *lex patriae* must be considered as binding upon nationals wherever they are engaged in business.[3]

It is an obvious consequence of prevailing rules as to the assumption of jurisdiction that courts will seldom be in a position to consider cases of unfair competition committed abroad by foreign companies against foreign competitors, or, for that matter, against firms domiciled within the jurisdiction. It would be a logical consequence of the earlier German theory on the extraterritoriality of trade marks that foreign marks should be protected in Germany. The few reported decisions of actions with a stronger foreign element do not allow any far-reaching conclusions. In an early case, it was held that where a trade mark is registered in a foreign country, its use in that country cannot constitute an infringement of a German trade mark,[4] and another decision of the *Reichsgericht* applied both German law and the allegedly identical foreign law to an infringement committed within the American state of Ohio by a company domiciled in, and exporting its articles to, Hamburg.[5] When a Munich firm brought an action against a company domiciled in Vienna on account of a letter allegedly constituting unfair competition sent from the Vienna office of the defendant company to another Viennese firm, the *Reichsgericht* declined to take jurisdiction although the plaintiff contended that the ultimate effect of the tort was felt at the plaintiff's Munich domicile.[6] Similarly, an action for the infringement of a German copyright in Russia was not entertained by the courts on the ground that the German copyright law provided exhaustive rules both on the penal and the civil liability incurred by copyright infringements and that no civil liability could be enforced where the penal responsibility was excluded.[7]

[1] *RG* 1931. 31. 3., *IPRspr.* 1931, Nr. 42; BGH 1956. 13. 7., *BGHZ* 21, p. 266 (at p. 270).
[2] RG 1931. 31. 3., *IPRspr.* 1931, Nr. 42. Cf. Binder, p. 412.
[3] RG 1933. 17. 2., *RGZ* 140, p. 25 (at p. 26 f.); RG 1936. 14. 2., *RGZ* 150, p. 265 (at p. 270); BGH 1956. 2. 10., *BGHZ* 22, p. 1 (at pp. 13 ff.).
[4] RG 1899. 7. 11., *RGZ* 45, p. 143.
[5] RG 1900. 2. 5., *Clunet* 1900, p. 812.
[6] RG 1929. 17. 1., *IPRspr.* 1929, Nr. 52.
[7] RG 1894. 14. 11., *RGZ* 34, p. 46.

The only conclusion which may safely be drawn from these cases is that German courts are reluctant to apply foreign laws on industrial or literary property, and that the extension of the *lex fori* by fictitious location of the tort or other devices, is only used against German nationals.

It has been pertinently asked whether such artificial reasoning would be needed. Rules of unfair competition can be considered from two angles: either as rules for the members of a certain profession or as rules for the regulation of a market.[1] If the first view is adopted, the penal, or disciplinary, side of these laws is stressed, and their application would seem to be justified on the same ground as the extension of penal laws to nationals committing criminal offences abroad. Such an approach would in effect remove unfair competition by subjects of the *forum* country from the sphere of private international law. Although this idea is certainly helpful in understanding some of the German decisions, it would seem that other theories, to be discussed later, provide equally satisfactory explanations.

(c) England. 1) There is no real certainty as to the "place of wrong" rule followed by English courts. There are few decisions on this point, and in conflict literature the problem has been raised and discussed only in the last ten years.[2] It has been contended that the stress laid by English courts upon the "justifiable" or "unjustifiable" character of the defendant's acts speaks strongly in favour of a "place of acting" rule.[3] The cases, however, hardly lend themselves to any such construction, or, indeed, to any definite construction at all.

2) Relevant decisions have generally been concerned with the question whether a tort has been committed in England so as to allow service of notice to a defendant resident outside England under the Rules of the Supreme Court. Service was refused in

[1] Wengler, W., Laws concerning Unfair Competition and the Conflict of Laws, (1955), 4 *Am. J. Comp. L.*, p. 167 (at pp. 178 ff.). The learned writer concludes in favour of the interpretation of unfair competition rules as a regulation of a market.

[2] Lorenzen, E. G., Tort Liability and the Conflict of Laws, 47 *L. Q. R.*, p. 483 (at pp. 491 ff.); Wolff, pp. 493 ff.

[3] Wolff, p. 495.

Kroch v. *Rossell*,[1] but the *ratio* of this decision seems to have been that the English courts were held *forum non conveniens* in an action brought by a Frenchman, domiciled in Germany, against a French company which had published allegedly defamatory matters in their newspapers, a few copies of which had been sold in England.

In *George Monro Ltd.* v. *American Cyanamid and Chemical Corp.*[2] the Court of Appeal equally refused to allow service of notice of a writ under R. S. C. Order XI, 1 (e) and (ee). The plaintiff had bought artificial manure from the defendant, under a contract made in New York, where title to the goods passed to the plaintiff. The goods were resold in England and, in the last instance, were used by a farmer who suffered economic loss from a deleterious substance found in the manure. The British importer now sued the manufacturer, and as it was agreed that the proper law of the contract was the law of New York, the action was confined to the alleged tortious negligence of the defendant. Whereas du Parcq L. J. in his judgment clearly considered the location of the tort to be that place where a wrongful act has been committed,[3] Scott, L. J. seems to have founded his decision on the element of discretion left to the courts in Order XI, and expressly refused to give any opinion on the question whether the tort could be said to have taken place in England. The vagueness of the tort claim as opposed to the defendant's contractual liability for the vices of the goods also seems to have had some weight with the learned Lord Justice.[4]

Bata v. *Bata*,[5] where service was allowed, may not necessarily be considered as irreconcilable with the *George Monro Ltd* case.[2]

[1] *Kroch* v. *Russel et Cie* (1937), 156 L. T. 379 (Court of Appeal).

[2] *George Monro Ltd.* v. *American Cyanamid and Chemical Corp.* [1944] 1 K. B. 432 (Court of Appeal); Cheshire, pp. 269 ff.; Cowen, Z., Locus Delicti in English P. I. L., (1948), *B. Y. I. L.* 25, p. 394; Dicey, p. 969.

[3] *Ibid.*, at p. 441.

[4] *Ibid.*, at p. 436 f. For the dictum of Goddard, L. J. (at p. 439), see Cheshire, pp. 269 ff. As pointed out by Professor Cheshire, His Lordship's *dictum* seems to be in flat contradiction with the opinions of Pollock, C. B. in *Hernaman* v. *Smith* (1855), 10 Exch., 655 and of Lord Esher, M. R., in *Read* v. *Brown* (1888), Q. B. D. 128 (at p. 131).

[5] *Bata* v. *Bata* (1948), W. N. 366 (Court of Appeal); Cheshire, p. 271; Cowen, Z., *op. cit.*, at pp. 395 ff.; Dicey, p. 969; Binder, p. 434. Cf. Scottish cases: *J. Evans & Sons* v. *J. G. Stein & Co* (1904), 7 F. 65 and *Tomson* v. *Kindell* (1910), 2 S. L. T. 442, where the place of wrong in defamation by letter and telegram respectively was held to be the place of publication.

A letter containing defamatory statements about the appellant had been sent from Zurich to three persons in London. Scott, L. J. held that "it was the publication of the contents of a defamatory document to a third party which constituted the tort of libel and which alone justified the libelled party in issuing his writ."[1] This decision was followed by the High Court of Ontario in *Jenner* v. *Sun Oil Co.*,[2] an action for defamation in a radio programme broadcast in the United States but heard in Ontario. The latter province was thus obviously considered as one of the places of publication. Finally, in an Irish decision, *Quinn* v. *Kelly*,[3] the flooding of a turbary in Co. Fermanagh, N. I., by digging in the banks of a stream in Co. Donegal, Eire, was held to be a tort committed in Fermanagh.

There are, on the other hand, hardly any decisions supporting the "place of acting" theory in English reports. *Baschet* v. *London Illustrated Standard Company*[4] is hardly a case in point, although it may possibly be argued that the granting of damages for an infringement of a French copyright in the jurisdiction would point towards a location of the tort to the place of acting. However, the special character of the case and the presence of an international convention binding upon the courts make such suggestions very dubious.[5] In a Scottish seduction case, *Ross* v. *Sinhjee*[6], a solution contrary to the French decisions was adopted and the place of acting chosen as *locus delicti*. In actions brought under Wrongful Death Acts, the place of injury, not that where death occurred as a result of the injury, seems to have been generally adopted.[7]

[1] Cheshire, p. 271; Cowen, Z, *op. cit.*, at pp. 395 ff.; Dicey, p. 969; Binder, p. 4. Cf. Scottish cases: *J. Evans & Sons* v. *J. G. Stein & Co.* (1904), 7 F. 65, and *Tomson* v. *Kindell* (1910), 2 S. L. T. 442.

[2] *Jenner* v. *Sun Oil Co.* [1952] D. L. R. 526.

[3] *Quinn* v. *Kelly* (1945), Ir. L. T. 143.

[4] *Baschet* v. *London Illustrated Standard Co.* [1900] 1 Ch. 73.

[5] Another copyright case, *Morocco Bound Syndicate Ltd.* v. *Harris* [1895] 1 Ch. 534, is concerned with the question of the effectiveness of an injunction against a copyright infringement abroad and can hardly be said to furnish a clue.

[6] *Ross* v. *H. H. Sir Bhagvat Sinhjee* (1891), 19 R. 31. In a similar case, *Soutar* v. *Peters* (1912), 1 S. L. T. 111, the "homeward trend" seems to have made the Court of Session choose Scotland, the place of the "psychological seduction" — where recovery was possible — in preference to England, where the physical act had been committed.

[7] *Koop* v. *Bebb* [1951] 84 C. L. R. 629.

3) Writers have interpreted the English decisions in various ways. The majority seem to advocate the American "place of wrong" rule, which they find adopted in *Bata* v. *Bata*[1]. To reach this result, however, these writers find themselves compelled to consider the decision of the Court of Appeal in the *George Monro* case[2] erroneous. A few authors prefer the German *Reichsgericht* rule,[3] whereas the "law of the social environment", discussed earlier in the present study, seems to be supported in the latest edition of Dicey's *Digest.*[4]

It is submitted that English courts are still free to make their choice, although there is possibly, after the decision in *Bata* v. *Bata*,[1] some authority for the "place of harm" rule. However, in consideration of the special character of the tort — libel by letter — in this case and in *Jenner* v. *Sun Oil Co.*,[5] this conclusion is not necessary. As the Chief Justice of the High Court pointed out in the last-mentioned case, "a radio broadcast is not a unilateral operation"[6] – an observation which also applies to defamation by letter. Indeed, although the publication is not effected by the tortfeasor, it is still part of the series of physical operations which, taken together, constitute the wrongful act as distinguished from the injury, which is of a psychological nature.

On the other hand, it is submitted that the decision in *George Monro*'s case[2] is not irreconcilable with a "place of harm" theory. The alleged tort in this case was closely interwoven with the execution of a contract, and it can be argued that the injury was suffered, not when the intrinsic vices of the goods caused actual damage, but at the time when the goods, possessing already its dangerous qualities, became the property of the plaintiff in New York where it was delivered.

The conclusion of this reasoning is that whereas English courts

[1] *Bata* v. *Bata* (1948), W. N. 366 (Court of Appeal), Cheshire, p. 397 f.; Graveson, p. 431.

[2] *George Monro Ltd.* v. *American Cyanamid and Chemical Corp.* [1944] 1 K. B. 432.

[3] Kuratowski, R. K., Torts in Private International Law, (1947), 1 *I. L. Q.*, p. 172 (at p. 188); Schmitthof, p. 161.

[4] Dicey, pp. 967 ff.

[5] *Jenner* v. *Sun Oil Co.* [1952] 2 D. L. R. 526.

[6] *Ibid.*, at p. 535.

have not rejected the "place of harm" theory they have not so far had an opportunity to decide upon the "place of acting" theory, or, indeed, the *Reichsgericht* rule.

(d) U. S. A. 1) The special conditions prevailing within the United States have been discussed above, and there is no need to enlarge upon the topic in this connection. It may be pointed out, however, that in the few reported actions with not only inter-state but also international aspects, American courts have not been entirely insensitive to the "homeward trend" so obvious in some European decisions.[1]

2) It has for a long time been considered as beyond doubt that the "place of harm" rule, based upon the theory that a tort is accomplished where the last event necessary to make its author liable took place, is the prevailing principle in the United States. Among the very great number of American decisions on this topic, it is easy to pick out typical cases: from *Alabama Great Southern R. R. Co.* v. *Carroll*,[2] where negligent inspection of a train in Alabama resulted in a fatal accident in Mississippi; *El Paso etc. R. R. Co.* v. *McComas*,[3] a similar case; to more modern decisions like *Reed & Barton* v. *Maas*,[4] where a Massachusetts manufacturer was held liable under Wisconsin law for an accident due to the faulty construction of a coffee urn ultimately sold to a person resident in Wisconsin; *Anderson* v. *Linton*,[5] where the law of Iowa imposed liability upon an Illinois manufacturer for the negligent fabrication of a house trailer which caused a highway accident in Iowa; and, finally, *La Prelle* v. *Cessna Aircraft Co.*,[6] a decision to the effect

[1] Cf., e. g., *Thompson's Towing etc. Ass'n* v. *McGregor* (1913), 207 F. 209, where an accident occurring in Canadian waters on board an American vessel, coming from and bound for an American port, was considered subject to American law.

[2] *Alabama G. S. R. R. Co.* v. *Carroll* (1892), 38 Am. St. Rep. 163 (S. Ct. of Alabama).

[3] *El Paso etc. R. R. Co.* v. *McComas* (1903), 72 S. W. 629 (Tex. Court of Civil Appeal).

[4] *Reed & Barton* v. *Maas* (1934), 73 F. 2d 359 (U. S. Court of Appeal, First Circuit).

[5] *Anderson* v. *Linton* (1949), 178 F. 2d (U. S. Court of Appeal, Seventh Circuit).

[6] *La Prelle* v. *Cessna Aircraft Co.* (1949), 85 F. Supp. 182 (U. S. District Court, District of Kansas).

that a Kansas aircraft producer answered under Oklahoma law for an accident which occurred in the latter State owing to defects in an aircraft manufactured by the defendant.

3) The "place of harm" rule is unequivocally stated in the Restatement,[1] and endorsed by most American textbook writers.[2] One line of criticism, inaugurated by Professor W. W. Cook, has already been mentioned: writers of this school of thought recognize the validity of the rule in American decisions but at the same time criticize it in favour of a "place of acting" or *Reichsgericht* rule.[3] As the present analysis is at this stage concerned with the law as it is, and not as it ought to be, the arguments of these critics will not be further enlarged upon.

A far more radical criticism has recently been directed against the Restatement rule by writers who contend that it is not consistent with the decisions of American courts. Professor Ehrenzweig argues, with the support of a great number of decisions, that intentional torts are normally judged according to the law of the place of acting,[4] whereas Professor Rheinstein goes even further and declares that the place of acting is the *locus delicti* chosen by American courts in *all* tort actions.[5] This is not the place to discuss extensively the propositions put forward by the two learned authors; some of the American cases invoked to support their theories have not been available to the present writer.

However, to deal in the first place with the most radical suggestion, it is submitted, with respect, that Professor Rheinstein's contention is hardly compatible with the cases. The Professor starts with an inquiry into the nature of torts and comes out strongly in favour of the theory that tortious liability, although in its essence a form of loss shifting, is imposed upon "conduct which falls short

[1] *Restatement of the Law of Conflict of Laws*, 1934 (revised in 1948), § 377.

[2] Beale, p. 1289; Goodrich, p. 263; Stumberg, pp. 182 ff. Cf. also, Rabel, vol. II, pp. 301 ff., and Hancock, pp. 193 ff.

[3] Cook, pp. 311 ff (also in Tort Liability and the Conflict of Laws, (1935), 35 *Col. L. R.* pp. 202 ff.); Cook, S. E., Long Distance Torts, (1950), 10, *La. L. R.*, p. 329; Harper, F., Tort Cases in the Conflict of Laws, (1955), 33 *Can. Bar R.*, p. 1155.

[4] Ehrenzweig, A., The Place of Acting in Intentional Multi-State Torts, (1951), 36 *Minn. L. R.*, pp. 1 ff. Cf. same author, Alternative Actionability in the Conflict of Laws of Enterprise Liability, (1951), 63 *Jur. R.*, p. 39.

[5] Rheinstein, M., The Place of Wrong, (1944), 19 *Tul. L. R.*, pp. 4 and 165.

of the standard of the community *i. e.*, through conduct which is either clearly prohibited or which falls short of that vague standard to which we expect the ordinary prudent man to conform and the violation of which we call negligence."[1] The supreme social interest of the place of acting is thus postulated, and setting out from this hypothesis, Professor Rheinstein proceeds to scrutinize the cases upon which the Restaters built their "last event" doctrine. The demonstration that these cases gave little or no support to the theory is generally convincing. This, however, does not change a iota of the present law as administered by American courts. It is sufficient to point out the few cases cited above as illustrations of the application of the Restatement rule. The Restaters may have misinterpreted earlier decisions — though it is more likely that they gave them a strained interpretation consistent with their own theoretical view — but it is certain that under the influence of the Restatement American courts follow, in the vast majority of cases, the "last event" doctrine. For our present purposes, this is certainly enough.

Professor Ehrenzweig's argument is that in intentional torts, such as conversion, fraud, unfair competition and alienation of affections, American courts, although regularly paying lip-service to the "place of harm" rule, have almost universally applied the law of the place of acting. Cases belonging to these different groups of torts will be discussed more fully below, where it will be submitted that the only category of intentional torts in which the Restatement rule has been more notably departed from are those which constitute attacks upon immaterial property and similar rights, i. e. where the "place of harm" is for obvious reasons difficult to locate. The remaining groups discussed by Professor Ehrenzweig are the "property" torts — conversion and fraud, which will also be discussed later — and the very few and, it is submitted, unimportant cases of wilful or negligent physical acts which cause physical damage in another jurisdiction than that where they are committed.

It is submitted that there is hardly any reason of justice or equity requiring intentional torts to be treated in what must be described as a more lenient way than unintentional acts giving rise to a

[1] *Ibid.*, p. 25.

liability in tort. However, the relative importance of the central group of cases cited by Professor Ehrenzweig is not such as to invalidate in a serious way the Restatement rule. As most of the special categories of decisions discussed by the learned Professor will be dealt with in the course of this and the following two chapters, there does not seem to be any need for analysing these decisions in detail at this stage.

4) Those cases where an orthodox application of the Restatement rule has met with real and considerable difficulties belong to certain specific groups of torts in which, as we have already pointed out, these problems are largely due to the difficulty of locating the injury.

The first group is concerned with torts perpetrated by modern means of mass communication. In *Dale* v. *Time Inc.*[1] an agency for controlling the honesty and efficiency of employees which was domiciled in Connecticut sued the Time magazine for an allegedly libellous article, prepared in New York, printed in Illinois, Pennsylvania and California, and reprinted in New Hampshire, Ohio and various foreign States. The Federal Judge, sitting in Connecticut, had to apply the conflict rules of that State, but finding no precedent from its courts, held that the law of the plaintiff's domicile best met all the practical requirements of the case, and with this advantage combined "simplicity, certainty and ease of application" and, finally, prevented the plaintiff from "shopping for the most favourable of a plurality of jurisdictions".[2] Simplicity is not the keynote of a somewhat earlier case, *Hartmann* v. *Time Inc.*,[3] where a person known throughout the Union brought an action for defamation against the same magazine as in the *Dale* case. The

[1] *Dale System* v. *Time Inc. et al.* (1953), 116 F. Supp. 527 (U. S. District Court, District of Conn.). See Ginsburg, L. M., Choice of Law in Multi-State Defamation, (1953), 5 *Syracuse L. R.*, p. 272; Van Domelen, P., Conflict of Laws — Torts — Choice of Law in Multistate Defamation, (1953), 51 *Mich. L. R.*, p. 432; and note in (1954), 29 *N. Y. U. L. R.*, p. 1285.

[2] *Per* Hincks, Chief Judge (at p. 530 f.).

[3] *Hartmann* v. *Time Inc.* (1947), 166 F. 2d, 127 (U. S. Court of Appeals, Third Circuit); Prosser, W. L., Interstate Publication, (1953), 51 *Mich. L., R.* p. 959 (at pp. 967 ff.); notes in (1948), 61 *H. L. R.*, p. 1460 and (1949), 62 *H. L. R.*, p. 1041. Cf. the similar case *Hartmann* v. *American News Co.* (1947), 69 F. Supp. 736 (U. S. District Court, District of Wis.) and Remmers, D. H., in (1950), 64 *H. L. R.*, p. 732.

action was brought in a Federal Court in Pennsylvania, where the State courts have adopted a "single publication" rule, according to which only one cause of action arises in libel, independently of the number of jurisdictions in which the libellous matter has been published. The Court held, on appeal, that all the causes of action arising in States following the "single publication" doctrine were barred by the Pennsylvania limitation statute, whereas in each of those other jurisdictions where publication had taken place, a separate cause of action had arisen and was still in existence. The law of the plaintiff's domicile was again applied in *Mattox* v. *News Syndicate Co.*[1]

Defamation by broadcast was considered in *Dale System* v. *General Teleradio.*[2] The allegedly defamatory programme was broadcast from New York which was also the State of the *forum.* These connecting factors persuaded the court to choose New York law as the municipal legal system entitled to govern the action. In *Bernstein* v. *National Broadcasting Corp.*[3], an ex-convict, domiciled in Virginia but working in Washington, D. C., brought an action against a television-company which produced the story of his crime in such a way as to make him identifiable. The court held, applying the Restatement test, that the last event necessary to create a cause of action for invasion of privacy was the psychological reaction of the plaintiff in Virginia or the District of Columbia.

The cases of multi-state defamation by press, radio or television have created considerable difficulties in the United States. Whereas some writers hold that the only way of solving this complicated problem is uniform or federal legislation,[4] others have suggested a number of tests by which to ascertain that the contact between the incriminated activity and the law invoked by the plaintiff is sufficiently substantial. Among these contact points, the

[1] *Mattox* v. *News Syndicate Co.* (1949), 176 F. 2d 897. See notes in (1950), 25 *N. Y. U. L. R.*, p. 165, and (1950), 63 *H. L. R.*, p. 1272.

[2] *Dale System* v. *General Teleradio* (1952), 105 F. 745 (U. S. District Court, Southern District of New York); Van Domelen, *op. cit.*, pp. 433 ff.

[3] *Bernstein* v. *National Broadcasting Corp.* (1955), 129 F. Supp. 184 (U. S. District Court, District of Columbia).

[4] Prosser, W. L., Interstate Publication, (1953), 51 *Mich. L. R.*, p. 959 (at pp. 999 f.).

forum, the place of the last event necessary to make the actor liable, the point of origination of the defamatory statements, the State of principal circulation of the newspaper or radio programme, and the domicile of the plaintiff, seem to be those most commonly accepted.[1]

The tendency of U. S. courts in cases of unfair competition with international effects seems to be in favour of the application of American law when possible.[2] Thus, in *Vacuum Oil Co.* v. *Eagle Oil Co. of New York*[3], where the defendant company had shipped unmarked oil barrels to Hamburg and marked them with names previously used only by the plaintiff, the fact that parts of the preparations for the unlawful practices had been performed in New York was held sufficient for American law to be applied.[4] Similar facts produced the same result in *Steele* v. *Bulova Watch Co.*, a decision of the Supreme Court[5], and in a case of trade mark infringement, decided by a Federal Court of Appeal, *Hecker H.-O. Co.* v. *Holland Food Corp.*[6] In a case of multi-state unfair competition, *Adressograph-Multigraph Corp.* v. *American Bolt and Manufacturing Co.*[7], the court applied the law of Illinois, the defendant's principal place of business.

A special problem, more properly treated as a matter of public international law, but of symptomatic interest for the present topic, is created by the American Federal and state anti-trust legislation, which has been applied to avoid trade agreements, wherever concluded, as soon as they affect the American market.[8]

[1] Van Domelen, *op. cit.*, p. 434; these torts are discussed by the court in *Dale* v. *General Teleradio* (1952), 105 F. Supp. 745. Cf. Prosser, *op. cit.*, pp. 971 ff., where the different points of contact are discussed.

[2] Binder, p. 451.

[3] *Vacuum Oil Co.* v. *Eagle Oil Co. of N. Y. et al.* (1907), 154 F. 867 (U. S. District Court, District of N. Y.).

[4] *Ibid.*, at p. 874 f.

[5] *Steele* v. *Bulova Watch Co.* (1952), 344 U. S. 280; 97 L. Ed. 919; 73 S. Ct. 252; also in Cheatham, pp. 425 ff.

[6] *Hecker H.-O. Co.* v. *Holland Food Corp.* (1929), 36 F. 2d 767 (U. S. Court of Appeal, Second Circuit).

[7] (1941), 124 F. 2d 706 (U. S. District Court, S. District of Ill.). Cook, S. E., Long Distance Torts, (1950), 10 *La. L. R.* p. 329 (at p. 335).

[8] *U. S.* v. *Sisal Sales Corp.* (1927), 274 U. S. 268; *U. S.* v. *Aluminium Co. of America et al.* (1945), 148 F. 2d 416 (U. S. Court of Appeal, Second Circuit); *U. S.* v. *National Lead Co. et al.* (1947), 332 U. S. 319; *U. S.* v. *U. S. Alkali*

Breaches of legally recognized minimum price agreements, known as "fair trade" agreements, have finally created a new kind of unfair competition, in which the place of wrong seems to be, if possible, even more difficult to ascertain than in other torts of this kind.[1] Copyright, being a matter for Federal legislation, has produced few decisions of interest in the U. S. A.[2]

C. *Theoretical Discussion.* (a) Statement of the problem. The task set by the previous survey of solutions may seem both ungrateful and academic: to find, in the variety of decisions, a pattern of universal validity and formulate a "place of wrong" rule which, with due allowances for national diversities and technicalities, would be acceptable to courts. One thing seems obvious from the very beginning: however perfect a rule may be, it has no chances of being applied if it does not take into account the strong homeward bias noticeable in the courts of most jurisdictions.

Very few modern writers have supported an uncompromising "place of acting" theory, and as the foregoing survey shows, courts have done so only when the acting, as distinct from the injury, has taken place within the *forum* state. It is far from certain that in these decisions they have given particular consideration to the conflict problem involved.

It has already been submitted that an unmitigated "place of acting" rule tends to overvalue the similarity between the law of torts and penal law in stressing too heavily that fairness to the defendant demands that he be judged according to the standard under which he acted. The plaintiff has also a right to be judged according to the law under the empire of which he lived when injured, economically, physically or mentally. The only way in which the foresight of the potential victim of a tort can be expressed, however, is in his insurance policy, which, on the other hand, is regularly a product of the legal system prevailing in the country where it is issued.

Export Ass'n, Inc. et al. (1949), 86 F. Supp. 59 (U. S. District Court, Southern District of N. Y.). On the problems of enforcement raised by such decisions, see *British Nylon Spinners* v. *Imperial Chemical Industries* [1952] 2 All E. R. 780 (Court of Appeal).

[1] (1955), 22 *U. of Chic. L. R.*, p. 525 (anonymous note).

[2] Cf. *Triangle Publications* v. *N. England Newspaper Publishing Co.* (1942), 46 F. Supp. 198 (U. S. District Court, District of Mass.) where the action was brought both for copyright infringement and unfair competition.

If fairness to both parties is considered the ultimate end to be achieved, and it is submitted that there are, in the conflict of laws, few other principles to consult, it must be borne in mind, however, that private international law is not concerned with the fair shifting of the losses caused by tortious acts, but with the fair distribution of those disadvantages which necessarily follow from the application of a legal system other than that which gives the protection and imposes the standard normally expected by a man living or doing business in a given community.

(b) The place of injury. Before the tests of fairness and practicability can be applied to the second theory claiming attention, the "place of harm" doctrine, it is necessary to examine the most difficult problem confronting that doctrine, the objective location of the injury in those cases where it is not a clearly ascertainable physical impact.

In the cases where courts professing and generally applying with some consistence the *lex loci injuriae* rule have derogated from that principle, there seems to be at least one common denominator — the difficulty of locating the injury.[1] These cases are all concerned with libel, slander, invasion of privacy, unfair competition, infringement of patent and of copyright. The tort of seduction may possibly, with some hesitation, be admitted to this group.

To analyse the problem of locating the injury in all these cases, it is necessary to determine the character of the harm itself. Is there any common feature between the kind of damage suffered by the victim in these torts as opposed to other wrongful acts? It is submitted that such a common feature exists. If A hits B or sets fire to his barn, no lawyer and, indeed, no legal system, is needed to ascertain that A has done B a bad turn. If X in Massachusetts manufactures a defective coffee-urn which after having been sold and re-sold a couple of times explodes and injures Y in Wisconsin, a system of laws may be needed to determine the legal consequences for X, but the factual consequences to Y are ascertainable as naked facts, deprived of legal qualification, and would be felt just as acutely if Y lived on a desert island. In all the torts enumerated above, on the other hand, the injury is a legal fiction. To ascertain their existence, it is necessary to resort to the legal

[1] Cf. Cook, S. E., Long Distance Torts, (1950), 10 *La. L. R.* p. 329 (at p. 338 f.).

concept of "subjective right". All these torts constitute attacks, not upon the victim's body or barn, but upon a legally defined position, comprising a factual situation, expectations as to the behaviour of the social surroundings, including the officers of the law, and a historical development leading up to the factual situation. Two objections may be made against this distinction between the two different groups of torts. It may be argued, in the first place, that the harm suffered by B when his barn is burnt down is equally artificial and dependent upon a legal construction, namely the right of property. The answer is that quite apart from the truth that property is to a great extent the legal name given to the non-legal fact of possession, it is immaterial, for the purpose of the present comparison, who is the actual proprietor of the barn: what matters is the physical injury, the question of property is raised only when the facts are brought into the sphere of legal concepts by the institution of proceedings at law. Secondly, it may be contended, against the reasoning above, that in many of the torts specially discussed here, the injury is far from artificial: unfair competition can hit the purse of the victim very hard, and libel can cause the alienation of affections, the loss of customers and other easily ascertainable effects. This, however, does not invalidate the proposition that these torts are, *qua* injuries, artificial. Lawful competition can ruin a merchant and perfectly legitimate behaviour of neighbours and acquaintances can inflict the same harm as libel, but no legal redress is available because the law has not extended that artificial concept, a legally protected right, to these cases.

The rights attacked by the tortfeasor in committing the wrongful acts enumerated above can be divided into two groups.

Impairment of privacy, libel, slander, and such acts of unfair competion as defamation of a competitor or disparagement of his goods, are all attacks upon that dim and imperfect right which in German legal terminology is called "*Persönlichkeitsrecht*", and which could perhaps be called in English a "right of personal integrity". This right is imperfect, because it can only be described as the legal position protected by law against the above-mentioned torts, and beyond that, no further conclusions can safely be drawn as to its scope and character. It is, however, a convenient symbol for defining, in the language of legal formulae, the combined functions of the protection.

Patent and copyright infringements and those acts of unfair competition which constitute an improper use of a competitor's trade marks or business name are attacks upon rights more clearly defined — so clearly, indeed, that they are often referred to under the name of "immaterial property". It is true that trade marks and business names have been described in German judicial language as rights belonging to the same sphere as those affording protection of personal integrity, but it is submitted that their legal functions come closer to those generally attributed to industrial property — the fact that in most legal systems they can be the object of such transactions as assignment seems to point in that direction.

If the place of harm is to have importance in locating a tort, it is desirable that the place of harm be found according to objective and uniform principles. It is submitted that when the tort consists in an attack upon any of the "immaterial rights" discussed here, the injury is best located to the place where by legal fiction the right is held to be situated, and it seems to be commonly agreed in the conflict of laws that such rights are situated at the domicile of the person entitled to them.[1] This rule, however, has been formulated for other purposes in private international law, and some modifications may be needed to adapt it for use in the law of torts. Thus, for instance, whereas the private domicile of the owner of a trade mark is no doubt the best connecting factor where succession to the property is concerned, the domicile of his business is more likely to provide a satisfactory location for the injury inflicted by passing off and disparagement of goods.

Upon the whole, however, the present suggestion for locating torts against immaterial rights does not seem to require many adjustments. It is identical in result with the decisions of courts on cases of libel,[2] invasion of privacy,[3] unfair competition by libel[4] and passing off.[5] The few existing decisions on infringements

[1] Wolff, p. 492.

[2] *Dale* v. *Time Inc. et al.* (1953), 116 F. Supp. 527 (U. S. District Court, District of Conn.).

[3] *Bernstein* v. *National Broadcasting Corp.* (1955), 129 F. Supp. 184 (U. S. District Court, District of Columbia).

[4] RG 1923. 19. 6., *RGZ* 108, p. 8.

[5] *Steele* v. *Bulova Watch Co.* (1952), 344 U. S. 280; 97 L. Ed. 319; 73 S. Ct. 252.

of foreign patents and copyrights do not allow any conclusion as to the law chosen by the courts,[1] but it is submitted that the similarity of these wrongs to the wrongful appropriation of trade marks is strong enough to warrant a similar location of the injuries. However, the regulation of this branch of the law by international conventions tends to make such cases very uncommon.

One exception to the rule may be needed in such cases where libel, disparagement of goods or similar wrongs are committed by communications to a limited number of persons within one jurisdiction in the intention of affecting their attitude to a person in private or commercial connections. This case can perhaps be compared with fraudulent communications inducing a person to undertake acts detrimental to his economic position within one country. Although the fraud constitutes an attack upon the victim's whole fortune, courts have considered the place where, by acting, the victim sustained the economic loss, as the place of injury.[2] Similarly, if the result of a defamatory letter is limited to certain specific acts or attitudes of a limited number of persons within a certain country, the place of wrong may be located to that country although the tort is normally described as an attack upon the victim's right of personal integrity. Another way of dealing with cases of this kind would be to adopt, as suggested above, a fictive location of the injury to the country where a person has his business domicile as distinct from his personal domicile.[3]

The case of seduction, so cherished by conflict lawyers, and so uncommon in the courts,[4] may possibly be considered in the same light as the torts discussed in this chapter. For what constitutes the injury in seduction is certainly not the possible physical impact — *volenti non fit injuria* — but the damage done to the woman as a member of a social group, and in some countries at least, her decreased value on the marriage market; this is certainly if anything an attack upon a special right of personal integrity granted

[1] In *Baschet* v. *London Illustrated Standard Company* [1900] 1 Ch. 73, the only element in the decision which was clearly governed by English law was the remedy; cf. *dictum per* Kekewich, J. at p. 78.

[2] RG 1891. 15. 5., *RGZ* 27, p. 418.

[3] Cf. the decision in *Bata* v. *Bata* (1948), W. N. 366 (Court of Appeal).

[4] *Ross* v. *H. H. Sir Bhagvat Sinhjee* (1891), 19 R. 31; *Soutar* v. *Peters* (1912), 1 S. L. T. 111; Cour d'appel de Paris 18. 10. 1955, *Revue* 1956, p. 484.

by the law. The *locus injuriae*, then, would be the woman's domicile, a solution which seems to satisfy the "social surroundings" tests advocated by modern writers, prevent in many cases the impasse created by different characterization of seduction (and breach of promise) in different countries,[1] and agree with the results reached by courts.

The reasoning above may be considered highly artificial and conceptualistic. It is a practice often indulged in by conflict lawyers to produce ready-to-wear theories which must immediately be adjusted to the vigorous and irregular body of judicial decisions. On the other hand, it is submitted that a coherent edifice of legal concepts provides a better system of rules than policy considerations which are necessarily vague: courts, however conscious of the necessity of decisions which satisfy practical needs, must proceed by deductive reasoning, and a theory will serve them best if it can secure equitable results without sacrificing traditional legal techniques.

Another possible objection seems to require an answer. Is it not unnecessary, and unduly burdensome for the courts, to proceed by two successive stages: first, the location of the tort, often the result of lengthy consideration, and then the choice of such law, or laws, as may follow from that location? Would it not be possible to do without the first stage? This is the challenge of Mr. Binder's suggestions. It is submitted that whereas the vast majority of uncomplicated cases present no problem at all, even actions of greater complexity will not often require additional labour from the court, since it is frequently necessary to decide upon the location of the tort at an earlier stage of the action, before jurisdiction is assumed. The two most important principles of competence are embodied in the formulae *forum rei* and *forum delicti*. If the alleged *forum delicti* is seized with an international action in tort, it would not be very fortunate if the court assumes jurisdiction on the ground that the tortious act — or part of it — has been committed within the country where the *forum* is sitting, and then proceeds to try and decide the action in accordance with another legal system. This, it is submitted, would often mean considerable

[1] V. Schelling, F. W., Unerlaubte Handlungen, *RabelsZ* 3, 1929, p. 854 (at pp. 863 ff.).

waste of time for the court, and might also cause hardship to the defendant. It is most unlikely that the *forum delicti* principle will be replaced by more differentiated rules of competence, and this being so, it seems equally unrealistic to plead for the adoption of different choice-of-law principles in actions where the competence of the court is founded upon the formula *forum rei.*

(c) Merits and disadvantages of the place-of-injury rule. The next stage of the present discussion must be an appreciation of the traditional *locus injuriae* rule adopted by the Restatement.

It is submitted, with respect, that the modifications suggested by Professor Ehrenzweig,[1] according to whom intentional torts should be governed by the law of the place of acting, emphasize the interests of the defendant too much at the expense of the plaintiff. A comparison with considerations of remoteness of damage in municipal laws may help to clarify this point. If it is considered, in internal law, that certain events are connected with an act in a way which satisfies normal tests of causation and remoteness, why should the fortuitous fact that some of these events took place in another jurisdiction cut off the chain of causation and put not only the consequences occurring in the foreign country but the very fact that they occurred there at all in a special and privileged position?

The Restatement rule on duty or privilege to act also seems to go too far in protecting the defendant[2], as it seems to imply — to use the illustrations of the Restatement — that a party injured in state X by the negligence of a police officer shooting after a fleeing murderer in state Y, or by the negligence of a health officer who when burning infected rags in state Y sets fire to property in X, would be without any redress, simply because the negligent acts

[1] Ehrenzweig, A., The Place of Acting in Intentional Multistate Torts, (1951), 36 *Minn. L. R.*, p. 1.

[2] *Restatement of the Law of Conflict of Laws*, 1934 (revised in 1948), § 382. "*Duty or Privilege to Act.* (1) A person who is required by law to act or not to act in one state in a certain manner will not be held liable for the results of such action or failure to act which occur in another state. — (2) 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."

were, *in abstracto*, performed under duty or privilege. The mistake, it is submitted, is here again to cut off a series of cause and effect at the borderline between two states and consider the two elements separately.

(d) Conclusions. The real problem, it is submitted, is how to avoid this artificial splitting up of a factual situation, which leaves the courts with two sets of facts separated from their attending circumstances. Is there any way out from this dilemma?

It is submitted that there may exist such a solution. Would it be too daring, in the present state of municipal tort law in civilized countries, to let the plaintiff choose under what law he prefers to proceed — the Reichsgericht rule — but to give the defendant a right to invoke as a matter of defence the provisions of the law of acting, not as to the act as such and isolated from its consequences, but as to *the whole complex of facts, including the injurious effect?*

In actual practice, this suggestion would hardly be as revolutionary as it may seem. In the first place, there is already a limited possibility of choice in favour of the plaintiff in all those jurisdictions where provisions of foreign law are presumed to be identical with the rules of the *lex fori* unless the contrary has been proved. Moreover, whether the plaintiff proceeds under the *lex loci*, or prefers to make use of this presumption of identity, the defendant is at liberty to invoke defences available in the law of the place of the tort.

Although this freedom of choice between two legal systems is not complete, and does not concern two alternative *leges loci* — that of the place of acting and that of the place of injury — it is nevertheless important, because it shows that it is technically possible for a court to decide upon an action when two legal systems with entirely different structures are opposed to each other. It should be added that the same technique has been developed by German courts in actions where a German defendant has invoked article 12 of the Preliminary Dispositions of the Civil Code against a foreign claim.

With a pure "place of harm" rule, a businessman in country X could successfully proceed in that country against a competitor from country Y who had committed acts of competition in countries W and Z, if the acts, although lawful in W and Z, were unlawful

in X where the damage was sustained. Under the present suggestion, no action would lie, for the defendant would be able to show that both his acting and its consequences, if considered in the light of W and Z municipal law, were lawful and unquestionable. The suggested rule would protect the Restatement policeman and health officer if they could prove that the duty or privilege of the law of the place of acting also extended to such consequences as the harm suffered by the plaintiff.[1] A broadcast company would be justified in an action for defamation, not by proving *in abstracto* that this or that kind of commentaries were lawful under the law of the place of acting but that the incriminated statement would be lawful if pronounced with respect to a person within the country of acting under circumstances identical with those in the case at bar.

The suggested defence would amount to something very similar to the "justifiable" test in *Machado* v. *Fontes*[2] with the important difference, however, that the two legal systems considered would be, not the *lex loci* and the *lex fori*, but the law of the place of acting and that of the place of harm. As the plaintiff would presumably in most cases choose the law of the place where he sustained the injury, the *lex loci injuriae* would be applied to all those elements of the action which are not immediately concerned with the ascertainment of liability or no liability.

The discussion of cases from various countries has shown a clear "homeward trend" of the *forum* as soon as its own legal system is in any way connected with the allegedly wrongful act or its results.

This tendency is obviously strengthened by jurisdiction rules. The normal requirements for the assumption of jurisdiction over an international tort are that the defendant is domiciled, or at least

[1] It is submitted, with respect, that the illustrations chosen by the Restaters are not very fortunate. Quite apart from the fact that in both cases actions would probably lie in strict liability against the state employing the officials, it seems highly improbable that the duty to shoot after escaping criminals, or to burn infected rags, would in any state excuse an official from liability for inflicting injury upon innocent third parties. The error, it is submitted, is that the acting is considered *as such, in abstracto*, and disconnected from its consequences.

[2] *Machado* v. *Fontes* [1897] 2 Q. B. 231 (Court of Appeal).

resident, in the *forum* country, or that the tort has taken place within the jurisdiction.

In the first instance, the "homeward trend" is due to the fact that the defendant is normally a national of the *forum* country, and considerations of national allegiance or protection of nationals will be very near at hand, more particularly where the moral evaluations of the *forum* are concerned. The point is best illustrated by the tort of unfair competition, where the *forum* is almost regularly the domicile of both plaintiff and defendant. In the German decisions on this topic, various arguments of morality, national allegiance, and standards of conduct imposed by the fatherland are proffered against the defendant.

Where the tort has been committed, or at least the acting performed, within the country of the trial court, a strong tendency to apply the *lex fori* is found particularly in those countries where the similarity between the law of torts and laws of public order and safety is emphasized. In the case of torts which also constitute criminal offences, that tendency is universal.

In the extraordinary case, finally, where jurisdiction is assumed on the ground that the plaintiff is a national of the *forum*, there is a certain bias in favour of protecting the victim by means of his own national law.

For these reasons, a rule which attempts to cover and rationalize the decisions of courts must take into consideration the fact that the *lex fori* is almost invariably likely to have a considerable interest in such tort cases as are litigated in its courts.

There is no probability that a clear and exclusive *lex loci injuriae* rule will ever apply in such cases where the defendant is a national of the *forum*, his acts have been committed within the jurisdiction and only the resulting injury has materialized beyond its frontiers. It is not very likely that the *forum* will apply another law than its own when the tortious act is located within its territory, whether the defendant is a national or not, and whether the actual damage has been done within or outside the *forum* country.

It is submitted that the one possible way of counter-acting the "homeward trend" of the *forum* is to leave the choice of law in multistate torts to the plaintiff. In those cases where the acting has taken place within the jurisdiction, or where the defendant is domiciled there — and these are certainly the majority of cases —

the suggestion that the defendant should be allowed to justify his act by invoking the law of the place of acting would make courts more willing to accept the choice of law made by the plaintiff.

The present suggestion has not been adopted by any court, but it is submitted that it would go a long way towards solving most of the problems discussed by recent writers, and that it would replace the Restatement rule on privilege and duty to act with a less artificial and more flexible way of protecting the legitimate interests of the defendant. It is in keeping with early English decisions, and only modifies the well-established German choice-of-law rule.

CHAPTER 5

TORT AND CONTRACT

A. *Statement of the Problem.* It has been suggested in modern conflict literature that some of the disadvantages created by the rigidity of the classical *lex loci delicti* rule might be mitigated by a more frequent use of the *lex contractus* in cases where the parties to the action stood in a contractual relationship with each other at the time of the tortious act. Earlier writers usually emphasized that a clear distinction between actions in tort and in contract must be upheld in the interest of systematic clarity;[1] those recent authors who advocate, or at least suggest as a possible solution, a more extensive characterization of these actions as contractual seem to stress the fact that a contractual relationship can often amount to a "social environment" and thus furnish a legal system less fortuitous than the law of the place where a wrongful act or its consequences happen to occur.[2]

For an assessment of the value of recent suggestions on this topic it is necessary to have more concrete information about the way courts have proceeded, about the results which would be obtained with a different characterization of actions belonging to the category under discussion and, finally, about the tests applied in municipal law to distinguish an action in tort from an action in contract. None of these problems have been discussed in detail, and it would seem, therefore, that such suggestions as have been made must be considered *a priori* as rather academical.

B. *Tort and Contract in Municipal Law.* (a). Legal consequences. In French municipal law it seems to be recognized that the liability flowing from inexecution or faulty execution of a contract is basically of the same character as liability for delicts and quasi-delicts.[3] On the other hand, it is, generally speaking, far more

[1] Cf. Bartin, tome 2, p. 396.

[2] Neuhaus, P. H., Morris, The Proper Law of a Tort (review), *RabelsZ.* 16, 1951, p. 651 (at p. 655); Binder, p. 463; cf. Dicey, p. 939 f.

[3] Bartin, p. 394.

advantageous for the plaintiff to bring an action in tort whenever possible: the defendant can be held liable although a minor; the period of limitation is often considerably longer; injuries even remotely caused by the act found liability to a greater extent.[1]

In Germany, on the other hand, an action in contract will give the plaintiff greater advantages in the form of a longer period of limitation, a more extensive vicarious liability and a different distribution of the burden of proof.[2] In common law countries, a few minor advantages seem to be gained by a plaintiff who can show that an unlawful act constitutes a breach of contract.[3]

The choice made by courts between contractual and tortious liability is a matter of characterization, and consequently determined by the *lex fori*, ultimately on the basis of its own municipal law. It is therefore of importance to examine the tests applied by different *fora* to ascertain whether an action belongs to either or both of these legal categories.

The position of French law is not absolutely clear. It seems to be generally assumed, however, that when an act constitutes a breach of contract, no action in tort will lie.[4] On the other hand, tortious liability has been extended considerably in favour of third parties who have an interest in the execution of an agreement but are not in privity of contract.[5] In Germany, no very sharp distinction of the two kinds of liability is needed, for the claims exist independently of each other and are accumulated in favour of the plaintiff.[6]

[1] Aubry et Rau, tome VI, 1951, pp. 535 ff. There are certain other differences, but mostly of a technical character.

[2] Enneccerus, p. 880.

[3] Salmond on the *Law of Torts*, 12th ed. (by R. F. V. Heuston), 1957, pp. 9 ff. Cf. *Batthyani* v. *Walford* (1887), L. R. 36 Ch. D. 269, where the survival of the liability depended upon the characterization of the action as contractual or tortious.

[4] *Planiol-Ripert*, tome 6, 1952, pp. 669 ff. In two other civil law countries, Belgium and Italy, both liabilities can be accumulated. See Cour de Cassation (Brussels) 13. 2. 1930, *RabelsZ.* 6, 1932, p. 183; Corte d'appell. Venezia 5. 9. 1929, *RabelsZ.* 4, 1930, p. 1017 and cases cited there.

[5] Cour de Cassation 22. 7. 1931 (note Esmein), *RabelsZ.* 6, 1932, p. 383; Cour de Cassation 6. 12. 1932 (note Esmein) *RabelsZ.* 7, 1933, p. 403 ff.; Cour de Cassation 8. 3. 1937, *S.* 1937. 1. 241. Cf. Salmond, *op. cit.*, pp. 11 ff. (on the »privity of contract fallacy»). French courts have gone much further than common law courts in this direction.

[6] Enneccerus, p. 879 f.

Common law jurisdictions also refrain from drawing a clearcut line between tortious and contractual liability. The notion of breach of duty, unknown in the tort law of other legal systems, has presumably contributed to the development of the tests applied by English courts upon the facts of the case: "The distinction in the modern view, for this purpose, between tort and contract may be put thus: when the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort; and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."[1]

C. *Theoretical Discussion.* What are the advantages and disadvantages of characterizing an action as contractual for conflict purposes in all those cases where the parties are in privity of contract?

It has been contended that such a choice of law would better satisfy a "social surroundings" test. This is presumably the argument in Mr. Binder's illustration — German law should govern the action of a German publisher against the members of a German mountaineering expedition to the Himalaya who sold material to another publisher in spite of an assignment to the first publisher performed under German law as *lex contractus*, of the copyright to all materials.[2] It is submitted that the chosen example is not entirely convincing; the acts of the German mountaineers would probably be characterized, even for municipal law purposes, as a real breach of the contract: the delivery of material still being in process, what is committed is a non-fulfilment of the assignment rather than a copyright infringement.

Another *ratio* for applying extensively the *lex contractus* could be that the only connecting link between the parties being the contract, their expectations, in dealing with each other, would

[1] *Per* Greer L. J. in *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* [1936] 1 K. B. 399 (at p. 405). Quoted with approval in an Irish case, *Lister* v. *Munster and Leinster Bank* [1940] I. R. 77. For Scotland, see *Johnston* v. *Strachan* (1861), 23 D. 758 (at p. 769, *per* Lord Justice Clerk, Lord Inglis) where a similar test is applied.

[2] Binder, p. 402.

normally be based upon the provisions of the law governing the contract.

One serious objection to the arguments set forth above is that few international contracts — usually concerned with the sale or carriage of goods, and similar commercial transactions — create anything amounting to a social environment. If a British bacon importer unintentionally injures a Danish exporter in the course of a business discussion in Holland, it is unlikely that either of the parties considers himself under the protection of English or Danish law.

Furthermore, a more extensive contractual characterization would sacrifice uniformity. The only conflict rule concerned with the choice of a *lex contractus* which could possibly produce desirable results is the "proper law" theory adopted in England and Scandinavia.[1] In countries where contracts are held to be governed by the law of the place of contracting or of performance[2], the rigid *lex contractus* can hardly be said to satisfy a "social environment" test better than the *lex loci delicti.* The ultimate choice of law would be entirely different depending upon the contract rule applied by the *forum;* a possibility which could be exploited by the plaintiff in choosing that *forum* which promisse the most favourable result.

Finally, great complications would be created in cases where the same wrongful act inflicts physical injury or economic loss upon several parties. If a railway company, domiciled in country X and issuing tickets in countries X, Y and Z, is sued for an accident in country T, surviving passengers would sue each under the law governing his contract; successors or administrators of passengers killed in the accident would presumably bring their action under the wrongful death act of country T. It should be added, however, that in many of the relevant cases, most problems are nowadays solved or reduced by international conventions.

It is submitted, in view of the foregoing considerations, that the best and most equitable results are achieved, not by an extensive use of the *lex contractus* but by an objective test whether the action sounds in tort or in contract. No serious objections appear to be

[1] Cheshire, pp. 200 ff.; Nial, H., *Internationell Förmögenhetsrätt,* Stockholm, 1953, pp. 37 ff.

[2] As, *e. g.,* in the U. S. A.; cf. Cheshire, p. 200.

raised by an accumulation of the two liabilities, each under its own law; but it seems necessary to distinguish clearly those elements which are to be governed by the *lex contractus* and those more properly considered as matters for the *lex loci delicti.* It would seem that the test suggested in *Jarvis* v. *Moy et al.*[1] is well suited to meet the requirements of private international law.

The following examination of judicial decisions will show what tests the courts have applied in those types of contract where the question is likely to be raised at all, contracts of carriage and contracts of employment — *i. e.* those contractual relationships where the agreement of the parties can create, as it were, a legal sphere possibly able to embrace also those breaches of duty which, in strict reasoning, would not normally be considered as connected with the execution of the contract.

D. *Contracts of carriage.* (a) Statement of the problem. There are two types of contracts of carriage which can with some advantage be considered separately: carriage of persons and transport of goods. The Berne Convention of 1890 and its later amendments have provided such a comprehensive set of rules concerning transport of goods by railway that this important branch of the topic is now hardly any longer a matter for private international law. Similar international agreements on aerial law and maritime law — which are not discussed in this study -- have solved other important international law problems. In the following, examples from maritime law will be given only when they can illustrate a point which has not been raised in other branches of the law.

(b) Judicial decisions. There is scanty authority as to the characterization preferred by French courts when a wrongful act occurs in the execution of a contract of carriage of persons. A decision by a tribunal of first instance seems to indicate that the tortious aspect was considered in preference to contractual liability, but the court made no explicit statement on this question.[2] In a couple of decisions concerned with damage to goods transported by rail from London to Paris, the courts decided that the *lex loci* determines the liability of the carrier, independently of contract

[1] *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* [1936] 1 K. B. 399 (at p. 405).

[2] Tribunal de commerce de Dunkerque 19. 3. 1931, *Clunet* 1935, p. 334.

clauses.[1] In both cases, however, the special statutory regulations of transport by rail were emphasized as strictly territorial; it is difficult to say whether the result would have been the same in the absence of such regulations.

Although the exiguity of the material and the bias in favour of French law so abundantly demonstrated earlier in the present study make it difficult to draw general conclusions, there seems to be at least some authority for the view that French courts will characterize as tortious the liability incurred by carriers for injuries to persons; the result in cases concerning carriage of goods seems impossible to predict in the present state of authorities.

German decisions on the present topic are equally few and difficult to interpret. In an action against the German State Railways for the death of the plaintiff's son in an accident on Polish territory and on the track of the Polish State Railways, both tortious and contractual liability was considered by the courts; as the German railways were found to be innocent in both cases, the court did not proceed to characterize the action.[2] In an earlier action, however, the refusal of an Austrian railway company to carry certain goods was considered tortious by the *Reichsgericht*.[3] It would seem, therefore, that the statutory duties of common carriers are at least the primary basis of actions for injuries inflicted by inexecution, or faulty execution, of the contract of carriage.

In the U. S. A. there is some authority for a contractual characterization of actions against carriers for injuries to passengers,[4] and it has also been held that the choice of form of action is a matter of remedy.[5] However, the greatest weight of authority is in favour of the view that the action sounds in tort. This standpoint, ex-

[1] Cour d'appel de Caen 11. 2. 1907, *Revue* 1912, p. 762; Tribunal de commerce de la Seine 4. 12. 1907, *Clunet* 1908, p. 846. Cf. Cour de Cassation 16. 3. 1914, *Clunet* 1914, p. 1212, where the French statutory regulations were held to be superseded by the Berne Convention of 1890.

[2] RG 1929. 2. 5., *IPRspr.* 1929, Nr. 60.

[3] RG 1904. 25. 4., *RGZ* 57, p. 142.

[4] *Dyke* v. *Erie R. R. Co.* (1871), 45 N. Y. 113 (N. Y. Court of Appeals); *Sawyer* v. *El Paso R. R. Co.* (1908), 108 S. W. 718 (Tex. Court of Civil Appeals); cf. Rabel, vol. II, p. 290; Hancock, p. 192 f.

[5] *Frykland* v. *Great Northern R. R. Co.* (1907), 111 N. W. 727 (S. Ct. of Minn.).

pressed in earlier cases,[1] fully expounded in *Pittsburgh etc. R. R. Co.* v. *Grom*,[2] seems to have got the support of federal courts in *Page* v. *United Fruit Co.*[3], and, finally, of the Supreme Court in *First National Bank of Chicago* v. *United Airlines*[4] where the disputed issue was a matter of constitutional law but the judgment is clearly founded upon a tortious characterization of the action.

Such a characterization gives rise to a special problem in those cases where the contract of carriage contains a clause exempting the carrier from liability and such a clause is recognized as valid by the *lex contractus*. In *Lake Shore etc. R. R. Co.* v. *Teeters*,[5] such a clause was disregarded as contrary to the public policy of the *lex fori* (which was also the *lex loci*). It is submitted that it is not consistent with fairness to the defendant utterly to disregard a condition accepted by the plaintiff and presumably relied upon by the defendant in calculating costs, insurance coverage etc., when this condition is valid under the law of the contract.

In the United States as in England, there does not seem to have been any hesitation over the classification of actions for damage to goods transported by carrier — they are always regarded as contractual, and clauses of exemption or limitation of liability have consequently been accepted when valid in the *lex contractus*.[6]

A special kind of contracts, where the problem of characterization has been raised, are contracts with telegraph companies.[7] In several cases, the liability of the telegraph company for misdelivery, late delivery and similar mishaps has been characterized as contractual, and either the law of the place of contracting[8] or that of the place of performance[9] has been applied. Where

[1] *Louisville etc. R. R. Co.* v. *Williams* (1897), 21 So. 938 (S. Ct. of Ala.).
[2] *Pittsburgh etc. R. R. Co.* v. *Grom* (1911), 133 S. W. 977 (S. Ct. of Ky.). Cf. *Kansas City So. Ry Co.* v. *Phillips* (1927), 298 S. W. 325 (S. Ct. of Ark.) and note, (1928), 26 *Mich. L. R.*, p. 695 f.
[3] *Page* v. *United Fruit Co.* (1925), 3 F. 2d 747 (U. S. Court of Appeals, First Circuit).
[4] *First National Bank of Chicago* v. *United Airlines* (1952), 72 S. Ct. 421; Mundie, J. A., note in (1952), 26 *Tul. L. R.* p. 514.
[5] *Lake Shore etc. R. R. Co.* v. *Teeters* (1906), 77 N. E. 599 (S. Ct. of Ind.).
[6] *Collins* v. *Panama R. Co.* (1952), 197 Fed. Rep. 893 (U. S. Court of Appeals, Fifth Circuit); cf. (1941), 54 *H. L. R.*, p. 663.
[7] Beale, p. 1334; Hancock, p. 192.
[8] *Western Union Tel. Co.* v. *Pratt* (1907), 89 Pac. 237 (S. Ct. of Okla.).
[9] *Western Union Tel. Co.* v. *Fuel* (1910), 51 So. 571 (S. Ct. of Ala.).

the action has been held to sound in tort, various places have been chosen as *locus delicti:* the country where the delay or mistake was caused by negligence of the defendant's employees,[1] the place of contracting[2], and the place of delivery.[3] The Supreme Court has decided that the action lies in tort, and that the *locus delicti* is the place of delivery.[4] This also seems to be the view of the Restatement.[5]

Apart from Admiralty cases, there are few English decisions on international contracts of carriage, and it is difficult to ascertain whether a passenger's claim for damages founded upon injuries due to the negligence of the carrier would be characterized as contractual or tortious for conflict purposes. It is submitted, however, that the language of Viscount Haldane in *Canadian Pacific Ry. Co.* v. *Parent* suggests that the case was primarily an action for tort.[6] Under the prevailing English doctrine that maritime law as administered in England is a universally valid body of rules, the question of choice of law is not raised in Admiralty. It is clear, however, that a contractual exception of liability is a valid defence against a passenger's claims, provided the exemption clause is permitted under the *lex contractus.*[7] The special problem raised by injuries to gratuitous passengers does not seem to have been considered in England; in the Canadian decision *Key* v. *Key*[8], an Ontario court held that the car owner was bound by an implicit contract to exercise reasonable care so as not to injure the pas-

[1] *Hornthal* v. *Western Union Tel. Co.* (1914), 82 S. E. 851 (S. Ct. of N. C.).
[2] *Brown* v. *Western Union Tel. Co.* (1910), 67 S. E. 146 (S. Ct. of S. C.).
[3] *Balderston* v. *Western Union Tel. Co.* (1908), 60 S. E. 435 (S. Ct. of S. C.); *Bailey* v. *Western Union Tel. Co.* (1916), 156 Pac. 716 (S. Ct. of Kansas).
[4] *Western Union Tel. Co.* v. *Brown* (1914), 234 U. S. 542.
[5] § 414.
[6] *Canadian Pacific Ry. Co.* v. *Parent* [1917] A. C. 195 (at pp. 203 and 205, *per* Viscount Haldane). Cf. the Scottish decisions *Horn* v. *Northern British Ry. Co.* (1878), 5 R. 1055 and *Naftalin* v. *London, Midland and Scottish Ry. Co.* (1933), S. L. T. 193, where it was held, *obiter*, that a party to the contract of carriage *could* bring an action in contract.
[7] *Adler* v. *Dickson* [1955] 1 Q. B. 158 (Court of Appeal). In *Dummer* v. *Shaw, Savill and Albion Co. Ltd.* (1911), N. Z. L. R. 30, p. 779, an exemption clause contrary to the Merchant Shipping Act, 1894, was disregarded.
[8] *Key* v. *Key* (1930), 65 O. L. R. 232; cf. Heighington, A. C., Conflict of Laws in Automobile Negligence Cases, (1936), 14 Can. Bar R., p. 389 (at p. 403).

senger, but in *Lieff* v. *Palmer*[1], the owner's liability was clearly characterized as tortious.

Questions in respect of carriage of goods in English courts have been mainly concerned with *bills of lading*, and it is well established by a series of decisions that the duties of the parties and of their servants are determined by the contract embodied in the bill of lading.[2]

(c) Conclusions. Few conclusions can safely be drawn from the material analysed above. It would seem, however, that even in jurisdictions where liabilities in tort and in contract can be accumulated, the carrier's responsibility in contracts of carriage of persons is considered as a statutory duty, the breach of which is at least primarily classified as a tort. Carriage of goods, on the other hand, is normally governed by the *lex contractus* when actions are brought in common law courts. In France and Germany the situation is doubtful but what small authority there is rather indicates that the carrier's obligations are considered as flowing from a statutory duty; for conflict purposes this results in a choice of law similar to that prevailing in the law of torts.

E. *Contracts of Employment.* (a) Statement of the problem. The other important branch of contracts where the problem of characterization may arise, are contracts of employment. The bulk of decisions in this field deal with workmen's compensation cases, which are traditionally treated within the law of torts in private international law. For various reasons, the historical connections between workmen's compensation and the rules on tortious liability and, indeed, private international law as such, are dwindling into little more than a matter of systematical convenience. Already before the last war, normal conflict rules were largely put out of function by international agreements, and this development has continued after the war.[3] The increasingly universal

[1] *Lieff* v. *Palmer* (1937), 63 Que. K. B. 278.

[2] *P. & O. Co.* v. *Shand* (1865), 3 Moore's P. C. Reports (N. S.) 272; *Elder, Dempster & Co.* v. *Paterson Zochonis & Co. Ltd.* [1924] A. C. 522; similarly in a number of Australian cases: *Brooks, Robinson & Co.* v. *Howard Smith and Sons* (1890), 16 V. L. R. 245; *Gilbert Stokes & Kerr Proprietary Ltd.* v. *Dalgety & Co.* (1948), 81 Ll. L. R. 337; *Water's Trading Co. Ltd.* v. *Dalgety & Co.* (1951), 2 Lloyd's R. 385.

[3] See, *e. g.* Niboyet, tome V, pp. 186 ff.

adoption of social insurance systems all over the world has equally contributed to diminish the importance of private international law in the field of workmen's compensation. Finally, the approach to legislation of this kind is nowadays completely different from prevailing theories on the basis of tortious liability, the machinery of enforcement is largely administrative, and the proper place of workmen's compensation laws would now be in international administrative law or the law of nations. For a study of the methods and evolution of private international law, the development of this branch of the law presents a considerable interest, however, and for this reason a very brief survey of that development, particularly in France and the United States, will be given as a background to the following discussion concluding this chapter.

(b) Workmen's Compensation Acts. It has been pointed out that the French development in workmen's compensation cases is rather similar to the trend of American decisions.[1] In France, however, the pattern is easier to follow, the cases are not so numerous, and in spite of the fact that precedents, even of the highest authority, are not always followed, the trend is fairly uniform throughout the country. The basis of the development is the W C A, 1898, which was from the very beginning interpreted by the courts as a law of public order and safety.[2]

It was consequently established by a long series of decisions that whenever an accident occurred in France, the statute was applicable independently of the nationality or domicile of the injured workman and of the employer.[3] Under the provisions of the statute, dependants of a fatally injured workman were entitled to benefits under the Act only if resident in France;[4] this condition was held

[1] Donnedieu de Vabres, p. 594.

[2] Cour d'appel de Douai 9. 8. 1905, *Revue* 1906, p. 154 (at p. 155). Cf. Arminjon, pp. 344 ff., where a *lex loci* theory for workmen's compensation is expounded.

[3] Tribunal civil de Narbonne 8. 11. 1900, *Clunet* 1901, p. 108; Tribunal de simple police de Luzarches 5. 1. 1906, *Revue* 1906, p. 705; Cour d'appel de Nancy 10. 2. 1906, *Clunet* 1907, p. 1056, *Revue* 1907, p. 541; Tribunal civil de Grasse 3. 5. 1911, *Clunet* 1912, p. 814; Cour d'appel de Nancy 8. 6. 1921, *Clunet* 1923, p. 267 (both employer and employee foreigners); Cour d'appel de Besançon 22. 4. 1932, *Clunet* 1933, p. 68.

[4] Tribunal civil de la Seine 7. 11. 1900, *S.* 1901. 2. 223; Cour de Cassation 16. 11. 1903, *Clunet* 1904, p. 353.

to be incompatible with the Geneva Convention of Social Security of June, 10, 1925, and generally disregarded.[1] Only if a workman entitled to compensation left France was the annual pension withdrawn.[2]

In early decisions on accidents to French workmen abroad, the courts refused to apply the law, which was held to have only territorial operation,[3] but as this restrictive application was found contrary to the social purposes of the Act, various devices were invented to extend its operation to accidents abroad. The first argument upon which such extraterritorial application was based was the theory that the W C A became part of the contract of employment in France and thus followed the workman wherever he went in the service of his employer.[4] The reasoning was slightly modified to meet the objection that a compulsory obligation could not, on principle, be considered as contractual. Instead, the employer's responsibility was described as a statutory consequence of the contract.[5] This theory also proved to be attended with certain disadvantages: the law could not be applied when the contract was void because the employee was a minor or had neglected certain administrative provisions,[6] and courts in some cases declared themselves incompetent to admit actions founded on foreign contracts although the accident had occurred within the

[1] Cour d'appel de Riom 24. 12. 1930, *Clunet* 1932, p. 85; *Revue* 1931, p. 140 (dependants in Spain); tribunal civil de Saint-Nazaire, 19. 11. 1932, *Revue* 1933, p. 106 (Spanish dependants); Cour d'appel de Paris 9. 1. 1933, *Clunet* 1933, p. 618, *Revue* 1933, p. 109 (Spanish dependants); Cour de Cassation 27. 2. 1934, *Revue* 1934, p. 714 (Spanish dependants); recovery refused dependants in Spain: Cour d'appel de Montpellier 4. 3. 1933, *Clunet* 1934, p. 854.

[2] Tribunal civil d'Alençon 9. 11. 1937, *Clunet* 1938, p. 42.

[3] Cour d'appel de Douai 9. 8. 1905, *Revue* 1906, p. 154; Tribunal civil de Sousse 16. 3. 1905, *Revue* 1906, p. 706.

[4] Cour d'appel de Douai 4. 4. 1905, *Revue* 1905, p. 137; reversed by Cour de Cassation 8. 5. 1907, *S.* 1907. 1. 43, *Revue* 1907, p. 539. The same reasoning is still used in a recent case, Cour de Cassation 9. 12. 1954, *Revue* 1956, p. 462.

[5] Cour de Cassation 26. 5. 1923, *S.* 1923. 1. 33. Cour d'appel de Paris 16. 3. 1925, *Clunet* 1926, p. 346, *Revue* 1925, p. 348. Cf. Donnedieu de Vabres, pp. 590 ff.

[6] Tribunal civil du Havre 7. 2. 1936 and Cour d'appel de Rouen 15. 7. 1936, *Clunet* 1937, p. 758; Cour d'appel de Montpellier 7. 6. 1937, *Clunet* 1938, p. 266; Cour de Cassation 2. 11. 1943, *Revue* 1947, p. 291. The act was amended to cover such cases in 1938, Niboyet, tome V, pp. 180 ff.

jurisdiction.[1] The final stage of the development seems to be reached when the W C A was described as a statute of public order and safety, controlling French industry as a whole, and applicable to workmen at home or abroad whenever their employment can be considered as part of a business in France.[2]

As might be expected, the forty-nine jurisdictions of the United States have provided a very great number of decisions and theories in the field of workmen's compensation.[3] The constitutional right of the individual States to grant awards is circumscribed only by the liberal rules laid down in a series of decisions by the U. S. Supreme Court. In the present state of the authorities, a State is entitled to grant a workmen's compensation award whenever the State has a social interest in the case and the claimant has not already received the benefits of another W C A which explicitly purports to provide a final and exclusive remedy.[4]

[1] Tribunal civil de Béthune 8. 11. 1927, *Clunet* 1929, p. 734. On the other hand, *exequatur* was given to a foreign judgment, Cour d' appel de Paris 1. 6. 1911, *Revue* 1912, p. 752.

[2] Cour de Cassation 11. 7. 1938, *Clunet* 1939, p. 645; *Revue* 1939, p. 100. Similar ideas had been expressed in early judgments; Cour d'appel de Rennes 22. 12. 1902, *Clunet* 1903, p. 598; *Revue* 1905, p. 131; Tribunal civil d'Alais 27. 1. 1903, *Revue* 1905, p. 135. Cf. Niboyet, J.-P., *Manuel de droit international privé*, 2e éd., 1928, p. 618 f.

[3] Beale, pp. 1316 ff.; Goodrich, pp. 281 ff.; Hancock, pp. 208 ff.; Stumberg, pp. 212 ff.; Otjen, C. J., Conflict of Laws Questions in Workmen's Compensation Law, (1949), 20 *Miss. L. J.*, p. 162; *Restatement of the Law of Conflict of Laws*, 1934 (revised 1948), §§ 398—403.

[4] This is the result of decisions, starting with *Bradford El. Light Co.* v. *Clapper* (1931), 52 S. Ct. 571; 76 L. Ed. 1026, in which the courts of the State where the fatal injury occurred were considered bound to give full faith and credit to a previous W C A award in the State of the deceased workman's domicile; (1932), 46 *H. L. R.*, p. 291. This rather severe principle was abandoned in *Ohio* v. *Chattanooga Boiler and Tank Co.* (1933), 53 S. Ct. 663; 77 L. Ed. 1307. *Alaska Packers Ass'n* v. *Industrial Accidents Comm'n of Calif* (1935), 55 S. Ct. 518; 79 L. Ed. 1044; (1936), 44 *Yale L. J.*, p. 869; (cf. *State ex rel. Weaver* v. *Missouri Workmen's Compensation Comm'n* (1936), 95 S. W. 2d 641 (S. Ct. of Mo.), and *Pacific Employers Ins. Co.* v. *Industrial Comm'n of Calif.* (1939), 59 S. Ct. 629; 83 L. Ed. 940 established the test of social interest; maintained in *Cardillo* v. *Liberty Mutual Ins. Co.* (1947), 67 S. Ct. 801; 91 L. Ed. 1028. The obligation to give full faith and credit to exclusive remedies granted by sister States was established in *Magnolia Petroleum Co.* v. *Hunt* (1943), 64 S. Ct. 208; 88 L. Ed. 149; (1944), 18 *Tul. L. R.*, p. 509; P. A. Freund in (1946), 59 *H. L. R.*; p. 1210. "Exclusivity" was given a very narrow interpretation in

Within this framework of constitutional law, various solutions have been given to W C A problems. There seems to be general agreement as to the policies underlying such acts: the social interest of support to disabled workmen and recognition of the doctrine that accidents as inevitable results of industry should be paid for by industry as a part of business costs.[1] The tests applied to ascertain the interest of a State in an industrial accident also seem to be universally recognized. The objective points of contact, each of which may justify the application of a certain State's W C A, are usually five: the State is the *locus contractus*, the *locus injuriae*, the injured employee's domicile, or the principal centre of his work; finally, it may be the country where the employer has his centre of business.[2] Courts have justified their decisions by referring to either of the following theories, each of them similar to those adopted in France. An industrial accident can be considered as a tort, as a breach of the contract of employment or as an event concerning the legally defined status created by the contract of employment.[3]

Early decisions reflect the tort theory, and in some jurisdictions which were late in enacting W C A, this doctrine survived well into the 1920's.[4] The contract theory was most readily accepted

Industrial Comm'n of Wisconsin v. *McCartin* (1947), 67 S. Ct. 886; 330 U. S. 622; Conway in (1947), 33 *Cornell L. R.*, p. 310; and almost disregarded in subsequent decisions: *Carroll* v. *Lanza* (1955), 349 U. S. 408; (1956), 23 *U. of Chic. L. R.*, p. 515; Ammerman, J. H. in (1955), 34 *Tex. L. R.*, p. 311.

[1] Cowan, F. E., Extraterritorial application of Workmen's Compensation Laws, (1955), 33 *Tex. L. R.*, p. 917 (at pp. 920 ff.).

[2] Dunlap, D. C., The Conflict of Laws and W C A, (1935), 23 *Cal. L. R.*, p. 381 (at pp. 383 ff.); Ammerman, J. H., Conflict of Laws — Workmen's Compensation, (1955), 34 *Tex. L. R.*, p. 211; Cowan, F. E., Extraterritorial Application of Workmen's Compensation Laws, (1955), 33 *Tex. L. R.*, p. 917.

[3] Dunlap, *op. cit.*, at p. 382 f.; Beale, pp. 1317 ff.; anonymous note, (1956), 23 *U. of Chic. L. R.*, p. 515.

[4] *Alabama G. Southern R. R. Co.* v. *Carroll* (1892), 38 Am. St. Rep. 163 (S. Ct. of Ala.); *Denver & Rio Grande R. R. Co.* v. *Warring* (1906), 86 Pac. 305 (S. Ct. of Colo.); *El Paso etc. R. R. Co.* v. *McComas* (1903), 72 S. W. 629 (Tex. Court of Civil Appeals); *Logan* v. *Mo. Valley Bridge & Iron Co.* (1923), 249 S. W. 21 (S. Ct. of Ark.) are illustrations of the doctrine, prevailing before W C A were introduced, that injuries to employees gave rise to actions in tort against the employer. *Gould's case* (1913), 102 N. E. 693 (Supr. Judicial Court of Mass.) is an example of the "tort theory" of W C A.

when the contract had been concluded within the *forum* country,[1] whereas there are few decisions in which a W C A award has been granted under a foreign *lex contractus;*[2] particularly when the *lex fori* coincided with the *lex loci*, there seems to have been a certain reluctance to accept the contract theory.[3]

Like the contract theory in earlier days, the more modern approach which considers the employer-employee relationship as a special status has been used as a rationale for applying the W C A of the *forum* to industrial accidents, whether that law has been used as governing "hazardous employment" within the State with all its "radiations" outside the jurisdiction,[4] or as the law of the employer's business centre,[5] the employee's ordinary place of work[6] or domicile.[7] Where the *forum* country is at the same time the *locus injuriae*, considerations of public policy have also been used.[8]

In all the cases discussed above, the courts have applied one of the tests of social interest in order to ascertain whether there was any reason for the W C A of the *forum* to be applied. When called

[1] *Industrial Comm'n of Colorado* v. *Aetna Life Ins. Co.* (1918), 3 A. L. R. 1336 (S. C. of Colo.); also, *semble*, *Post* v. *Burgher and Gohlke* (1916), 111 N. E. 351 (N. Y. Court of Appeals).

[2] *De Gray* v. *Miller Bros. Constr. Co.* (1934), 173 A. 556 (S. Ct. of Vt.); *Norman* v. *Hartman Furniture Co.* (1926), 150 N. E. 416 (Appellate Court of Ind.); *Orleans Dredging Co.* v. *Frazie* (1936), 173 So. 431 (S. Ct. of Miss.).

[3] *Norman* v. *Hartman Furniture Co.* (1926), 150 N. E. 416 (Appellate Court of Ind.); *Orleans Dredging Co.* v. *Frazie* (1936), 173 So. 431 (S. Ct. of Miss.).

[4] This rule seems to prevail in New York: *Anderson* v. *Jarrett Chambers Co.* (1924), 206 N. Y. Supp. 458 (S. Ct. of N. Y., Appellate Div'n); *Lepow* v. *Lepow Knitting Mills* (1942), 43 N. E. 2d 450 (same court).

[5] *Anderson* v. *Miller Scrap Iron Co.* (1919), 170 N. W. 275 (S. Ct. of Wis.).

[6] *Stansberry* v. *Monitor Stove Co.* (1921), 20 A. L. R. 316 (S. Ct. of Minn.); *Durrett* v. *Eicher-Woodland Lumber Co.* (1932), 140 So. 867 (La. Court of Appeal); *McKesson* v. *Industrial Comm'n* (1933), 250 N. W. 396 (S. Ct. of Wis.); *Severson* v. *Hanford Tri-State Airlines* (1939), 105 F. 2d 622 (U. S. Court of Appeals, Eighth Circuit).

[7] *Crane* v. *Leonard et al.* (1921), 18 A. L. R. 285 (S. Ct. of Mich.); *Johnson* v. *Carolina etc. Ry. Co.* (1926), 131 S. E. 390 (S. Ct. of N. C.); (1926), 40 *H. L. R.*, p. 130.

[8] *Carl Hagenbeck etc. Show Co.* v. *Ball* (1920), 126 N. E. 504 (Appellate Court of Ind.); *Ocean Acc. & Guarantee Corp. Ltd.* v. *Industrial Comm'n of Arizona* (1927), 257 Pac. 644 (S. Ct. of Ariz.); *Quong Han Wah Co.* v. *Industrial Comm'n* (1920), 12 A. L. R. 1190 (S. Ct. of Calif.).

upon to grant an award under a foreign W C A, the courts have often refused to do so on account of the technical character of many W C A which, for their application, need the judicial or administrative machinery of the State which has enacted them.[1]

For present purposes, it is of interest to note that in a number of cases courts have granted recovery in common law actions for tort although workmen's compensation awards had already been given to the plaintiff. There are few cases where such double recovery has been allowed in the courts of the same State as granted the first award[2], but when the action is brought in the courts of another State, recovery is normally allowed, provided the W C A under which the first award was given does not expressly purport to be an exclusive remedy.[3]

The development of workmen's compensation in American conflict of laws shows how a contractual characterization of what was historically a tort can provide a technical rationalization for the extraterritorial application of a certain law, considered by the *forum* important enough to be extended to acts and events outside the jurisdiction but with economic and social repercussions within the *forum* country. It is obvious that all the ingenious technical devices used by American courts have not been invented in order

[1] *Logan* v. *Mo. Valley Bridge & Iron Co.* (1923), 249 S. W. 21 (S. Ct. of Ark.); *Moseley* v. *Empire Gas & Fuel Co.* (1926), 281 S. W. 762 (S. Ct. of Mo.); *Johnson* v. *Employers' Liability Co.* (1936), 99 S. W. 2d 979 (Tex. Court of Civil Appeals); in *Resigno* v. *Jarka Co.* (1927), 223 N. Y. Supp. 5 (S. Ct. of N. Y., Appellate Div'n) the court refused to take jurisdiction when a foreign W C A was invoked.

[2] See, however, *Western Fuel Co.* v. *Garcia* (1921), 42 S. Ct. 89, 257 U. S. 233; the action was barred by a limitation statute.

[3] Two W C A awards allowed: *Jenkins* v. *Hogan & Sons* (1917), 163 N. Y. Supp. 707 (S. Ct. of N. Y., Appellate Div'n); *Tex. Employers' Ins. Ass'n* v. *Price* (1927), 300 S. W. 667 (Texas Court of Civil Appeals); *Cook* v. *Minneapolis Bridge Constr. Co.* (1950), 43 N. W. 2d 792 (S. Ct. of Minn.). Recovery for tort granted independently of W C A award in other State: *Betts* v. *Southern Ry. Co.* (1937), 71 F. 2d 787 (U. S. Court of Appeals, Fourth Circuit); *Miller* v. *Yellow Cab Co.* (1941), 31 N. E. 2d 406 (Appellate Court of Ill.); refused in *Barnhart* v. *Am. Concrete Steel Co.* (1920), 125 N. E. 675 (S. Ct. of N. Y., Appellate Div'n); *Magnolia Petroleum Co.* v. *Turner* (1933), 65 S. W. 2d 1 (S. Ct. of Ark.); *Stacy* v. *Greenberg* (1952), 88 A. 2d 619 (S. Ct. of N. J.); *Buccheri* v. *Montgomery Ward & Co.* (1955), 118 A. 2d 21 (S. Ct. of N. J.); see (1956), 31 *N. Y. U. L. R.*, p. 1139.

to make possible the application of a "proper law" but to secure the widest possible operation of the *forum* country's own laws.

For present purposes, English and German workmen's compensation statutes are of no great interest. In Germany this branch of the law is considered as an entirely administrative matter, and in German conflict literature it is not normally treated together with questions of tortious liability.[1] English courts, on the other hand, have stuck to the strictly territorial application of workmen's compensation statutes, and although there are *obiter dicta* in favour of the contractual theory,[2] there does not seem to be any decision in favour of it. There is, indeed, an Irish decision, *Keegan* v. *Dawson*[3] where an award was granted to an Irish employee for an accident in England, but it is in flat and conscious contradiction of the English cases.[4]

(c) Other problems in contracts of employment. In workmen's compensation cases the employer is, in a highly technical sense, the tortfeasor. There are few international actions known to the present writer in which an employee has been sued for allegedly wrongful acts in the fulfilment of his contract of employment, and they are generally of a different character.

In an early French decision,[5] French law, which was undoubtedly the *lex contractus*, was applied to a case of abuse of powers by a business agent in South America. Curiously enough, the court did not invoke art. 1153 C. c., which deals with breaches of contractual obligations, but art. 1382, the provision on torts. However, this decision belongs to the formative stage of modern conflict law, it

[1] In RG 1930. 28. 4., *IPRspr.* 1930, Nr. 55, the German courts applied an American compensation act to an accident on board a U. S. ship in the port of Hamburg.

[2] Gilbert, R. L., Workmen's Compensation for Accidents outside a State, 11 *Austr. L. J.*, p. 242 (cases quoted at p. 244). Cf. Pollock, M. R. in *Hunter's case* [1925] 2 K. B. 493 (at pp. 499 ff.).

[3] *Keegan* v. *Dawson* [1934] I. R. 232.

[4] In an early Quebec case, *Logan* v. *Lee* (1906), 31 Queb. S. C. 469, an award was given to a Quebec employee when the accident occurred in New Brunswick, In *Dupont* v. *Quebec Steamship Co.* (1896), Q. R. 11 S. C. 188, the Quebec contract of an employee was held sufficient to allow the application of Quebec law to an accident on board the defendant's British ship in the port of Trinidad. See Hancock, p. 207; Dicey, p. 961.

[5] Cour de Cassation 9. 6. 1880, *S.* 81. 1. 449; *Clunet* 1880, p. 394.

has not been followed, and therefore seems to be of doubtful authority. A *dictum* of the German *Reichsgericht* hints at the possibility of bringing an action for breach of contract against a fraudulent employee[1] — a particularly valuable possibility if the employee is a German, for the special protection of nationals against foreign tort claims in EGBGB, art. 12, does not extend to liability for breach of contract. English law is equally poor in cases of this kind. *Galaxias S. S. Co.* v. *Panagos Christofis*[2] has hardly any bearing upon this point; it was an action in trespass under English law against Greek sailors who remained on board a Greek ship in the harbour of Newcastle-upon-Tyne after they had been dismissed by the master for disobedience. As the contract of employment had come to an end by the dismissal of the crew, no *lex contractus* could be applied. The Scottish case *Johnston* v. *Strachan*[3] is equally unhelpful: in an action for fraud against the manager of a Scottish company in America, it was found that the plaintiff as a shareholder was not in privity of contract and thus could only proceed in tort.

From what little may be safely concluded, it would seem likely that the *lex contractus* can be used in those cases where the wrong constitutes a breach of explicit or implied conditions in the contract of employment.[4]

F. *Conclusions.* It was submitted earlier in the present study that the best way of achieving results which are satisfactory from the point of view of justice and practicability in those cases where characterization may result in either a contractual or a tortious construction of the case, is to establish an objective test. Where a plaintiff is entitled to use the advantages of both these types of action, it is just as important that the courts are able to distinguish tortious and contractual elements in an objective way and thus deprive the plaintiff of the possibility of what is called in American conflict literature "forum-shopping".

[1] RG 1927. 29. 9., *RGZ* 118, p. 141 (at p. 144).

[2] *Galaxias S. S. Co.* v. *Panagos Christofis* (1948), 81 Ll. L. R. 499; identical result in a similar South African case, *Leask* v. *French and others* (1949), 4 S. A. L. R. 887.

[3] *Johnston* v. *Strachan* (1861), 23 D. 758.

[4] This suggestion seems to get some support in a recent English decision, *Matthews* v. *Kuwait Bechtel Corp.* [1959] 2 Q. B. 57; cf. note in (1959), *I. C. L. Q.*, p. 741 f.

The test established in *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.*[1] seems to have proved sufficiently clear and objective for municipal law purposes, and it is submitted that it would be well suited for application also in conflict cases.

Generally speaking, this test seems to agree with the decisions of courts. The distinction between carriage of persons and carriage of goods would seem to offer an illustration. Accidents to railway passengers have, in the majority of cases, been regarded as torts, whereas damage to goods by the negligence of the carrier have been considered as a breach of contract. As the duty of railway companies not to injure its passengers is in the first place a legal duty which would bind the carrier even without any contract, breaches of this duty are normally classified as torts, not as a non-fulfilment of the contract which is in the first place concerned with the transport of passengers, while their safety is a *naturale negotii* more closely related to the protection granted by the law of torts. Carriers of goods, on the other hand, have a position similar to that of a bailee, and the safety of the goods is consequently an important part of the contract.

The "social environment" test suggested by some writers also seems to be satisfied by the proposed rule and by the decisions of courts. Between railway companies and their passengers there cannot be said to exist any common "social environment"; this is particularly true in international cases, where the contract is often carried out by a number of companies of different nationality and the passengers come from different countries. Between an employer and an employee, on the other hand, the *lex contractus* is in most cases the common legal ground upon which they normally meet, and this fact seems to be taken into account in the decisions of courts.

The technical problem arising in those cases where both a contractual and a tortious cause of action exist and may be cumulated in a lawsuit should not create greater difficulties than those created in normal contract cases, when questions incidental to the performance of the contract are governed by one law and the essential validity of the agreement by another. The only special

[1] *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* [1936] 1 K. B. 399 (at p. 405 *per* Greer L. J.).

consideration which courts must bear in mind is that the recovery granted to the plaintiff does not exceed what is allowed under that one of the two relevant legal systems which provides the most favourable conditions.

CHAPTER 6

INCIDENTAL QUESTIONS

A. *Preliminary Remarks.* The earlier parts of the present study have been concerned with cases where the difficulties caused by the traditional *lex loci* rule are mainly due either to the difficulty of ascertaining the place of harm or to the fact that the parties to the action are, at the time of the tort, connected with each other by contract.

The remaining group of cases against which criticism has been directed, are not easily gathered within one single formula. It is submitted, however, that it is possible to examine these situations[1] from one common angle: they are almost all complicated by the presence of a third party, connected in one way or another with the actual tortfeasor or with the injured party, and the problem they raise seems to be created less by the *lex loci* rule as such than by the difficulty of determining its scope with regard to that third party.

In the following survey of cases of this kind they will be discussed in groups determined by the legal relation in which the third party involved stands to the victim or the tortfeasor. There seem to be three such groups: in the first, the third party is related to either of the parties to the action by contract (*e. g.* a contract of insurance); in the second, the relationship is the result of a contract but its scope and consequences are largely defined by law (*e. g.* the relation between an employer and an employee); in the third, finally, the

[1] Exemplified by Dr. Morris: vicarious responsibility of car owner (*Levy* v. *Daniels' U-Drive Auto Routing Co.* (1928), 143 A. 163; *Scheer* v. *Rockne Motors Corp.* (1934), 68 F. 2d 942; Morris, J. H. C., The Proper Law of a Tort, (1950), 64 *H. L. R.*, p. 881 (at pp. 890 ff.); by Mr. Binder: liability of non-resident husband for wife's acting (*Siegmann* v. *Meyer* (1939), 100 F. 2d 367); Binder, pp. 401 ff.; by Professor Harper: husband's right to recover damages for loss of wife's services (*Lister* v. *McAnulty* [1944] 3 D. L. R. 673); Harper, F., Tort Cases in the Conflict of Laws, (1955), 33 *Can. Bar R.*, p. 1155 (at p. 1166).

relation, whether created by law or by contract, is wholly determined by legal provisions (*e. g.* marriage, the parent-child or guardian-minor relations).

This classification is not arbitrary. It is submitted that the strength, and the more or less personal character, of a third party's connection with either party to the action, also very largely determine the strength with which a third legal system may claim to govern certain elements of the suit. An action in tort is chiefly an economic matter, and the usual remedy is payment of money. It therefore seems reasonable that the law governing the tort as such is allowed to govern also those incidental questions which are chiefly concerned with economic relations. On the other hand, personal relationships are often more deeply connected with other sets of rules, normally the *lex patriae* or *lex domicilii* of the party concerned. In most countries, economic relations are largely left for the parties themselves to settle, usually in the form of contracts, whereas personal relations — the most typical of which is marriage — are defined by law. Between these two extremes, there are various intermediary types which will be ranged in our second group.

One further distinction seems to be necessary. The problems raised by third party relations already formed at the time of the tort may be expected to differ from those which emerge after the commission of the incriminated act. The difference is likely to be particularly important in cases of purely economic third party relations, *i. e.* situations where the claim — or liability — once it has arisen may become an object of transactions affecting the interests of the opposite party to the action. Where the relationship between the third party and the tortfeasor or victim of the tort is of a personal character, it is usually more permanent.

B. *Third Party Connected with the Tortfeasor.* (a) Before the tort. (aa) Contractual relationship. 1. Statement of the problem. Normally, a third party who stands in a contractual relationship with the tortfeasor at the time of the commission of the incriminated act is not in any legally relevant manner affected by an action against the latter. There is, however, one important exception to this rule: the tortfeasor's insurer. In actions for tort committed in those countries which have adopted a so-called "direct action statute" allowing the victim of a tort to proceed, without previous action against the tortfeasor, against his liability

insurance carrier, the courts have had the opportunity to consider the problems raised when such insurance carriers are domiciled abroad or when the policy has been issued in a foreign country.

There are obviously at least four possible theoretical approaches to the problem. In the first place, the right of direct action can be considered as part of the municipal law of torts of the *lex loci* and consequently enforced, wherever the insurance policy was issued; secondly, the law governing the insurance contract can be allowed to determine the liability incurred by the insurer; a third possibility is to classify the insurer's liability as a debt, situated at the domicile of the debtor and subject to the laws prevailing there; finally, the right of direct action can be characterized as remedial and thus governed by the *lex fori*. When the action is brought in the courts of the *locus delicti*, there is, presumably, a strong temptation for the *forum* to resort to the first or the last of the four solutions suggested above.

2. France. In France where a right of direct action has been developed by the courts, most writers on the conflict of laws seem to be in favour of the first solution: the direct action is an essential part of the victim's right of recovery and should be governed by the *lex loci* without reference to the law governing the insurance contract.[1]

In cases without an international element, French courts have emphasized that although the insurance contract is, of course, a condition *sine qua non* for the direct action, the victim's right is created by operation of law, not by the contract.[2] When first confronted by an insurance contract, issued abroad, and under a foreign *lex contractus* to which the direct action was unknown, some courts hesitated to apply the provisions of French law. The device to escape from this dilemma was a characterization of the third type indicated above: the insurer's liability was a debt located to the company's domicile and consequently governed by the

[1] Perroud, J., L'Action directe, *Revue générale des assurances terrestres* 1931, p. 21; Savatier, T., in comment of case *D. P.* 1936. 1. 149 (pp. 149 ff.); Niboyet, tome V, p. 173; Mazeaud, H. et L., pp. 913 ff.; Batiffol, p. 609.

[2] Cour de Cassation 14. 6. 1926, *S.* 1927. 1. 25; Cour d'appel de Nîmes 5. 6. 1932, *D. H.* 1932. 78.

foreign *lex situs*.[1] In a case where the facts made an application of the direct action statute particularly desirable — the tortfeasor, a South American diplomat who had injured a French couple by reckless driving, invoked his diplomatic immunity to escape from liability — the courts, declaring that the direct action was part of the law of torts of the *locus delicti* and independent of the foreign contract, granted recovery against the insurer.[2] Other courts immediately followed suit, founding their decisions on similar reasoning,[3] generally supported by the notions of public policy and order.[4] In 1936, the *Cour de Cassation* gave its sanction to this development in a decision where the interests of French public policy were emphasized;[5] after this judgment the courts seem to have accepted universally the application of the *lex loci*.[6] A logical consequence of this solution is that no direct action is admitted when the accident takes place abroad, even if the insurance policy has been issued in France and is subject to French law as *lex contractus*.[7]

3. U. S. A. In the United States, where a certain number of jurisdictions have enacted "direct action" statutes, the main problem seems to have been whether such statutes are remedial or substantive.[8] There are few modern decisions in which the direct

[1] Cour d'appel de Rouen 8. 1. 1930, *S.* 1930. 2. 167 (with approving note); *D. P.* 1930. 2. 85 (approving note Lalou); *Revue* 1931, p. 292; Tribunal civil de la Seine 2. 7. 1931, *Clunet* 1933, p. 622.

[2] Tribunal civil de Chinon 27. 7. 1931, *S.* 1932. 2. 153 (approving note Guyot); *Revue* 1931, p. 668 (in a note, Professor Niboyet describes the decision as *"piraterie internationale"*); confirmed Cour d'appel d'Orléans 28. 12. 1932, *Revue* 1933, p. 340.

[3] Tribunal civil de Lille 6. 3. 1933, *Clunet* 1934, p. 324.

[4] Tribunal civil de Saintes 3. 10. 1933, *Clunet* 1935, p. 69; Cour d'appel de Lyon 25. 7. 1933, *Clunet* 1934, p. 881; Tribunal de commerce de Dunkerque 19. 3. 1934, *Clunet* 1935, p. 334.

[5] Cour de Cassation 24. 2. 1936, *S.* 1936. 1. 161; *D. P. I.* 1936; *Clunet* 1937, p. 70; *Revue* 1936, p. 782.

[6] Cf. *e. g.* a recent decision: Cour d'appel de Douai 21. 6. 1955, *Revue* 1956, p. 71.

[7] Cour de Cassation 13. 7. 1948, *D.* 1948. J. 433; *Revue* 1949, p. 94.

[8] Most writers seem to be in favour of a characterization of such statutes as substantive: Hancock, p. 242; Faude, J., Conflict of Laws in Automobile Insurance, (1951), 99 *Can. Bar R.*, p. 266 (at p. 277); anonymous note, (1956), 57 *Col. L. R.*, p. 256; *contra* Rickert, T. G. in (1956), 42 *Cornell L. Q.*, p. 83; (1956), 57 *Col. L. R.*, p. 256 (at p. 259).

action of a victim against the tortfeasor's insurer has been held a matter of remedy. That seems to have been the earlier view in Louisiana, one of the jurisdictions which have adopted a direct action statute, and it was held by a Mississippi court in *McArthur* v. *Maryland Casualty Co.*[1]. However, most decisions of modern and recent date are founded upon the view that direct action is a substantive right.[2]

The question whether direct action statutes should be comprised within the general *lex loci* rule or the law governing the insurance contract should be resorted to has not been uniformly answered.[3]

The courts of Rhode Island, where a statute of this kind is in force, have adopted the contractual characterization in a series of cases,[4] and similar decisions have been rendered in other jurisdictions allowing direct action,[5] and by federal courts.[6] In some of these cases it would seem that the courts have considered it contrary to due process of law as understood in the Federal Constitution to impose a liability unforeseen in the insurance contract.[7] Such considerations have not prevented other courts from allowing a direct action granted by the *lex loci delicti*,[8] and the Supreme Court

[1] *McArthur* v. *Maryland Casualty Co.* (1939), 186 So. 305 (S. Ct. of Miss.); Hancock, p. 242. But cf. *Burkett* v. *Globe Indemnity Co.* (1938), 181 So. 316 (same court).

[2] *Collins* v. *American Automobile Ins. Co. of St. Louis* (1956), 230 F. 2d 416 (U. S. Court of Appeals, Second Circuit), also in Cheatham, p. 462; comments in (1956), 57 *Col. L. R.*, p. 256; Henican, C. E., in (1957), 31 *Tul. L. R.*, p. 673.

[3] Rabel, vol. II, pp. 264 ff. The learned author advocates the application of *lex loci*.

[4] *Coderre* v. *Travellers' Ins. Co.* (1927), 136 A. 305 (S. Ct. of R. I.); *Riding* v. *Travellers' Ins. Co.* (1927), 138 A. 186 (same court); *Farrell* v. *Employers' Liability Ass. Co.* (1933), 168 A. 911 (same court).

[5] Louisiana: *Lowery* v. *Zorn* (1934), 157 So. 826 (La. Court of Appeals); Wisconsin: *Ritterbusch* v. *Sexsmith* (1950), 41 N. W. 2d 611 (S. Ct. of Wis.); Faude, *op. cit.*, pp. 268 ff.; Irman, L., in (1951), 25 *Tul. L. R.*, p. 290.

[6] *Martin* v. *Zurich Gen. Accident Co.* (1936), 84 F. 2d 6 (U. S. Court of Appeals, First Circuit); *Bayard* v. *Traders & Gen. Ins. Co.* (1951), 99 F. Supp. 343 (U. S. District Court, Western District of La.); (1952), 65 *H. L. R.*, p. 688.

[7] Faude, *op. cit.*, p. 268; (1952), 65 *H. L. R.*, p. 688.

[8] *Kertson* v. *Johnson* (1932), 242 N. W. 329. (S. Ct. of Minn.); Hancock, p. 241 f.; *Borris* v. *Aetna Casualty & Surety Co.* (1950), 91 F. Supp. 954 (U. S. District Court, Western District of La.); (1951), 19 *Tul. L. R.*, p. 290.

adopted this solution in *Watson* v. *Employers' Ass. Corp. Ltd.*,[1] where the legitimate social interest of the *lex loci* was emphasized. In a recent New York case, *Morton* v. *Maryland Casualty Co.*,[2] the Appellate Division of the Supreme Court refused to entertain a direct action, founded upon the Louisiana *lex loci*, as opposed to the public policy of the *forum*.

Where the *lex loci* gives a plaintiff a more extensive right against the defendant's insurer than is granted in the contract, or where exemptions of liability in insurancy policies are void under the law of the place of wrong, courts have generally accepted the contract provisions if lawful under the *lex contractus*.[3] Thus, in *New Amsterdam Casualty Co.* v. *Stecker*,[4] a clause of exemption for injuries between spouses, included in a New York policy and lawful in New York, was considered applicable although the accident upon which the suit was brought occurred in Connecticut where such exemption clauses were unknown.[5]

4. Statements on the probable attitude of English courts to foreign direct action statutes can be little more than guesswork. According to Dicey, it is likely that the *lex contractus* should be held to govern the insurer's liability.[6] A Canadian decision, *Monast* v. *Provincial Ins. Co. Ltd. of England*[7] seems to characterize the

[1] *Watson* v. *Employers' Liability Ass. Corp. Ltd.* (1954), 75 S. Ct. 166; 348 U. S. 66; (1955), 33 *Tex. L. R.*, p. 744.

[2] *Morton* v. *Maryland Casualty Co.* (1955), 148 N. Y. S. 2d 524; (1957), 31 *Tul. L. R.*, p. 673; (1957), 57 *Col. L. R.*, p. 256; (1956), 43 *Cornell L. Q.*, p. 81. Cf. the decision in *Collins* v. *American Automobile Ins. Co. of St. Louis* (1956), 230 F. 2d 416, where a Federal C ourt of Appeals sitting in N. Y. held that a direct action granted by the *lex loci* would lie in N. Y.

[3] Faude, *op. cit.*, pp. 270 ff.; *Myers* v. *Ocean Accident & Guarantee Corp.* (1938), 99 F. 2d 485 (U. S. Court of Appeals, Fourth Circuit); *American Fidelity & Casualty Co.* v. *Sterling Express Co. Inc.* (1941), 22 A. 2d 327 (S. Ct. of N. H.); (1942), 42 *Col. L. R.*, p. 685.

[4] *New Amsterdam Casualty Co.* v. *Stecker* (1956), 152 N. Y. S. 2d 879 (S. Ct. of N.Y., Appellate Div'n.).

[5] When an action upon closely similar facts was brought in Connecticut, however, the court held that the New York statute allowing the exemption clause had no extraterritorial operation; by this backdoor, Connecticut law was applied to the contract; (1955), 35 *Boston U. L. R.*, p. 291 (case note on *Williamson's case*, 109 A. 2d 896).

[6] Dicey, p. 958.

[7] *Monast* v. *Provincial Insurance Co. Ltd. of England* (1939), Ont. W. N. 113; Spence, *op. cit.*, p. 979.

insurer's liability as a debt, not as a liability for damages; possibly, this would indicate that the law of the insurer's domicile, as the *lex situs* of the debt, would be resorted to.

(bb) Contracts with consequences defined by law. 1. Statement of the problem. Our second group of such relations between the actual perpetrator of a tortious act and a third party as exist already at the time of the tort comprises such contractual relations whereby an employer (owner, *superior*) is, in the eyes of the law, associated with the tort. In modern theories of delictual responsibility, the employer is not only a third party associated with the wrongful act but identified with the tortfeasor and liable for his acts as if they had been committed by the employer himself. It may therefore seem unnecessary or even incorrect to discuss the modern forms of vicarious liability in this context, and as will be shown below, few courts have thought of splitting up the fictitious unity between the tortfeasor and the *superior*, whether the latter be found within the jurisdiction or not. On the other hand, some American decisions, where the courts have expressed hesitation when confronted with a claim against a *superior* resident outside the jurisdiction in an action for tort committed within its territory, are most suitably examined in this connection; these cases seem to have a closer affinity with, for instance, cases of direct action than with any other problem, and this affinity may be more obvious if the two groups are studied from a common point of view.

2. French courts have held, in a long series of decisions, that there is no distinction to be drawn between the responsibility of a tortfeasor and that of his employer or *superior:* the whole complex of civil liability is governed by the law of the place where a tort takes place.[1] There has been little or no hesitation on this topic, and writers have generally approved of the line followed by the

[1] Cour de Cassation 4. 11. 1891, *Clunet* 1892, p. 152; Cour de Cassation 24. 11. 1897, *S.* 1898. 1. 311; Cour de Cassation 18. 7. 1895, *S.* 1895, 1. 305; *Clunet* 1896, p. 130; Cour de Cassation 15. 2. 1905, *S.* 1905. 1. 209; cf. *Clunet* 1903, p. 384; Cour de Cassation 25. 5. 1948, *S.* 1949. 1. 21; *D.* 1948. J. 357; *Clunet* 1946—1949, p. 38; *Revue* 1949, p. 89. In a Belgian case, Cour d'appel de Liège 8. 1. 1931, *RabelsZ.* 6, 1932, p. 189, the court justified its decision by referring to Pillet's theories on the social purposes of laws.

courts.[1] Certain modifications of the general principle have been suggested by Bartin.[2] The law of the contract must be consulted to determine whether the relationship between the actual tort-feasor and the alleged *superior* is of the same nature as the relations between a "*préposé*" and a "*commettant*" in French municipal law. Similar ideas were discussed by the *Cour de Cassation* in an early case,[3] where it was held that a shipowner's liability for the acts of the master are founded on the contract existing between them, and that the liability must be determined in the light of the *lex contractus*. The case was a special one, however: the action was brought for a maritime tort, and the reasoning of the court was an attempt to justify its refusal to let an English shipowner exercise the right of abandon granted by French maritime law.[4]

3. German writers generally advocate the application of the *lex loci*[5] and the *Reichsgericht* decided as early as 1887 that the law of the place of wrong decides whether vicarious liability exists or not.[6] This line has been followed ever since.[7] In *English* law, the principle that vicarious liability is a matter for the *lex loci* seems to have been clearly expressed by James L. J. in *The Mary Moxham*,[8] and no later decision has involved any change of this principle.

4. That the same rule normally applies in the U. S. A. is certainly beyond doubt. Indeed, the American "place of harm" rule would be virtually ineffective if the law of the place of harm were not extended to employers, car-owners and other categories of

[1] Donnedieu de Vabres, p. 212; Niboyet, tome V, p. 167 and p. 175; Battifol, p. 609.

[2] Bartin, tome 2, pp. 427 ff.

[3] Cour de Cassation 4. 11. 1891, *Clunet* 1892, p. 152.

[4] Similar reasoning for similar purpose in Cour d'appel d'Aix-en-Provence 23. 1. 1899, *Clunet* 1901, p. 104.

[5] Lewald, p. 267; Raape, p. 369. Frankenstein follows his general line, preferring the *lex patriae* of the tortfeasor, vol. 2, p. 372; von Bar suggests a test of concurrent liability: no recovery against the *superior* unless granted both by the *lex loci* and his *lex patriae;* von Bar, vol. 2, p. 122.

[6] RG 1887. 23. 9., *RGZ* 19, p. 382.

[7] RG 1888. 30. 5., *RGZ* 21, p. 136; RG 1896. 1. 7., *RGZ* 37, p. 181 (where some sympathies for the law of the *superior's* domicile were expressed, at p. 182); OLG Karlsruhe 1929. 28. 2., *IPRspr.* 1930, Nr. 51; OLG Nürnberg 1934. 4. 1., *IPRspr.* 1934, Nr. 26; BGH 1956. 21. 12., *BGHZ* 23, p. 65.

[8] The Mary Moxham (1876), 1 P. D. 107 (at p. 110).

superiores resident outside the jurisdiction where that law is in force.[1] Textbook writers also follow their European colleagues in acknowledging the empire of the *lex loci* over questions of vicarious and strict liability.[2]

Curiously enough, the Restatement, otherwise so orthodox on this point, is singularly timid in asserting the sway of the *lex loci* in cases of vicarious liability: "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."[3] The problem of authorization has been raised in a few cases.[4] In *Levy* v. *Daniels' U-Drive Auto Co.*[5], a vicarious liability known in the law of the place where the defendant rented his car to the tortfeasor — which was also the *lex fori* — was enforced although the *lex loci* knew of no such liability. The decision can presumably be ruled out from this discussion as influenced by considerations of public policy and the "homeward trend" of the *forum.*[6] Authorization in the sense of the Restatement was found in *Young* v. *Masci,*[7] where a car owner in N. J. was held liable for the negligence of the driver in N. Y. In N. J. a car owner was not vicariously liable for the driver's

[1] Cf., for instance, *Reed & Barton* v. *Maas* (1934), 73 F. 2d 359 (U. S. Court of Appeals, First Circuit); *La Prelle* v. *Cessna Aircraft Co.* (1949), 85 F. Supp. 182 (U. S. District Court, District of Ark.).

[2] Goodrich, p. 277; Stumberg, p. 188; also Rabel. p. 263.

[3] *Restatement of the Law of Conflict of Laws,* 1934 (revised in 1948), § 387.

[4] A particular problem is presented by strict liability for animals. In *Le Forest* v. *Tolman* (1875), 19 Am. Rep. 400 (S. Ct. of Mass.), no action under *lex loci* was held to lie against the non-resident owner of a dog; in *Fischl* v. *Chubb* (1939), 30 Pa. D. & C. 40 the *lex loci* was applied; (1938), 51 *H. L. R.*, p. 738.

[5] *Levy* v. *Daniels' U-Drive Auto Co.* (1928), 143 A. 163 (S. Ct. of Conn.); (1929), 42 *H. L. R.* p. 433.

[6] The case is approved of by Dr. Morris as an application of the "proper law of the tort". Morris, J. H. C., The Proper Law of a Tort, (1950), 64 *H. L. R.*, p. 881 (at p. 890). Professor Ehrenzweig, in (1951), 36 *Minn. L. R.*, p. 1 (at p. 28) contends that the decision supports his thesis that the law of the place of acting governs intentional torts; this does not seem entirely convincing; it is hard to imagine a tort less intentional than that of a car owner liable for the driver's actions.

[7] *Young* v. *Masci* (1933), 53 S. Ct. 599; 77 L. Ed. 1158; (1933), 47 *H. L. R.*, p. 349.

acts. To justify the application of N. Y. law, Mr. Justice Brandeis held that, "when Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant."[1] This *dictum* seems to stress the peculiar character of the car owner's position as opposed to the normal case of vicarious liability in master-servant relations. In *Scheer* v. *Rockne Motors Corp.*,[2] however, it was held that the tortfeasor's employers had not, by giving him a car, authorized him to go into the country of the *locus delicti*, where vicarious liability existed. Recovery against the defendant was consequently refused.

This doctrine of submission, so inconsistent with current American theories on vicarious liability, seems hardly worth following. A possible device to avoid grossly unfair decisions would be considerations of remoteness of damage, and it is submitted that such a method would be more in keeping with both municipal tort law and private international law. The presence of the tortfeasor within a certain jurisdiction can occasionally be such a remote effect of his relationship with the *superior* that it would be unfair to subject the latter to the law of the place of injury; that may be the case where it can be proved that the acting did not occur in the course of the employment. In such cases, however, it must be remembered that what is considered is the remoteness of the tortfeasor's acting in a certain place, not the remoteness of the injury as such. It is submitted, however, that this exception should be used with the greatest restriction and that the Restatement and the two cases discussed express a rule which is hardly satisfactory. It should be for the employer or car owner to prove that the tortfeasor has acted against his instructions or been present in the jurisdiction of the *lex loci* for reasons completely unconnected with his employment.

(cc) Legal relationships. There are few cases in which a third party is involved in an action for tort as a result of a purely legal relationship to the tortfeasor. In countries where parents

[1] 77 L. Ed. 1158, at p. 1161.

[2] *Scheer* v. *Rockne Motors Corp.* (1934), 68 F. 2d 942 (U. S. Court of Appeals, Second Circuit).

are strictly liable for the acts of their children it has been suggested that the question whether such liability exists or not is a matter for the *lex loci*, not for the personal law of the family, to decide.[1] If the legal validity of the underlying relationship is questioned, it seems obvious that this issue must be considered separately from the tort action and submitted to its own law. Similarly, it is submitted, the law of the tortfeasor's domicile or nationality must be consulted to ascertain who is, under that law, in a position to exercise the control and authority which must be the basis of the vicarious liability.[2]

The question of the law applicable to a third party connected by legal status with the actual tortfeasor was raised in the American case *Siegmann* v. *Meyer*[3] where a husband in New York was sued for an assault committed by his wife in Florida. Under the *lex loci*, husbands were vicariously liable for the acts of their spouses; no such provision existed in New York, and the husband had not been in Florida at the time of the tort. The action was dismissed in terms which, although laconic, would seem to imply that the liability invoked by the plaintiff was contrary to New York public policy. There are, however, other possibilities of justifying this result which appears eminently sound. One would be to characterize the issue as a question of matrimonial status and thus arrive at the N. Y. *lex matrimonii*. Even if the vicarious liability as such is considered as a matter for the *lex loci*, an investigation into the law governing the relations between the tortfeasor and her husband would presumably show that N. Y. law gives the husband no such position of control as would justify a vicarious liability.

(b) Relations existing after the commission of the tort. The only situation in which a lawsuit can affect the rights of a third party who has become involved in the action because of a legal relation with the tortfeasor which has come into existence after the commission of the wrongful act seems to be where the perpetrator of the tort dies and the question is raised whether the victim's claim survives against the successors. This problem can be considered as incidental to the question of liability as such

[1] Batiffol, p. 609.
[2] Valéry, p. 977.
[3] *Siegmann* v. *Meyer* (1938), 100 F. 2d 367 (U. S. Court of Appeals, Second Circuit), (1938), 52 *H. L. R.*, p. 834; Hancock, p. 255.

and consequently governed by the *lex loci;* it can be distinguished from the tort action and treated as a matter of succession subject to the deceased's *lex domicilii* (or *patriae*) or to the law of the court which has appointed the administrator of the estate. Finally, it can be regarded as a procedural question to be governed by the *lex fori.*[1]

In the absence of decisions known to the present writer, the solutions which French and German courts would give to this question are impossible to foresee. Continental writers are equally silent on the topic. English law is almost as difficult to ascertain. *Batthyani* v. *Walford*[2] would seem to indicate that English courts apply their own rules of survival in actions brought before them, but the decision could also imply that the *lex situs* of the claim[3] — in the principal case English law as the law of the administrator's domicile — or the law of the place of administration is resorted to. If the *Phillips* v. *Eyre*[4] formula is taken as a rule of concurrent actionability or interpreted in the traditional way, survival under English law would be required in any case.

American courts have applied both the law of the deceased tortfeasor's domicile,[5] and the *lex loci.* The latter solution has been adopted by the Supreme Court,[6] and seems to have the greatest weight of authority in favour of it.[7] In *Grand* v. *McAnliffe,*[8] the Supreme Court of California applied the *lex fori* on two grounds, namely that survival is a matter of procedure and further that the law of the place of administration must govern all matters of succession. In one case, New York courts refused to apply a foreign survival statute to the estate of a deceased New York resident on grounds of public policy.[9]

[1] Hancock, p. 244.
[2] *Batthyani* v. *Walford* (1887), L. R. 36 Ch. D. 269.
[3] Cf. Dicey, p. 955.
[4] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.
[5] *Whitten* v. *Bennett* (1896), 77 F. 271 (Circuit Court, District of Conn.).
[6] *Ormsby* v. *Chase* (1933), 54 S. Ct. 211; 78 L. Ed. 378.
[7] *Orr* v. *Ahern* (1928), 139 A. 691 (S. Ct. of Errors of Conn.); *Chubbuck* v. *Holloway* (1931), 234 N. W. 314 (S. Ct. of Minn.); Hancock, p. 244; Robertson, pp. 264 ff.
[8] *Grand* v. *McAnliffe* (1953), 264 P. 2d 944 (S. Ct. of Calif.); (1954), 29 *N. Y. U. L. R.*, p. 1288; (1954), 42 *Calif. L. R.*, p. 803.
[9] *Herzog* v. *Stearn* (1934), 191 N. E. 23 (S. Ct. of N. Y., Appellate Div'n.).

C. *Third Party Connected with the Plaintiff.* (a) Contractual relationship. (aa) Relations existing at the time of the tort. The legal position of a third party connected by contract with the victim of a tort at the time of its commission is not as such affected by the wrongful act. There are certainly situations where a tort committed against a contract partner can result in economic loss or other damage to a third party, but such rights as he may acquire by this fact are not a result of the contract, but of the tort, and whether or not a right of action accrues is a question of remoteness of damage. Thus the addressee of a consignment of goods may suffer from the negligence of the carrier, but in that case his right of action is based upon the wrong committed against himself, and not a consequence of his contractual relationship with the sender.

(bb) 1. After the commission of the tort, on the other hand, a third party can be introduced into the action by *assignment* of the victim's claim. The question confronting the courts in cases of this kind is whether the validity of the assignment should be judged by the *lex loci delicti* or distinguished from the tort action and considered as an independent transaction governed by its own law. There are no European authorities on this topic,[1] but American courts have had some opportunities to consider the question.[2] In *Leach* v. *Mason Valley Mines*[3] a right of action which could not be assigned under the *lex loci* had been the object of an assignment valid at the place of the transaction. The Court upheld the assignment. The converse situation is found in an early case, *Vimont* v. *Chicago etc. Ry. Co.*,[4] where the assignment was void under the law of the State where it took place but valid under the *lex loci*, which was applied by the court. The Restatement (§ 389) seems to advocate the application of the *lex loci*, a solution defended by Professor Hancock as consistent with fairness to the defendant: a transferable obligation being more burdensome than one which cannot be assigned, the plaintiff should not be able to perform an assignment

[1] Dicey, p. 956, suggests that the *lex loci delicti* should govern the assignment.
[2] Hancock, pp. 202 ff.; Stone, D., Assignment of Employee's Accident Claims and the Conflict of Laws, (1956), 7 *Syracuse L. R.*, p. 233.
[3] *Leach* v. *Mason Valley Mines* (1916), 161 P. 513 (S. Ct. of Nev.).
[4] *Vimont* v. *Chicago etc. Ry. Co.* (1886), 22 N. W. 906 (S. Ct. of Iowa).

merely by going into another State.[1] It has been contended, however, that if the claim is considered as property created by the *lex loci*, some other State, *e. g.* the plaintiff's domicile, may have a more important social interest in that property.[2]

2. A special type of assignment of the plaintiff's right of action is the subrogation of an insurer who has satisfied the victim's claims and, generally by operation of law, is substituted in his rights.

French courts have recognized the validity of such subrogation effected under the foreign law of the insurance contract and allowed the insurance carrier to proceed against the perpetrator of a tort in France.[3] However, it has been emphasized that if the foreign transaction had in any way aggravated the defendant's situation, it would have been disregarded.[4] Similar considerations were voiced, and similar results reached, by a New York court in *General Accident, Fire etc. Co.* v. *Zerbe Constr. Co.*[5] and by the Supreme Court of New Hampshire in *Saloskin* v. *Houle.*[6] However, in a recent decision, *Middle Atlantic Transportation Co.* v. *New York*,[7] an assignment valid in Michigan, where it took place, was not recognized in the courts of New York, the *locus delicti*, which does not allow subrogation of insurers.

(b) Legal relationships. (aa) At the time of the tort. A status relationship with the victim of a tort existing at the time of the wrongful act may involve a third party in various ways, and the courts will have to decide, here again, whether the legal

[1] Hancock, p. 202.

[2] Stone, *op. cit.*, p. 261.

[3] Cour d'appel de Riom 29. 1. 1932, *S.* 1934. 2. 49.

[4] Tribunal civil de la Seine 2. 1. 1935, *Clunet* 1936, p. 904. The *lex loci* was held to govern the subrogation. This was only a coincidence, as France (the *locus delicti*) was also the country where the insurer had paid the victim, and the French statute of 1930 allowing subrogation was held to apply to all payments effected in France.

[5] *General Accident, Fire etc. Co.* v. *Zerbe Constr. Co.* (1935), 199 N. E. 89 (S. Ct. of N. Y., Appellate Div'n.).

[6] *Saloskin* v. *Houle* (1931), 155 A. 47.

[7] *Middle Atl. Transportation Co.* v. *N. Y.* (1934), 133 N. Y. S. 2d 901 (Court of Claims). In an earlier case, *Hartford Acc. & Indemnity Co.* v. *Chartrand* (1924), 145 N. E. 274 (S. Ct. of N. Y., Appellate Div'n), the subrogation was upheld in equity.

position of this third party is to be determined by the *lex loci delicti* or by some other legal system, *e. g.* the law governing the status, or the *lex domicilii* of the victim.

1. Continental law. Valéry has expressed the opinion that the *lex patriae* of the victim must determine whether the tort gives rise to a right of action to members of the victim's family,[1] and in a German decision it was held that the (German) *lex matrimonii* determined the right of a husband to bring an action for a tort committed against his wife in Belgium.[2]

2. The English tort rule as traditionally applied would seem to disregard such rights as are not actionable in England whether they are recognized by the *lex loci* or any other legal system.[3] A Canadian case, *Lister* v. *McAnulty*,[4] provided an interesting example of the combined use of the *lex fori* (= *lex loci*) and the law of the plaintiff's domicile. A husband domiciled in Massachusetts brought an action in Quebec for injuries tortiously inflicted upon his wife in that province. Among other heads of claim he asked for damages for the loss of *servitium* and *consortium* as known in Quebec law. Upon examination of the rights and obligations attending his status in Massachusetts law, the court found that this status, defined as "the whole of his juridical qualities, which the law takes into consideration to attach thereto legal effects",[5] did not comprise any right of *servitium* or *consortium;* these claims were consequently dismissed.

3. In *Redfern* v. *Collins*,[6] a recent American decision, the court refused to grant recovery to a Colorado woman injured in Texas on the ground that under the *lex loci* (but not under the woman's *lex domicilii*) the right of action was part of the community of property existing between spouses and that the plaintiff's husband should therefore have joined in the action. This sweeping applica-

[1] Valéry, p. 977.

[2] RG 1919. 30. 5., *RGZ* 96, p. 96.

[3] In a Canadian case, *Lucas* v. *Coupal* (1930), 66 Ont. L. R. 141, the capacity of minors to bring an action was possibly characterized as a matter determined by their *lex domicilii;* that law, however, was also the *lex loci.*

[4] *Lister* v. *McAnulty* [1944] 3 D. L. R. 673 (S. Ct. of Canada); Smith, C., Torts and the Conflict of Laws, (1957), 20 *M. L. R.* p. 447.

[5] At p. 686.

[6] *Redfern* v. *Collins* (1953), 113 F. Supp. 892 (U. S. District Court, Eastern District of Tex.).

tion of the *lex loci* has been severely criticized and does not seem to have been adopted by other American courts.[1]

(bb) After the tort. Cases of survival of the plaintiff's claim constitute by far the most important group of cases concerned with the rights of a third party whose legal relationship with the victim of a tort becomes relevant after the wrongful act. The *lex loci*, the law of the deceased's plaintiff's last domicile, or of the place where administration of the estate is carried out, are possible legal systems as well as the *lex fori* and the *lex situs* of the claim.

1. In a recent case from the then French Indochina, the *Cour d'appel de Hanoï* had to decide which of the numerous wives of a Chinese wrongfully killed in an accident in Indochina was entitled to recover damages for the tort.[2] The court declared that whereas the *lex loci* determines to what categories of dependants damages are due, it is for the *lex familiae* to determine the status of the claimants. One step further towards recognition of the interests of the law governing the family relations of the deceased seems to have been taken by the *Cour de Cassation* in an earlier case, where it was held that the *lex successionis* determines *who* is entitled to recover.[3] German conflict law seems to consider the question of survival as a matter for the *lex loci*, but there are no reported decisions which can provide reliable information on this point.[4]

2. In England and those parts of the Commonwealth where the common law prevails, particular importance is given to the *lex fori* by the fact that no action can be brought for damages due to a deceased victim unless the plaintiff has got letters of administration in the *forum* country.[5] Furthermore, where the formula in

[1] (1954), 32 *Tex. L. R.*, 341. See, however, Rabel, vol. II, p. 262 and p. 265. In *Williams* v. *Pope Manufacturing Co.* (1900), 27 So. 851 (S. Ct. of La.), it was held that the incapacity to institute legal proceedings without the husband's concurrence which is attached to married women in Louisiana law was applicable only to women domiciled in that State.

[2] Cour d'appel de Hanoï 24. 3. 1949, *Revue* 1950, p. 399.

[3] Cour de Cassation 4. 6. 1941, *S.* 1944. 1. 133; *Clunet* 1945, p. 111.

[4] Raape, p. 364. The writer suggests that funeral costs and alimony to surviving dependants may possibly be granted in accordance with the *lex domicilii* of the victim.

[5] *Finnegan* v. *Cementation Co. Ltd.* [1953] 1 Q. B. 688 (Court of Appeal); *Couture* v. *Dominion Fish Co.* (1910), 19 M. L. R. 65 (Court of Appeal of Manitoba).

Phillips v. *Eyre*[1] has been interpreted as a rule of concurrent actionability, letters of administration in the *locus delicti* are equally required.[2] Under the traditional construction of the English tort rule it would seem that survivability of the claim in England is the only requirement, provided the incriminated act is not justifiable in the *lex loci*.[3]

3. In the United States the procedural requirement of letters of administration in the *forum* country which was earlier upheld in all jurisdictions,[4] has been mitigated by decisions to the effect that an administrator can be appointed in the *locus delicti* for the purpose of recovering damages from the tortfeasor.[5] In a certain number of jurisdictions, foreign administrators are admitted without further requirements.[6]

It would seem that the logical outcome of the American "obligation" theory, according to which "the plaintiff owns something"[7], would be a characterization of the tort claim as property, subject to the same rules as ordinary debts.[8] The "orthodox" American

[1] *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1.

[2] *Young* v. *Industrial Chemicals Co. Ltd.* [1939] 4 D. L. R. 393 (S. Ct. of Br. Columbia). Cf., however, *Walpole* v. *Canadian Northern Ry. Co.* [1923] A. C. 113 (Privy Council).

[3] Dicey, p. 955, suggests the law of the *situs* of the claim; a German writer, Mr. Ficker, in Die Ansprüche der Hinterbliebenen, *RabelsZ.* 8, 1934, p. 376, seems to hold (at p. 444) that the *lex loci* governs this question in English law.

[4] *Hall* v. *Southern Ry. Co.* (1907), 59 S. E. 879 (S. Ct. of N. C.); *Cornell Co.* v. *Ward* (1909), 168 F. 51 (U. S. Court of Appeals, Second Circuit); *Compton's Administrators* v. *Borderland Coal Co.* (1918), 201 S. W. 20 (Ky. Court of Appeals).

[5] *In re Mayo's Estate* (1901), 38 S. E. 634 (S. Ct. of S. C.); *Sharp* v. *Cincinnati etc. Ry. Co.* (1915), 179 S. W. 375 (S. Ct. of Tenn.).

[6] *Ghilain* v. *Couture* (1929), 146 A. 395 (S. Ct. of N. H.); *Wiener* v. *Specific Pharmaceuticals Inc.* (1949), 83 N. E. 2d 673 (S. Ct. of N. Y., Appellate Div'n.); in this case the foreign administrator was characterized as a statutory trustee and was allowed to sue in this capacity; (1950), 48 *Mich. L. R.*, p. 520; (1956), 54 *Mich. L. R.*, p. 821; *Howard* v. *Pulver* (1951), 45 N. W. 2d 530 (S. Ct. of Mich.), where a similar construction of the foreign administrator's position was adopted; (1951), 50 *Mich. L. R.*, p. 148. When a statute of survival or a wrongful death act in the *lex loci* specifically designates the person who may bring an action, this is generally observed at the *forum: Centofanti* v. *Pa. R. R. Co.* (1914), 90 A. 550 (S. Ct. of Pa.).

[7] *Loucks* v. *Standard Oil Co. of N. Y.* (1918), 224 N. Y. 99, at p. 110 *per* Cardozo, J.

[8] Stone, D., Assignment of Employee's Accident Claims and the Conflict of Laws, (1956), 7 *Syracuse L. R.*, p. 233 (at pp. 249 ff.).

view, however, seems to be that all questions incidental to the plaintiff's right, including that of survival and distribution of damages among the successors are governed by the *lex loci delicti*.[1] Whether the reasons are the theoretical reasoning of Holmes J., who held that it is "quite inadmissible . . . that the law of the place of wrong may be resorted to so far as to show that the act was a tort, and then may be abandoned . . ."[2], or the considerations of fairness to the defendant put forward by Professor Hancock,[3] the courts have generally followed the Restatement view,[4] which can also claim the authority of the Supreme Court.[5] However, the variety of solutions is considerable. Courts have submitted the survival of the claim to the *lex loci* but the distribution of the proceeds to the *lex fori* as the law of the place of administration,[6] or applied the *lex fori* to both the question of survival and that of distribution.[7] In an early case, both questions were held to be governed by the *lex domicilii* of the deceased;[8] a more common solution has been to apply the *lex loci* to the question whether the claim survives, but reserve the question of distribution for the *lex domicilii*. The reasons given for these decisions have been varying: in one case, the court described the proceeds of the action

[1] *Restatement of the Law of Conflict of Laws*, 1934 (revised in 1948), § 390 and § 393; Beale, p. 1304; Goodrich, p. 298; Stumberg, p. 193; Hancock, p. 125; Rabel, vol. II, p. 261.

[2] *Slater* v. *Mexican Nat. Ry. Co.* (1904), 24 S. Ct. 581; 48 L. Ed. 900 (at p. 903).

[3] Hancock, pp. 247 ff.

[4] *McDonald* v. *McDonald's Administrator* (1893), 49 Am. St. Rep. 289 (Ky. Court of Appeals); *Davis* v. *N. Y. & N. E. R. R. Co.* (1897), 58 Am. Rep. 138 (S. Ct. of Mass.); *van Doren* v. *Pennsylvania R. R. Co.* (1899), 93 F. 260 (U. S. Court of Appeals, Third Circuit); *Denver & Rio Grande R. R. Co.* v. *Warring* (1906), 86 P. 305 (S. Ct. of Colo.); *Betts* v. *Southern Ry. Co.* (1937), 71 F. 2d 787 (U. S. Court of Appeals, Fourth Circuit). In *Pa. R. R. Co.* v. *Levine* (1920), 263 F. 557 (U. S. Court of Appeals, Second Circuit), the court applied a sort of *renvoi* and, by holding that the distribution statute of the *lex loci* could not operate extraterritorially, arrived at the *lex domicilii*.

[5] *Spokane & I. E. R. R. Co.* v. *Whitley* (1915), 85 S. Ct. 655; 59 L. Ed. 1060.

[6] *Hall* v. *Southern Ry. Co.* (1907), 59 S. E. 879 (S. Ct. of N. C.).

[7] *Baltimore & O. R. Co.* v. *Joy* (1899), 19 S. Ct. 387; 173 U. S. 226.

[8] *Stockwell* v. *Boston etc. Ry. Co.* (1904), 131 F. 153 (U. S. Circuit Court, District of Vt.).

as money belonging to the plaintiff,[1] in another the plaintiff's domicile was held to be the *situs* of the claim.[2]

D. *Conclusions.* (a) Technical problems. It is submitted that the classification of different types of problems made in this chapter has proved helpful for a proper analysis of the questions involved.

In all these cases the courts have had to answer the same question. In terms of private international law techniques, they deal with what has been called the "preliminary question"[3] or the "incidental question".[4] The problem so called concerns the scope of the law chosen to govern the tortious act as such. Shall it be allowed to govern also problems which the conflict rules of the *forum* would certainly refer to another legal system if they were brought before the court as principal elements of an independent action?

It has been argued that the introduction of the term "preliminary question" is of small assistance to the solution of problems of this kind and that the traditional techniques of *renvoi* and characterization are sufficient.[5] On the other hand it is contended that these problems are not identical with those solved by the process of characterization as commonly understood; the "preliminary question", it is said, is concerned with the finding and use of connecting factors different from those of the principal issue at bar.[6]

It is submitted that the discussion on this topic is largely a quarrel over words. When dealing with a problem of this kind the courts proceed by two successive stages. First, they decide, either because a conflict rule to that effect is in force, or because

[1] *Hartley* v. *Hartley* (1905), 114 Am. St. Rep. 519 (S. Ct. of Kansas).

[2] *Higgins* v. *Central N. E. & W. R. R. Co.* (1892), 31 Am. St. Rep. 544 (S. Ct. of Mass.). No particular explanation is given in *Compton's Administrators* v. *Borderland Coal Co.* (1918), 201 S. W. 20 (Ky. Court of Appeals). In *Re Hertell's Estate* (1929), 237 N. Y. Supp. 655 (Surrogate's Court, N. Y. Co.) it was held that once the proceeds were within the jurisdiction of the *lex domicilii*, its distribution laws applied.

[3] Robertson, p. 135; Nussbaum, pp. 104 ff.; Cheshire, p. 91.; Dicey, pp. 57 ff.

[4] Wolff, p. 206.; Dicey, *ibid.*

[5] Nussbaum, p. 108 f.

[6] Schnitzer, vol. I, pp. 112 ff. For an exhaustive discussion of the problem, see Dicey, pp. 57—63.

justice and expediency seem to require it, that a certain element of the action shall or shall not be governed by the law governing the tort as such. This decision is a matter of policy, not of technique, and involves consideration of such connecting factors as recommend themselves with greater strength than that generally applicable to torts.

If the law governing the tort is held applicable to the particular element of the action under consideration, the problem is solved. In the converse situation, that part of the action which is thus withdrawn from the *lex loci* is characterized, presumably in accordance with the ordinary classification rules of the *forum*, and referred to the law thus found applicable. For this process, there seems to be a need for another term than "characterization" or "secondary characterization". Indeed, it is difficult to see how another term could create any confusion.[1] The term "incidental question" seems to offer the best description of the reasoning of the courts, and it is submitted that it should be adopted. The preliminary decision as to the scope of the *lex loci delicti* is present to the same extent in every case where characterization is resorted to: basically, it is an expression of the same policy that in all conflict cases persuades courts to go to the trouble of finding out, by means of classification and choice-of-law rules, which foreign law is best suited to govern the case, and of applying that law instead of letting their own rules govern the whole action.

Another technique for dealing with the problem discussed in this chapter would be possible, and has been suggested by American writers: the use of *renvoi*. The prevailing opinion in the United States, expressed in the Restatement, is clearly against *renvoi*.[2] However, a few cases of tort actions between spouses have given rise to the suggestion that undesirable results might be avoided by applying not only the municipal law of the *locus delicti* but the "whole law" prevailing there, including its conflict rules. In *Gray* v. *Gray*,[3] a wife domiciled in New Hampshire claimed damages from her husband for a motor car accident caused by his

[1] Nussbaum, p. 108 f.

[2] Griswold, E., Renvoi Revisited, (1938), 51 *H. L. R.*, p. 1165 (at p. 1206); Gediman, N., Conflict of Laws — Husband and Wife, (1955), 35 *Boston U. L. R.*, p. 291 (at p. 293).

[3] *Gray* v. *Gray* (1934), 174 A. 508 (S. Ct. of N. H.).

negligent driving in the State of Maine. Under Maine law, a wife could not sue her husband; in New Hampshire, such actions are admitted. The court applied the *lex loci* and held that the woman was barred from bringing an action. Dean Griswold suggests that the New Hampshire courts should have considered the whole law of Maine and thereby possibly found that Maine courts would not apply the provision prohibiting suits between spouses to a foreign couple.[1]

There are few decisions in which courts have used or even considered this technique. It was discussed but rejected in *Gray* v. *Gray*.[2] *Williamson*'s case[3] has been considered as an example of *renvoi*[4], but it is submitted that no such explanation is necessary; once the court had decided that the liability of the insurance company was a matter for the *lex contractus*, it seems reasonable that they took into account the territorial limitations of that law — this does not amount to deciding as a court sitting in the country of the *lex contractus*.[5]

It is submitted that a technique identical with the ordinary method of characterization is sufficient to deal with problems of this kind once the court has found that a given question falls outside the normal field of application of the *lex loci*.[6] *Renvoi* would imply the adoption by the *forum* of the characterization and choice-of-law rules of the *lex loci delicti*, and it seems neither logical nor practical that incidental questions with which, in the eyes of the *forum*, the *lex loci* has little or no real connection, should be governed by the conflict rules of that very *lex loci* from the empire of which these questions should be withdrawn.

[1] Griswold, *op. cit.*, at p. 1205; similar suggestion in Robertson, p. 97 f. See further (1939), 52 *H. L. R.*, p. 834, where it is suggested that the court in *Siegmann* v. *Meyer* (1938), 100 F. 2d 367 should have decided as if sitting in Florida; it might then have found that the Florida rule making the husband liable for his wife's acts was applied only to couples residing in Florida.

[2] At p. 511, *per* Peaslee C. J. In *Buckeye* v. *Buckeye* (1931), 234 N. W. 342, the Supreme Court of Wis. considered, *obiter*, what would have been the attitude of the courts of Ill. (*locus delicti*), but this did not influence the decision.

[3] *Williamson's* case (1955), 109 A. 2d 896.

[4] Gediman, N., *op. cit.*, p. 293.

[5] *Mutatis mutandis*, a similar explanation can be given to *Pa. R. R. Co.* v. *Levine* (1920), 263 F. 557 (U. S. Court of Appeals, Second Circuit).

[6] Cook, Supplementary Remarks.

(b) Policies. As submitted earlier, apart from technical aspects, the real problem raised by the cases discussed in this chapter is one of policy. A discussion in some detail of such practical considerations as may affect the solutions in the different groups of cases may presumably shred some light upon the question whether it is possible to formulate comprehensive rules for secondary characterization.

The trend of decisions involving statutes which allow *direct action* against a tortfeasor's liability insurance carrier seems to point towards a more general application of the *lex loci delicti*. In no country, however, has this been taken to mean that a more extensive liability could be imposed upon the insurer than that granted by the contract as interpreted under its proper law. Subject to this qualification, the application of the *lex loci* does not seem to raise any serious objections. If the insurance policy covers the foreign country in which the tort is committed, it must be presumed that the insurer has had the opportunity to consider the risks he incurs and has adjusted the economical conditions accordingly.

The liability under the *lex loci delicti* of an *employer* or other *superior* has been sufficiently dealt with in the present chapter. There does not seem to be any valid objection to the decisions given by the vast majority of courts in this field, more particularly as the development of this kind of vicarious liability tends to be fairly uniform throughout the industrial countries where actions of this kind are likely to accrue.

Questions of *status relationship* will hardly be raised very often. Cases involving the vicarious liability of spouses, parents, and guardians, occupy an intermediary position between the *superior's* liability and the question of capacity to commit a tort. Neither courts nor writers seem to have entertained any doubt as to the empire of the *locus delicti* over the question of capacity.[1] The tortfeasor is cut off, as it were, from his normal status and temporarily given the capacity he would have at the place of his act. By parallel reasoning, it may be argued that this disregard of the domiciliary or national status of the tortfeasor should apply also to those who by their status — ascertained, of course, under

[1] Swiss law seems to present an exception to this rule. According to Schnitzer, vol. 2, p. 677, capacity to commit a tort is governed by the actor's *lex patriae*.

its own proper law — are held responsible for the acts of the tortfeasor in the *lex loci*. Such logical considerations are strengthened by the same practical arguments that apply to cases of vicarious liability and which, upon the whole, speak in favour of the *lex loci delicti*.

The *survival of liability* is more complex and more important. Professor Hancock finds an argument for the *lex loci delicti* in considerations of fairness to the victim: the perpetrator of a tort in a jurisdiction where the victim's claim for recovery survives the death of the actor can change his domicile at will and thus end his days under the empire of a law which does not grant recovery after the death of the tortfeasor.[1] It would of course be possible to apply the law of the tortfeasor's domicile at the time of the act, but such a solution could create considerable complications in cases where the administration of the estate is carried out under another law. Does fairness to the victim require that the survival of the claim be governed by the *lex loci*? Although the justified expectations of the parties are undoubtedly often the best guides to equitable results, it is submitted that in this case, the expectations of the victim are not engaged at all. A man using a public highway may walk or drive more confidently because he knows that such injuries as he may sustain from the recklessness of others will be economically redressed, but the knowledge that his claim would also be enforceable against the estate of the tortfeasor will hardly add to his confidence materially. Other considerations may give a better guidance to the proper solution of the problem. Whereas it seems unlikely that the victim's insurance protection, whether it is afforded by a policy issued to himself or by the tortfeasor's liability insurance, is affected by the death of the actor after the tort, the economic structure of the deceased tortfeasor's estate is closely connected with his last domicile, and any claim unknown to the legal system obtaining there may affect the economic position of his successors in a manner which can be out of proportion to the advantage gained by the plaintiff. It may be, therefore, that the survival of the claim should be governed by the defendant's *lex domicilii* (or *patriae*) rather than by the *lex loci*.

Assignment of a tort claim seems to be best governed by the *lex*

[1] Hancock, p. 245 f.

loci. Although the expectations of the parties as to this matter are certainly as non-existent as regarding the question of survival, there is some small likelihood that an ingenious plaintiff proceeds from a *locus delicti* where no assignment is possible to a more clement legal climate and there assigns his claim, thus unduly burdening the defendant. In the absence of any weightier reasons in either direction, this is enough to recommend the application of the *lex loci*. On the *subrogation* of insurers, the principle laid down by the French courts seems well worth following.[1] Disloyal practices by the plaintiff are impossible when the subrogation is governed by statute, and the *lex loci* can hardly have any interest in determining by whom the action is brought.

Disloyal practices seem equally unlikely in the matter of survival of the plaintiff's claim. The possibility that the victim moves to a domicile where survival is allowed, there to die, is rather academic, and the expectations of the tortfeasor as to the death of the victim seem worthy of little respect. The only disadvantage to the actor is a somewhat longer validity of an already existing liability whereas the economic position of the victim's successors is normally based upon the rules prevailing in the *lex domicilii*. It would seem, therefore, that the law of the plaintiff's domicile is entitled to govern this question in preference to the *lex loci*.

The result of the present study seems to be that the criticism directed against decisions of the kind discussed in this chapter does not hit the *lex loci* rule as such but rather its indiscriminate application to incidental questions. In the interest of a more flexible approach, it may be preferable not to formulate strict rules of characterization in this particular field, particularly as there are few international cases upon which to base such rules. A great number of the cases discussed in the present chapter come from American courts, and the fact that the United States are an economic and social unity in spite of all the differences in legal details which exist between the jurisdictions of the Union, must be remembered as a warning against sweeping conclusions drawn from the experience of American courts.

However, as a very general proposition, it seems permitted to conclude that the *lex loci delicti* has been applied in the vast

[1] See Cour d'appel de Riom 29. 1. 1932, *S.* 1934. 2. 49.

majority of cases to define the legal position of third parties connected by contract with either the actor of a tort or its victim, whether the implications of such contract are entirely left for the parties to determine or to some extent determined by law. When the third party is involved in the action by a relationship created or completely determined by law, there has been a stronger tendency to consider the legal system normally governing that relationship, at least as a subsidiary body of rules.[1]

[1] It is submitted that the foregoing discussion can shred some light upon a few highly particular cases where a secondary characterization may be helpful in reaching proper results. 1) *Actions between spouses* (cf. the discussion of *Gray* v. *Gray* (1934), 174 A. 508, *supra*, p. 182). In *Mertz* v. *Mertz* (1936), 3 N. E. 2d 597 (S. Ct. of N. Y., Appellate Div'n.) and *Jaeger* v. *Jaeger* (1952), 53 N. W. 2d 740 (S. Ct. of Wis.), the *lex domicilii* of a married couple was held to govern the right of one spouse to sue the other. — 2) *Matrimonial causes* (Kuratowski, R. K., Torts in Private International Law, (1947), 1 *I. L. Q.*, p. 172, at p. 189). In Tribunal civil de la Seine 6. 2. 1897, *Clunet* 1897, p. 771, the national law of a married couple was applied also to wrongful acts connected with the dissolution of the community of property; Niboyet, tome V, 1948, pp. 153 ff. For German law, see von Schelling, Unerlaubte Handlungen, *RabelsZ.* 3, 1929, p. 854 (at p. 863 f.). Possibly the law of the status of the parties may be used to complete the provisions of the *lex loci* in cases of breach of promise and seduction — where adultery or criminal conversation has taken place in the country of the *forum*, the public policy of that State may require that its law be applied. *Gordon* v. *Parker* (1949), 83 F. Supp. 40; *Clunet* 1950, p. 312; Harper, F., Tort Cases in the Conflict of Laws, (1955), 33 *Can. Bar R.* p. 1155 (at p. 1176). Cf. *Jacobs* v. *Jacobs and Ceen* [1950] P. 146. — 3) *Conversion or detinue in* cases where the question turns upon the underlying right created under foreign law. *Cammell* v. *Sewell* (1860), 5 H. & N. 728; *Kahler* v. *Midland Bank Ltd.* [1950] A. C. 24; Dicey, p. 950; Raape, p. 364; *Salimoff* v. *Standard Oil Co. of N. Y.* (1933), 186 N. E. 679 (S. Ct. of N. Y., Appellate Div'n); (1933), 47 *H. L. R.*, p. 127; Beale, p. 1289.

CHAPTER 7

GENERAL CONCLUSIONS

The present study is a plea for the traditional *lex loci* rule modified by the use of secondary characterization to limit its scope and completed with a rule on the place of wrong developed from the well-established doctrine of the German *Reichsgericht*.

The practical results are in many cases similar to those advocated by Mr. Binder in his brilliant and exhaustive study on torts in the conflict of laws.[1] It may be pertinently asked whether it would not be more consistent with clarity and, indeed, with intellectual honesty, to break up the time-honoured rule prescribing the application of *lex loci delicti* into a number of specialized rules each governing a special group of torts.

It is submitted that the very conservatism of the system suggested in the present study is a practical advantage. If equitable and practical results can be obtained by a slight modification of existing rules, there is some likelihood that such modifications will be adopted without too much reluctance; the radical changes suggested by Mr. Binder would meet considerable resistance and are unlikely to be realized within a foreseeable future. Moreover, as we have tried to demonstrate when dealing with the location of international torts, it is a condition for the competence of courts under the *forum delicti* principle that the incriminated act is wholly of partly localized to the jurisdiction of the *forum*. Thus, in a great number of cases, the process of location, which is largely made unnecessary in Mr. Binder's suggestions, must nevertheless be undertaken by the court before assuming jurisdiction.

It is further submitted that the approach suggested in this paper secures greater flexibility. In the discussion above, a distinction has been made between rules, dictated by policies, and legal techniques. It is in the interest of justice that rules should be as clear as possible, it is in the nature of the technical devices provided by the

[1] Binder, H., Zur Auflockerung des Deliktsstatuts, *RabelsZ.* 20, 1955, p. 401.

arsenal of legal concepts at the disposal of courts that their use should be attended with a certain element of discretion enabling the courts to make them fit the particular details of each case. The adoption of a choice-of-law rule to the effect that torts are governed by the *lex loci delicti commissi* leaves the court free to decide whether the survival of the plaintiff's claim against a deceased tortfeasor's estate shall be characterized, in consideration of all the circumstances of the case, as a matter of succession or, possibly, as incidental to the administration of the estate. Even if precedents have established a customary rule for the solution of a question of this order, there will always be a margin within which an equitable solution can be sought. By laying down a series of many-detailed rules, the suggestion of Mr. Binder hampers the development of case law by a rigidity far more severe than that of which the all-embracing *lex loci* rule has been accused.

On the other hand, flexibility is an advantage only as long as it does not encroach upon predictability. It is submitted that modified according to the present suggestion, the *lex loci* rule goes a great length towards disarming the criticism of Dr. Morris without incurring the disadvantages of his "proper law of the tort" system as discussed above.

It has been said that the principal advantage of the traditional tort rule in the conflict of laws is "its simplicity, the facility of its application".[1] It is submitted that when applied with discernment and without undue extension over fields of the law wholly unconnected with the interest of a country to regulate the consequences of wrongs within its jurisdiction, the *lex loci delicti* rule has far more to recommend it than these rather negative virtues; that it is, in fact, in the vast majority of cases, not *the* "proper law of a tort" — for no such law can be found — but the law *most* proper to govern the action.

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[1] Stumberg, p. 201.

ACTA

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