# Tort Cases in the Conflict of Laws*

FOWLER HARPER
*New Haven, Conn.*

## I

Rules of the Conflict of Laws have developed to meet the special problems presented when the significant or operative facts in a legal situation occur in different states or countries or when, although all the operative facts occur in one state or country, suit is brought in another. In the latter situation, the court has a choice among three courses of action. It can apply its own law ignoring the fact that the entire episode took place outside the state. On the other hand, it can take cognizance of such a fact by declining to adjudicate the case at all. Finally, the court can decide the case but take account of the foreign facts by seeking to apply the foreign law rather than its own law. In such a situation it is often said that the plaintiff sues on a "foreign" cause of action.

To an extent, courts follow all three courses or combinations of them. In all cases, the courts apply portions of their own law. A court never applies foreign law in its totality. This results in the dichotomy of what is called "substance" and "procedure". It is said that even when a court decides that it is appropriate to apply foreign law to determine the substantive rights of the litigants, it always applies its own rules of procedure. The determination of what rules of law are substantive and what are procedural often involves a problem of some nicety.

Again, a court will sometimes dismiss the case, leaving the parties to adjudicate their controversy in a more convenient forum. The fact that the parties are non-residents, that the cause of action "arose" under the law of another state whose substantive law is therefore "properly" applicable, and that thus difficult questions of conflict of laws and foreign law are involved frequently induces a court to apply the doctrine of *forum non conveniens* and decline to exercise jurisdiction in the case. So, too,

*A paper presented to the annual meeting of the Canadian Branch of the International Law Association at Montreal on October 13th, 1955, by Professor Fowler Harper of the Yale Law School.

if the action is characterized by the court as "local", as distinguished from "transitory", it will decline to exercise jurisdiction. All tort actions are transitory except the action for trespass to land, which by the common-law rule must be brought at the situs. But even this rule has been changed in some places by statute.

In cases where the operative facts occur in two or more states of which the forum may or may not be one, the court, if it exercises jurisdiction, must make a "choice" of the substantive law it will apply, always of course applying local procedure. The task now is to find the most appropriate law. If the only connection of the case with the state in which the court sits is to provide a forum, the court will ordinarily not apply its own substantive law. The forum's substantive law is ruled out on grounds of uniformity. If the proper rule were to apply the substantive law of the forum as such, there would be no conflict of laws and the rights of the parties would vary as they crossed state lines. One of the primary functions of the conflict of laws is to avoid this precise difficulty. It is thought that it would be most unfortunate if legal rights and obligations depended on the choice of a forum, although it is clear that, in so far as courts apply their own rules of procedure, this problem is not solved.

The problem in searching for the proper law is to find the state which has the most significant contacts with the situation, that is, the state where the most important, or more of the important, incidents of the case can be located. Of course, if this turns out to be the forum, the court will apply its own law, but not because it is the forum but because it is the "proper" law. The most significant contact or contacts may often be determined by appraising the interests in the situation of the various states connected with the matter. A question might be raised as to the propriety of applying the criminal law of New York to the behaviour of a British national. Great Britain has a keen interest in her nationals wherever they may be. But if the Briton's conduct took place in New York, most persons and all nations of the western world agree that New York's interest is paramount and the fact that the acts took place there makes New York law the "proper" law for the New York court to apply. So, too, it has been determined in Anglo-American, as well as the civil law, that the domicile of a person has the greatest concern with his personal status, that is, problems concerning marriage, divorce, infancy and the like, and thus, as a matter of choice of law, the law of the domicile should be determinative.

Another factor in the selection of the "proper" law to govern a particular type of case is the matter of fairness to the parties themselves. All men know that there are laws which govern their conduct and their transactions. In a general way, people are familiar with the law and, on technical matters with which they are not familiar, they know that they can "get a lawyer". In many types of case, therefore, it would appear proper to apply the law with which they are most familiar. But neither laymen nor lawyers are familiar with the laws of every state and nation in the world and thus there are certain presumptions as to which law they have familiarity with.

It is to be expected that a New Yorker will not be as familiar with the Italian law as he is with the New York law. Nevertheless, he knows that when he is in Rome he is expected to do as the Romans do, so far as the law is concerned, and he is thoroughly aware of the fact that he cannot take with him the law of the road, as codified in New York, when he drives his automobile into Canada. Thus, it is not unfair to require him to conform to Canadian law and the interest of Canada in his driving here clearly transcends that of New York. If he deviates from the rules of the road, according to Canadian law, it will most likely be Canadian citizens whose lives he endangers rather than New Yorkers.

But all cases are not obvious ones. Conflict of laws problems vary as much as the activities of the people who activate them. In many situations there will be several states or nations whose laws compete as the most appropriate law to be applied. The court must make a choice. General principles are not difficult to state, but the application of the principles to the complex and varied interstate affairs of a mobile people like those in the United States and Canada create challenging problems in the conflict of laws. The courts have sought to create a systematic body of rules for the choice of the proper law which, if applied uniformly by all states and nations, would refer every case to the law of the same jurisdiction, thus eliminating the uncertainty as to what law will be applied to the dispute. Unfortunately, perhaps, this goal has been achieved only in part for several reasons, not the least of which is the conflict in conflict of laws rules adopted by the various states and nations. There is, in fact, as much variation and difference in policy and doctrine in this branch of the law as in any other. It has been thought by some scholars that the doctrine of the *renvoi*, as a rule of conflict of laws on a higher level, would solve this problem, but most courts have declined to apply

it or have done so cautiously. Conflict of laws rules in torts cases, however, display a greater uniformity than in most types of cases, although, as will appear, there are important differences of opinion here too.

In their origin, principles of conflict of laws were thought to rest on the so-called doctrine of comity. This obscure term was supposed to reflect the deference which one sovereign paid to another in certain circumstances where it appeared appropriate to look to the law of the other state or nation. As Goodrich[1] and others have pointed out, the term is highly misleading because it implies a discretion which courts might or might not exercise depending on the interpretation by the particular judge of the comity principle. Today it is generally recognized that the rules of conflict of laws are a part of the law and have the same, although no more, binding effect on the courts as any other rule of law. For the most part conflict of laws rules are judge-made law, although in connection with some areas, as, for example, workmen's compensation legislation, statutory rules have been adopted in many of the states of the United States.

A word should be said concerning the rôle of public policy in the conflict of laws. All choice of law rules are subject to the condition that the law referred to will not be applied if to do so would violate a strong public policy of the forum. Now, in one sense, all rules of law reflect public policy. If, therefore, foreign law would not be applied if it was violative of the public policy of the forum, it would never be applied. In these circumstances there would be no need for conflict of laws. No problem arises if the law of the forum and the foreign law are identical and, if they are different, the forum applies its own law and policy. Such, of course, is not the case. To refuse to follow the foreign law indicated by its choice of law rule, the forum must find that that law clashes with a strong local policy. As Judge Cardozo put it: "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals or some deep-rooted tradition of the common weal."[2]

Another limitation on choice of law rules is the principle that one state willl not enforce the penal laws of another state or nat-

---

[1] Goodrich, Conflict of Laws (2nd ed.) p. 7.
[2] *Loucks* v. *Standard Oil Co.* (1918), 224 N.Y. 99, 120 N.E. 198.

ion. But the phrase "penal law" as used in the conflict of laws does not refer exclusively to the criminal law. The determination as to what laws are penal has provoked considerable controversy. The widest interpretation would regard as penal any requirement for the payment of money beyond that necessary to compensate a plaintiff for loss or damage sustained. The narrowest application of the term would regard nothing as penal except a sanction imposed by the sovereign in a legal proceeding prosecuted by public authorities. The former test appears to be adopted in those states which decline to enforce a foreign rule of law for the payment of punitive or exemplary damages.[3] The latter test has been adopted by the United States Supreme Court in holding not penal a statute which made a director of a corporation personally liable for corporation debts if he knowingly made a false certificate stating that the capital stock of the corporation had been paid in.[4] Our Supreme Court decision is not binding on the state courts except where the claim has been reduced to judgment, although it is, of course, persuasive authority which has influenced decisions. The English law appears to be consistent with the Supreme Court's view as to what constitutes a penal obligation.[5]

## II

By English conflict of laws the question of tort liabilitiy is actually determined by English law provided the defendant's conduct was not lawful by the law of the place where he acted. Thus, if the defendant's behaviour was either tortious, or criminal but not tortious by the law of the place, he will be liable in an English court to the same extent as though he had acted in England.[6] I understand this to be the prevailing rule in Canada and probably it is the law of Quebec. But it is not the law in the United States where it is solely the place of wrong that determines civil liability regardless of the law of the forum,[7] subject of course to the public policy and penal law exceptions.

---

[3] *Adams* v. *Fitchburg R. Co.* (1894), 67 Vt. 76, 30 Atl. 687; *Raiser* v. *Chicago etc. R. Co.* (1905), 215 Ill. 47, 74 N.E. 69; *McLay* v. *Slade* (1927), 48 R.I. 357, 138 Atl. 212. *Contra: Pullman Palace Car Co.* v. *Laurence* (1897), 74 Miss. 782, 22 So. 53; *Brak's Adm'r.* v. *Cincinnati R. Co.* (1885), 83 Ky. 174.

[4] *Huntington* v. *Attrill* (1892), 146 U.S. 657, 36 L. Ed. 1123, 13 Sp. Ct. 224.

[5] *Huntington* v. *Attrill*, [1893] A.C. 150 (same issue between same parties).

[6] *Machado* v. *Fontes*, [1897] 2 Q.B. 231; *The Halley* (1868), 7 Moore P.C. (N.S.) 263.

[7] Goodrich on Conflict of Laws (2nd. ed.) p. 260; Stumburg on Con-

The usual rationale is the so-called "vested rights" theory of which Professor Beale, Justice Holmes and Justice Cardozo were the principal proponents. It can be set forth in no better words than theirs. "A foreign statute is not law in this state, but it gives rise to an obligation which, if transitory, 'follows the person and may be enforced wherever the person may be found. . . . No law can exist as such except the law of the land; but it is a principle of every civilized law that vested rights will be protected.' Beale, Conflict of Laws, § 51. The plaintiff owns something, and we help him to get it."[8] This is sometimes called the territorial theory of conflict of laws.[9] "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."[10]

This rule, that the place of wrong governs tort liability, is probably as satisfactory as any when applied to personal injuries and property damage, regardless of its theoretical basis, when everything in the tortious episode happens in one state or country. In complicated inter-state torts, however, it is necessary to determine the "place of wrong". Where is the place of wrong when the defendant acts in one state or country but the plaintiff is hurt in another? A man shoots or throws a stone across a state line or international boundary and hits another person on the other side? A wife, in love with another man, poisons a cake and sends it to her soldier husband in Korea? Blasting occurs in one state and causes damage to a building in another? A railroad employee negligently fails to inspect a coach in Boston and a wreck occurs in Canada?

---

flict of Laws (2nd ed.) p. 182; Restatement of Conflict of Laws, § 378. See Cook, Tort Liability and the Conflict of Laws (1935), 35 Col. L. Rev. 202; Lorenzen, Tort Liability and the Conflict of Laws (1931), 47 L.Q. Rev. 483; Hancock, Torts in the Conflict of Laws (1942).

[8] Cardozo J. in *Loucks* v. *Standard Oil Co.* (1918), 224 N.Y. 99, 120 N.E. 198.

[9] Actually, the original American architect of this theory was Story. See the criticism by Cook, The Logical and Legal Bases of Conflict of Laws (1942), Ch. 1.

[10] Holmes J. in *American Banana Co.* v. *United Fruit Co.* (1909), 213 U.S. 347, 53 L. Ed. 826, 29 Sp. Ct. 511. See also Holmes' opinion in *Slater* v. *Mexican Nat'l. R. Co.* (1904), 194 U.S. 120, 48 L. Ed. 900, 24 Sp. Ct. 581.

Presumably there are two (and only two) competing laws, but each would appear to have equally valid claims to govern the situation. Should the place where the defendant acts control, or the place where plaintiff sustains injury or loss? This question has been answered in United States cases both ways, but by the recent weight of authority it is the law of the place where the plaintiff sustains injury to his person or damage to his property which controls.[11]

Writers and judges have had some difficulty in explaining why the place of injury or loss should be preferred over the place of defendant's tortious conduct. It is said that it is because the place of injury is the place where "the last event necessary to make the actor liable for an alleged tort takes place".[12] As Judge Goodrich has put it, in a negligence case "the plaintiff does not sue the defendant for the latter's negligence but because the negligence has caused the plaintiff harm".[13] But this does not explain very much. It would be equally accurate to say that the plaintiff does not recover because the defendant caused the former harm but because the harm was caused by defendant's negligence. The point is that both tortious conduct and harm are necessary for recovery. The one is as legally significant as the other. Indeed, in the light of the underlying postulates of the "territorial theory", it would appear that the law of the place of the acts should determine their tortious character. But the rule is the other way. Again to quote from Judge Goodrich, "Whether a defendant is liable only for his negligent or intentional conduct, or whether he may be held liable without regard to fault on his part, is determined by the law of the *lex loci delicti*".[14]

The law of the place of wrong also governs the question of proximate cause[15] and any defences which are available, such as contributory negligence.[16] So, too, the law of the place of wrong

[11] *Otey* v. *Midland Valley R. Co.* (1921), 108 Kan. 755, 197 Pac. 203; *Hunter* v. *Derby Foods* (1940), 110 Fed. (2) 970 (2nd Cir.); *Dallas* v. *Whitney* (1936), 118 W. Va. 106, 188 S.E. 766; *Alabama G.S.R. Co.* v. *Carroll* (1892), 97 Ala. 126, 11 So. 803, 18 L.R.A. 433; *Cameron* v. *Vandergriff* (1890), 53 Ark. 381, 13 S.W. 1092; *Connecticut Valley Lumber Co.* v. *Maine C.R. Co.* (1918), 78 N.H. 553, 103 Atl. 263.

[12] Restatement of Conflict of Laws, § 377.

[13] Conflict of Laws (2nd ed.) p. 263. For a criticism of this rule see Rheinstein, The Place of Wrong (1944), 19 Tul. L. Rev. 4, 165; Ehrenzweig, The Place of Acting in Intentional Multistate Torts (1951), 36 Minn. L. Rev. 1.

[14] *Ante*, footnote 13, p. 265; Restatement of Conflict of Laws, § 379; *Dallas* v. *Whitney* (1936), 118 W. Va. 106, 188 S.E. 766; *Le Forest* v. *Tolman* (1875), 117 Mass. 109.

[15] Restatement of Conflict of Laws, § 383.

[16] *Ibid.*, §383.

determines whether plaintiff may recover under the last clear chance[17] doctrine, notwithstanding his contributory negligence, or under the doctrine of comparative negligence.[18] The standard of conduct necessary to liability is governed by the same law. Thus, if a guest statute of the place of wrong requires gross negligence or recklessness on the part of an automobile driver to enable the guest to recover, the latter must establish such conduct wherever he brings suit.[19] And if the violation of a statute in the state of the wrong is there held to be negligence *per se*, or if violated by the plaintiff bars recovery, the same effect will be given it in the forum.[20] By the better view, it is the law of the place of wrong which determines the measure of recoverable damages,[21] although some cases regard this issue as procedural and apply the law of the forum. If punitive damages are allowed by the law of the place of wrong, the forum may refuse to allow them if they are characterized by its law as penal.[22]

For the most part, the cases hold that questions of vicarious liability are governed by the law of the place of wrong.[23] Thus, whether a master is liable for the tort of his servant under the doctrine of *respondeat superior*, or whether he escapes liability by reason of the fellow servant rule[24] or because the servant at the time of the injury was acting outside the scope of his employment,[25] is governed by the law of the place of wrong. So, too, whether an employer of an independent contractor is liable for the torts of the latter and his servants is referred to the law of the place of wrong.[26]

[17] *Saba* v. *Illinois R. Co.* (1935), 337 Mo. 105, 85 S.W. (2) 429.

[18] See *Fitzpatrick* v. *International R. Co.* (1929), 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801.

[19] *Wood* v. *Shrewsbury* (1936), 117 W. Va. 569, 186 S.E. 294; *Mackey* v. *Robertson* (1938), 328 Pa. 504, 195 Atl. 870.

[20] Restatement of Conflict of Laws, §§ 380, 381, 388; *Beacham* v. *Proprietors of Portsmouth Bridge* (1896), 68 N.H. 382, 40 Atl. 1066.

[21] *Western Union Tel. Co.* v. *Brown* (1914), 234 U.S. 542, 58 L. Ed. 1457, 34 Sp. Ct. 955; *Slater* v. *Mexican Nat'l. R. Co.* (1904), 194 U.S. 120, 48 L.Ed. 900, 24 Sp. Ct. 581; *Louisville & N.R. Co.* v. *Whitlow's Adm'r.* (1897), 105 Ky. 1, 43 S.W. 711.

[22] *Consolidated Copper Mines* v. *Nevada Consolidated Copper Co.* (1926), 127 Misc. 71, 215 N.Y.S. 265; *McLay* v. *Slade* (1927), 48 R.I. 357, 138 Atl. 212; *El Paso etc. Co.* v. *La Londe* (1916), 108 Tex. 67, 184 S.W. 498.

[23] *Laughlin* v. *Michigan Motor Freight Lines* (1936), 276 Mich. 545, 268 N.W. 887; *Young* v. *Masci* (1933), 289 U.S. 253, 77 L.Ed. 1158, 53 Sp. Ct. 599, 88 A.L.R. 170; *Scheer* v. *Rockne Motors* (1934), 68 Fed. (2) 942 (2nd Cir.); *Black Diamond Lumber Co.* v. *Smith* (1934), 190 Ark. 91, 76 S.W. (2) 975; *Alabama G.S.R. Co.* v. *Carroll* (1892), 97 Ala. 126, 11 So. 803, 18 L.R.A. 433.

[24] *Alabama G.S.R. Co.* v. *Carroll*, *ante* footnote 23.

[25] Restatement of Conflict of Laws, § 387, Comment b.

[26] *Laughlin* v. *Michigan Motor Freight Lines*, *ante* footnote 23.

Some variations of this rule are occasionally to be found. A Connecticut court applied a Connecticut statute to impose liability upon the bailor for hire of an automobile negligently driven in Massachusetts where plaintiff was injured.[27] This result was based on the ground that the contract of bailment was made in Connecticut and the statute became a part of the contract. The "contract", the court held, was for the "direct, sole and exclusive benefit of the plaintiff". In a federal court, applying New York law, the law of the place of injury was not applied to hold a husband liable for his wife's tort, although under that law there would have been liability.[28] So, too, a New York court has declined, on grounds of public policy, to apply the law of the place of wrong to permit a New York wife to sue her husband for injuries received by his negligent driving.[29] But it has been held that, unless one spouse may sue the other in tort by the law of the place of wrong, no action may be maintained at the forum, although the domestic rule would allow it.[30] This however would not be the rule under *Phillips* v. *Eyre*,[31] still regarded, I assume, as the leading English case on the point.

It may seem like effrontery for a guest in Canada to undertake a discussion of the problem of characterization, but this is one of those "mysterious subjects" which the "eccentric professors" love and we will seldom be denied our moment. No one has subjected this problem to more penetrating analysis than has Dr. Falconbridge and no periodical has published more enlightening discussions of it than those which appear in the pages of the Canadian Bar Review.

As a first example, let us consider the relatively simple tort of conversion of chattels. The action for conversion, being a transitory action, may be prosecuted in the courts of any state in which jurisdiction is obtained over the defendant. Unlike actions for trespass to land, jurisdiction over the defendant is all that is necessary in such an action. The law which determines whether or not a trespass or conversion has been committed is thought to be the law of the state in which the goods were physically present at the time of the conversionary acts, except in the case of goods, title

[27] *Levy* v. *Daniel's U-Drive Auto Renting Co.* (1929), 108 Conn. 333, 143 Atl. 163, 61 A.L.R. 846; noted in (1929), 43 Harv. L. Rev. 433; (1929), 27 Mich. L. Rev. 462; (1929), 77 U. of Pa. L. Rev. 410.

[28] *Siegmann* v. *Meyer* (1939), 100 Fed. (2) 367 (2nd Cir.).

[29] (1936), 271 N.Y. 466, 3 N.E. (2) 597, 108 A.L.R. 1120. See also *Kyle* v. *Kyle* (1941), 210 Minn. 204, 297 N.W. 744.

[30] *Buckeye* v. *Buckeye* (1931), 203 Wis. 248, 234 N.W. 342; *Gray* v. *Gray* (1934), 87 N.H. 82, 174 Atl. 508, 94 A.L.R. 1404.

[31] (1870), L.R. 6 Q.B. 1.

to which is "merged" in a bill of lading, warehouse receipt, or similiar document. In such cases, the law applicable is the law of the state in which the document is present at the time of the defendant's wrongful acts. This place is called the "place of injury", and the law of the "place of injury" controls even though the acts of the defendant which result in conversion occur in some other place. While the law of the place where a bill of lading or warehouse receipt is located will govern the question of its conversion, rather than the law of the place where the goods themselves are located, it is the law of the latter place which determines whether the holder or owner of the bill or receipt is entitled to the goods, that is, whether title to the goods is "merged" in the document. In the case of share certificates, the law of the state of incorporation determines whether title to the share is similarly merged in the certificate so that the owner of the certificate is the owner of the shares themselves. If, by the law of the state of incorporation, title to the shares is thus "merged" in the certificate, the law of the place where the certificate is located will govern its conversion and, therefore, conversion of the shares.

Although the foregoing rules reflect orthodox principles of the conflict of laws, a subtle difficulty occasionally arises as a result of the problem of characterization. Conflict of laws rules are cast in terms of categories of law, on the one hand, and so-called connecting or contact points, on the other. In some rules, these connecting points are legal conceptions, such as "domicile" or "nationality", while in others they are factual, such as the situs or location of land or chattels. Before conflict of laws rules can be applied to any situation, it is thus necessary to qualify or delimit the legal idea, if such is the connecting point, and to classify the legal problem. Thus, before the rule that the intestate succession of chattels is governed by the law of the domicile can be applied to a situation, we have to know what is meant by "domicile" and whether the legal issue involves one of intestate succession. This type of problem can arise in connection with the present problem. An example will make the matter clear.

A farmer in Wisconsin borrows a sum of money and executes as security on the loan a chattel mortgage on two head of cattle. Subsequently, and while the loan is unpaid and the mortgage still in effect, the farmer drives the cattle across the state line into Minnesota, where he sells the cattle to a livestock dealer, who pays full value in ignorance of the Wisconsin mortgage. The cattle are resold and slaughtered. Under the law of Minnesota, it is a con-

version to buy a mortgaged chattel; under the law of Wisconsin it is not, although the mortgagee may foreclose if he can find them. The mortgagee sues the dealer for conversion.

It might be supposed that, since the chattels were physically present in Minnesota when the defendant bought and received delivery, Minnesota law would be applied and the defendant held liable for their value. A federal court in Minnesota held otherwise.[32] The reasoning was as follows:

> The right of the plaintiff [mortgagee] to maintain this action for conversion must depend necessarily upon the rights granted to him under the law of Wisconsin. The chattel mortgage given on property in Wisconsin is the foundation of those rights. In determining whether or not an action for conversion will lie, we must be guided by the terms and conditions of the chattel mortgage and the rights created thereby, and to determine such rights we must look to the common or statutory law of Wisconsin. There is no statutory law on the subject in Wisconsin, but the courts of Wisconsin have determined the rights which accrue to the mortgagee under such circumstances, and the rule established by state decisions must be followed. . . .
>
> The gist of an action in conversion is a wrongful assumption of dominion and control over property. The law of Wisconsin is that neither a sale by the mortgagor of property subject to a chattel mortgage, nor a subsequent sale by his vendee constitutes a conversion of the property described in the chattel mortgage.

The problem here is one of analysis and characterization. If the issue is regarded solely as a problem of tort law, that is, conversion, it would seem that Minnesota law should govern and undoubtedly most courts would so hold.

The court in the instant case, however, thought in terms of the law of property. What rights were acquired by the mortgagee as a result of the Wisconsin transaction entered into while the cattle were located there? What property rights were retained by the mortgagor? The court found that under the Wisconsin law the mortgagor retained the power to invest a bona fide purchaser with a good title. Conversely, it found that the mortgagee did not acquire such a property right as to enable him to recover the value of the chattels from a bona fide purchaser and his rights were not enhanced when the chattels were taken into another state.

The Quebec Civil Code in article 6 provides that Quebec law (article 1053) applies in a Quebec court to wrongs committed in this province. This is routine Anglo-American and civilian conflict of laws. But there is a qualification in article 6, which provides as follows:

[32] *United States* v. *Rogers & Rogers* (1941), 36 Fed. Supp. 79.

> An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

Without commenting on the effect of this interesting attempt to export the law of Lower Canada with its citizens while abroad, I should like to call attention to the obvious responsibility of a Quebec court in applying these articles. As in similar situations in the conflict of laws, the problem of "characterization" or "classification" or "qualification", as the Europeans call it, at once raises its ugly head. The court must, in a proper case, determine what are problems of "wrongs" or tort law and what are problems of the law of "status".

Take the case of *Lister* v. *McAnulty*,[33] which reached the Supreme Court of Canada a dozen years ago. The wife of a Massachusetts husband was hurt in an automobile accident while visiting in Quebec. The husband sued for the loss of her services and consortium in a Quebec court. In the Supreme Court, Mr. Justice Taschereau, speaking for the majority, took the position that these items were incidents of status and whether the husband could recover for them was a matter governed by the law of Massachusetts, which denied recovery. As to future medical expenses to be incurred by the wife, the learned judge applied Quebec law, which permitted recovery although the Massachusetts law was otherwise.

Mr. Justice Hudson took a different view. Not only would he have allowed the husband the future cost of medical care for the wife, but damages for loss of services and consortium as well. As to these last two items, he wrote: "With respect, I am of the opinion that the question here involved is not one of status within the meaning of this article [that is article 6]. The marriage has not been dissolved or annulled. The parties are still husband and wife." In referring to the Massachusetts cases relied on by the court, he remarked: "There is throughout all of these judgments a recognition of a right in the husband to the services of his wife in keeping the house and in giving companionship to her husband. What is denied is damages for a breach of this right, which are considered too remote. . . . [I]t seems to me that the remoteness of damages is not a question of status within the meaning of Article 6 of the Civil Code."

---

[33] [1944] S.C.R. 317, [1944] 3 D.L.R. 673.

But Taschereau J. was not persuaded. "We know the status of the plaintiff [husband]", he agreed, "and what are his rights and obligations toward his wife. Underlying his status as husband there is no right to the *consortium* of his wife, nor to *servitum*."

Now there you are! A question of the law of status or the law of torts? This problem must be solved before it is possible to apply the rule of conflict of laws because the choice of that rule depends upon the solution of the preliminary question.

## IV

As to maritime torts, the rules in Anglo-American countries have come to have considerable stability, although puzzling questions continue to arise from time to time to plague the courts and tax the ingenuity of counsel. For the most part an alleged tort committed on board a vessel while it is in the territorial waters of a sovereign state is governed by the law of that state. An exception seems to be well settled that if the alleged wrong affects only the internal discipline of the ship the law of the flag controls. So, too, the law of the flag governs torts committed on a ship while on the high seas. In case of a collision in territorial waters, of course, the *lex loci* is applied, although collisions on the high seas appear to be governed by the law of the flag if the vessels have a common registry; if they fly flags of different nations, the law of the forum seems preferred. And if the law of the forum limits liability, the limitation will be observed by its courts.

I suggest the foregoing rules as generalizations with no assurance as to their accuracy in any given case. There will be exceptions and complications. And of course legislation will affect their applicability. The Jones Act in my country, for example, has had varied treatment by our Supreme Court in its application to varying combinations of facts. The latest important decision[34] declined to apply it to a Danish seaman suing a ship of his own nation for a tort committed aboard while in Cuban waters, although the extra-territoriality of the act had been recognized many times. Mr. Justice Jackson employed a combination of reasoning to achieve the result, drawing both upon canons of statutory construction and principles of the conflict of laws. It is also my understanding that the application of the British Merchant Shipping Act to torts committed on British ships is not altogether clear, especially in relation to the conflict of laws rule of *Phillips* v. *Eyre*.

[34] *Lauritzen* v. *Larsen* (1953), 345 U.S. 571.

In the virgin field of air law, trails, for the most part, are yet to be blazed. The Warsaw and the Rome conventions have made a start in bringing some little uniformity, but conflict of laws questions arise and will continue to do so. With respect to injuries or death resulting from the crash of aircraft on land, there is little doubt about the law, although its application somehow raises pointedly the limitations of the territorial notion of law. An airplane takes off at midnight from New York, destination Los Angeles. It has fifty human beings aboard, most of them residents of New York. Motor trouble develops when the plane is three hours out. The crash landing in Missouri takes the lives of all passengers and crew. A suit is instituted in a federal district court in New York by the personal representative of one of the deceased. All claims will be settled on the basis of the result of this action.

The court, following the mandate of the United States Supreme Court in *Erie* v. *Tompkins*,[35] seeks to decide the case as would the New York courts. It will almost surely find that a New York court will apply the wrongful death statute of Missouri. The Missouri statute, however, contains a $15,000 limit on damages to be awarded in death cases. This is certain to be regarded as most unfortunate in New York, where jury verdicts regularly run several times that amount. Will the defendant get the advantage of the fortuitous fact that its pilot was able to keep his aircraft in the air until it got over Missouri?

More than a half century ago the New York Court of Appeals held that New York law applied to a railroad accident which occurred in Pennsylvania because the origin and destination of the plaintiff had been in New York and all but a few miles of the Erie Railway trackage between the two points were in New York. The court declined to apply the $3,000 dollar limit on damages of the Pennsylvania law merely because the accident occurred in that state.[36] If we can emancipate ourselves from the inarticulate premises of the territorial conception of law, it does not seem improper to apply New York law since New York rather than Pennsylvania would appear to be what Professor Rheinstein calls the "center of gravity" of the whole episode. But the court rationalized its decision on a contract theory and the case has been largely discredited in the state of its origin.

When we come to the matter of torts committed on board aircraft, we have practically no direct authority. It will be almost

---

[35] (1938), 304 U.S. 84.
[36] *Dyke* v. *Erie R. Co.* (1871), 45 N.Y. 113.

impossible, however, to escape the force of the territorial analysis when the plane is flying through the air space over a sovereign state. We may confidently expect an Anglo-American forum to apply the law of that state. If the tort is committed in the air over the high seas or over territory controlled by no sovereign, about the best analogy would appear to be that of maritime torts, and presumably the law of the nationality of the aircraft would govern just as the law of the flag governs torts committed on the high seas.

## V

Special problems of great complexity have been created in the fields of libel, disparagement of goods, unfair competition and invasion of the right of privacy by the development of mass media of communication. The spoken and written word is no longer confined to local areas. Magazines published in New York or Chicago are distributed all over the world. A radio hook-up may be heard by millions in every state in the Union and in Canada. There are probably few television stations in the United States which do not telecast beyond the state line.

Under the early common-law rule, every publication and republication constituted a separate cause of action. If a defendant wrote a defamatory letter to a single person, it was the publication of a libel. If he sent copies to a dozen, a hundred or a thousand others, there were as many causes of action. Theoretically, if a newspaper has a circulation of two hundred thousand, there will be the same number of causes of action where the paper is defamatory. To be sure, the plaintiff does not file two hundred thousand law suits for obvious reasons. He can recover his full damages in one—the extent of distribution affecting the amount of recovery.

The logic of this situation leads to the result that a defamatory article in a national magazine of the United States is governed by the law of every state in the Union if the place of publication is the proper law, as was early held. In *Sides* v. *F. R. Pub. Corporation*,[37] the plaintiff's complaint stated three causes of action: first, a violation of his right of privacy as recognized in California, Georgia, Kansas, Kentucky and Missouri; the second, infringement of the statutory right of privacy in New York; thirdly, malicious libel under the laws of Delaware, Florida, Illinois, Maine, Massachusetts, Nebraska, New Hampshire, Pennsylvania

[37] (1940), 113 Fed. (2) 806 (2nd Cir.).

and Rhode Island. In the course of his opinion in the second circuit, Judge Clark, remarking on the absence of authority in several states, said: "Under the mandate of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 Sp. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, we face the unenviable duty of determining the law of five states on a broad and vital public issue which the courts of those states have not even discussed".[38]

To escape the difficulties of litigating in one suit, many causes arising under the varying laws of many states, including the problem of the jury in attempting to follow instructions based on such laws, the plaintiff must encounter other difficulties. If the plaintiff elects to sue separately in each jurisdiction, the matter of expense and inconvenience may be prohibitive to him or result in unreasonable harassment of the defendant. Although it would appear that the question of res judicata should not trouble him,[39] a carelessly drawn or ambiguous complaint may cause him trouble.[40] If a suit has been dismissed in one state on the ground that it was barred by the statute of limitation of that state, it is res judicata so far as actions are concerned in other states, but, if it is not clear what the basis of the previous decision was, the court at the second forum may be at a loss as to what effect to accord it.[41]

Now so far as concerns the complexities of multiple intrastate publication are concerned, the single publication rule has in some of our states replaced the earlier common-law rule so that the whole process of printing, transporting and dissemination is regarded as one operation. This solves some of the problems, particularly that of the application of the statute of limitation and that of a multiplicity of suits for each publication in the same jurisdiction. The plaintiff may sue any one defendant but once and that one suit must be brought within the statutory time after the first publication.[42]

---

[38] 113 Fed. (2) 806. In *O'Reilly* v. *Curtis Publication Co.* (1940), 31 Fed. Supp. 364, as a further example, the court held that a defamatory article in a national magazine published in thirty-nine states created thirty-nine causes of action.

[39] The causes of action being distinct, the judgment for defendant or satisfaction of a judgment for plaintiff in one action is not conclusive in the others: *Kelly* v. *Loew's Inc.* (1948), 76 Fed. Supp. 473.

[40] For example, where it is not clear whether plaintiff was claiming damages in the first action resulting from publication in other states.

[41] See *Hartman* v. *Time Inc.* (1948), 166 Fed. (2) 127 (3rd Cir.).

[42] Prosser, Selected Topics in the Law of Torts (1954) p. 76, and cases cited. As pointed out by Dean Prosser, the rule seems never to have been applied to radio broadcasts or to television performances or to motion pictures, *ibid.*, p. 77.

But, as involved in conflict of laws situations, the single publication rule has only added one complicated problem to the others. Thus in *Hartman* v. *Time Inc.*[43] the offending publication was first sued in Illinois. This action was barred by the Illinois statute of limitations. Under a Pennsylvania "borrowing statute", this barred it at the Pennsylvania forum. Inasmuch as Illinois followed the single publication rule, the Pennsylvania court could consider no subsequent publication in Illinois. Pennsylvania had the same rule and thus no subsequent domestic publication could be considered. The court held that a determination must be made as to what rule prevailed in every state in which the defamatory publication appeared. In those states which still adhered to the multiple publication rule, a subsequent dissemination might come within the statutory period.

The fountain of much of this trouble appears to be the rule that the law of the place of wrong governs the substantive law of libel and that the law of the place of wrong is the place where the defamatory matter is heard or read. The Restatement of Torts[44] formulates the rule: "where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated". This is somewhat ambiguous, but the illustration given and the authority on which the rule presumably was based[45] makes it clear that it was intended to indicate the place where the persons who received the communication were at the time. This rule is easy enough to apply in a simple case, for example, where defendant sends a libellous letter from one state to another.

This rule as to place of wrong is supposed to be an application of the general principle of applying the law of the place where the plaintiff sustains injury or loss. It is no doubt true that the injury to the plaintiff's reputation ordinarily occurs where the recipient is when he receives the communication, but conceivably this may be only theoretically the case as, for example, where a Chicago employer reads in New York a defamatory statement (either in a newspaper or a private letter) about his Chicago employee, returns home and promptly discharges him. The real sting of the libel may not be felt in the place where the recipient reads it. A Montreal customer may see a defamatory or disparaging article in a trade magazine about a Chicago manufacturer

[43] (1948), 166 Fed. (2) 127 (3rd Cir).
[44] § 377, Note.
[45] *Haskell* v. *Bailey* (1894), 63 Fed. 873 (4th Cir.); *Evan & Sons* v. *Stein & Co.* (1904), 42 Scot. L. Rep. 103.

and cancel all future orders. The loss is as readily located in Chicago as in Montreal.

The Restatement rule has not been universally accepted, particularly in cases in which the libellous matter was circulated in a number of states. There is a strong argument for applying the law of the place where the defendant lives, that is, the law of his domicile, and some courts have so held. The theory is that the plaintiff is best known at his residence and thus his reputation suffers there most. This rule makes sense in cases in which the plaintiff is unknown outside the community where he lives. In a New York case[46] the plaintiff, a Virginia woman, was libelled by a publication circulated in New York and Virginia. The court applied only the Virginia law. "On the record", said Judge Hand, "the plaintiff was not a person of prominence, and it does not appear that she was known outside of Virginia; in any event there is no suggestion that she was known in New York. Since it does not appear that she suffered any damages in that or in any other state, it was not an error for the judge to rule upon the evidence upon the assumption that the only damages were suffered in Virginia."

But this rule has its limitations. Where, for example, the plaintiff has a national or international reputation as a public personage, the domiciliary law may not be adequate. If the law of the domicile denies recovery, but the law of other places where the libel was published permits recovery, the plaintiff may have suffered grievous injury with no recourse. The effects of a nationally circulated libel on the earning power of a nationally known movie star may be devastating but all relief denied because the law of his domicile does not allow recovery although the law of many or all the other states do. Again, a person's reputation may precede him in the place where he is defamed and, although he had no reputation before the publication because he was not known there, he finds that he has one afterward. He is now adversely known by repute.

A variant of the domicile rule, it seems, has some claim to consideration in cases of unfair competition when, if the plaintiff is a corporation, the principal place of business may be applied.[47] It can be argued that, when a corporation loses business, the loss is felt at its place of business, although probably business

---

[46] *Mattox* v. *News Syndicate Co.* (1949), 176 Fed. (2) 877 (2nd Cir.).

[47] *Skinner Mfg. Co.* v. *General Foods Sales Co.* (1943), § 2 Fed. Supp. 432.

men and corporate managers think in terms of loss of business where the customers live or do business.

In a privacy case, a United States federal court held that the law of the state of first publication should govern the entire case, regardless of the number of states in which the objectionable article appeared.[48] The place of wrong, he thought, was where "the seal of privacy" was first broken. This rule makes the plaintiff's rights depend upon a fortuitous event, if not, indeed, upon the defendant's deliberate choice of a state where the law is favourable to him. Moreover, in the case of radio and television broadcasts, the rule frequently will not work at all because the victim's privacy is invaded simultaneously everywhere.[49]

Some arguments have been made for the application of the law of the place where the defendant initiates the dissemination of the defamatory matter, such as the place of broadcast in radio defamation.[50] Some unfair competition cases suggest an analogous rule.[51] Here again, however, there will be difficulty in many cases in determining the place where the liability-creating conduct took place.[52]

In the case of fraud, the place of wrong is also not always easy to identify, although the Restatement of Torts declares that "when a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made".[53] But where does the plaintiff sustain loss? Is it where he acted in reliance upon the fraudulent misrepresentations, is it his domicile or place of business or some other place? Suppose the plaintiff in Montreal where he lives, as the result of fraudulent mis-statements made to him by a defendant in Boston, orders his New York broker to buy specified shares of stock, which turn out to be worthless. Where did the plaintiff "sustain loss"? The cases are not very helpful. Nor is it at all clear that the place-of-loss rule prevails over the place-of-acting rule.[54] The latter contact point at least has the advantage of being easier to identify in a complicated business transaction.

There is little that can be said confidently with respect to the

[48] *Banks* v. *King's Syndicate* (1939), 30 Fed. Supp. 352.
[49] Prosser, Selected Topics in the Law of Torts (1954) p. 92.
[50] Ehrenzweig, The Place of Wrong in Intentional Multistate Torts (1951), 36 Minn. L. Rev. 1.
[51] See *American Banana Co.* v. *United Fruit Co.* (1909), 213 U.S. 347.
[52] See (1949), 62 Harv. L. Rev. 1041 at p. 1048. See *Hartman* v. *Time, Inc.* (1946), 64 Fed. Supp. 671, as to the intricate interstate operations involved in publishing Time and Life.
[53] § 377, Note.
[54] Ehrenzweig, *ante* footnote 50, at pp. 37-43.

choice of law in the field of unfair competition and the cases again present a confused situation.[55] Some cases purport to apply the "place of wrong" rule,[56] but a problem similar to that in the fraud and defamation cases arises in identifying the place of wrong. If, as the Restatement holds, the place of wrong is the place where the plaintiff sustains loss,[57] there is still an ambiguity. Although there are various ways in which the tort of unfair competition may be committed, three common types are easily identified: diversion of business from the plaintiff to defendant by fraud or other unfair means; disparagement of plaintiff's product; and "passing off" defendant's goods as those of the plaintiff. Arguments with some plausibility can be made that the loss was sustained at the plaintiff's place of business or at the place where the deceived customer lived or had his place of business. Where plaintiff has lost business in several states, a multi-state tort has been committed with all the problems presented by the multi-state defamation cases.[58]

There is authority which points to the place where the defendant's misconduct occurs as the proper law to govern the plaintiff's right to recovery,[59] although some of the cases could be intepreted otherwise because of their ambiguity. In cases of trademark infringement, it appears that the law of the place to which the goods are sent, rather than the law of the origin of the trademark, controls,[60] which sometimes but not always will be the law of the forum.

[55] See Note, The Choice of Law in Multistate Unfair Competition: A Legal Industrial Enigma (1947), 60 Harv. L. Rev. 1315. See also Judge Goodrich in *Campbell Soup Co.* v. *Armour & Co.* (1949), 175 Fed. (2) 795 (3rd. Cir.). See cases collected in (1944), 148 A.L.R. 139.

[56] *Margarete Steiff* v. *Bing* (1914), 215 Fed. 204; *Vacuum Oil Co.* v. *Eagle Oil Co.* (1903), 122 Fed. 105; *Adam Hat Stores* v. *Lefco* (1943), 134 Fed. (2) 101 (3rd Cir.); *Zephyr American Corp.* v. *Bates Mfg. Co.* (1942), 128 Fed. (2) 380 (3rd Cir.).

[57] § 377, Note.

[58] See *Adam Hat Stores* v. *Lefco* (1943), 134 Fed. (2) 101 (3rd Cir.); *R.C.A. Mfg. Co.* v. *Whitman* (1940), 114 Fed. (2) 86 (2nd Cir.), cert. denied (1940), 311 U.S. 712, 85 L. Ed. 463, 61 Sp. Ct. 393. In the *R.C.A.* case, the court was confronted with a problem in which it was impossible to do justice to both parties. Plaintiff complained that defendant was broadcasting records of plaintiff's musical performances contrary to the law of unfair competition and literary and artistic property rights. The broadcasts were heard in many states and in Canada but defendant's conduct was unlawful only under Pennsylvania law. Plaintiff sought an injunction. But it was impossible to prevent the broadcasts from reaching sets in Pennsylvania and still be heard in other places. The injunction was denied.

[59] *Socony-Vacuum Oil Co.* v. *Rosen* (1940), 108 Fed. (2) 632 (6th Cir.); *Triangle Publications* v. *New England Newspaper Publ. Co.* (1942), 46 Fed. Supp. 198; *American Radio Stores* v. *American Radio & Television Stores* (1930), 17 Del. Ch. 127, 150 Atl. 180.

[60] *Ingenohl* v. *Walter E. Olson & Co.* (1927), 273 U.S. 541, 71 L.Ed. 762, 47 Sp. Ct. 451; and see note, 148 A.L.R. 144.

When it comes to disparagement of goods, there is very little authority one way or the other, but what little there is suggests that the law of the place of wrong is the proper law.[61] But where is the place of wrong? If the disparagement and loss of business resulting therefrom take place in the same state, the rule is easy to apply. But, if the plaintiff's product is disparaged in a national magazine or a newspaper circulating in several states or countries, the problem is more difficult. Has the plaintiff sustained loss at his place of business or in each state where he loses business? Simplicity and convenience of administration would call for the application of the law of the plaintiff's principal place of business. The dearth of authority is probably explained by the salutary fact that the law of disparagement of goods, "trade libel" as it is called, is approximately uniform in all the states of the United States and other common-law jurisdictions. The same problems are potential in cases involving slander of title to personal property, but the place of wrong in the case of slander of title to land is pretty clearly the situs of the land.

There is likewise a minimum of authority as to choice of law in cases involving torts to the marital relation. Assuming the application of the place of wrong rule, it would appear that the state in which the defendant engaged in sexual relations with a married woman would be the place of wrong in an action by her husband for criminal conversation. It is in that state that the husband's sexual monopoly has been broken. It would be hard to make much of an argument for any other place.

The case of alienation of affections, however, is not so clear. I have already considered the Canadian case of *Lister* v. *McAnulty*. Suppose a married couple to be domiciled in Pennsylvania when the husband is called into military service. The wife thereafter goes to Massachusetts to visit relatives, to find employment, for a vacation, or for any other purpose. While there, as a result of the importunities of another man, she falls in love and divorces her husband. Where is the "place of wrong"? A good case could be made out for the application of Pennsylvania law both on logic and policy. If we are to attempt a location of the husband's loss of affection, the matrimonial domicile would appear to be as good a choice as any and it can be argued that the matrimonial domicile has a greater interest in its families than any other state. If Pennsylvania has abandoned its policy of allowing a recovery

[61] *Black & Yates* v. *Mahogany Ass'n.* (1941), 129 Fed. (2) 227 (3rd Cir.).

for alienation, which it has, what justification can there be for permitting recovery under the law of any other state?

This reasoning, however cogent, was rejected by a federal court sitting in Massachusetts seeking to find the non-existent Massachusetts conflict of laws rule. The Massachusetts law was applicable, it thought, as the place where the defendant had successfully acted to divert the woman's affections from her husband to himself. Judge Wyzanski thought he was adhering to the territorial theory of conflict of laws, although the point is arguable. The fact that Massachusetts was both the state of the defendant's reprehensible conduct and the forum appeared to influence his belief that a Massachusetts court would apply Massachusetts law.[62]

From all this what is one to conclude as to the contribution of the conflict of laws to the administration of justice in torts cases? Of confusion there is considerable. Of certainty and uniformity of decision, and thus predictability of result, there are very little. But there is one advantage—and this is a big "one". A court in a conflict of laws case has latitude—latitude of choice in selecting the law which, in the particular case, will give a result most consistent with the court's conception of justice. Within limits, the Anglo-American idea of government is one of laws rather than of men. In many respects, if we are to be realistic, these limits are narrower than the elementary text books suggest. It is impossible to ignore the length of the judge's foot. But the judge's sense of justice—and his sense of injustice—is more reliable than the length of his foot. In the conflict of laws, the judge has the opportunity, even within the limits of a government of laws, to give a wider scope to his sense of justice.

---

## Rôle du pouvoir judiciaire

La loi demeure dans l'ordre juridique formel de sa naissance à sa mort, et sa mort ne peut être décidée que par le législateur qui l'a créée. Mais pendant sa vie elle échappe à la domination de son créateur. La règle qu'elle édicte ne saurait être violée par ceux qui sont chargés de l'appliquer, car ce serait créer le désordre; il n'y a pas de jurisprudence contraire à une règle légale précise et déterminée. Mais la règle ne pénètre dans le milieu juridique que par le pouvoir judiciaire chargé de l'appliquer et le pouvoir d'application consiste à la faire vivre utilement. (Georges Ripert, Les forces créatrices du droit (1955) p. 393)

---

[62] *Gordon* v. *Parker* (1949), 83 Fed. Supp. 40.