CHAPTER 25

The Scope of the Principle

1. The Law of Wrong Governs Capacity to Commit a Tort

This universal rule operates in Continental and English Courts as a considerable breach in the personal law, while it conforms to the territorial doctrine maintained in the United States subjecting transactions of various kinds to the law of the place where the "act is done."

Illustration. An American youth of 15 years, by driving a car in Brazil, injures a person. In all courts, his responsibility is to be determined according to the Brazilian Civil Code, article 156, which is understood as rejecting liability of persons under sixteen years. A Brazilian boy of the same age, acting in Venezuela, is capable according to his faculty of discernment (Venezuelan Civil Code, article 1186).

Equitable compensation for damage done by an irresponsible individual, now frequently provided after the pattern of article 829 of the German Civil Code, is naturally included in the law of wrong.

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1 Restatement §§ 379-381 (by implication).
Germany: RAAPE 197.
Italy: App. Firenze (Dec. 5, 1945) MONITORe 1946, 48 (invoking the local penal and police law).
Norway: CHRISTIANSEN, 6 Répert. 579 No. 154.
Poland: Int. Priv. Law, art. 11 No. 2.
Switzerland: BECK 137 n. 20. CONTRA: for the present law, 2 SCHNITZER 677 with formalistic arguments.
2 J. M. DE CARVALHO SANTOS, 3 Código Civil Brasileiro Interpretado (ed. 3, 1942) 298; CLOVIS BEVILAQUA, 1 Código Civil (ed. 6, 1940) 420.
3 The Belgian C. C. art. 1386 bis, as amended by Law of April 16, 1935, formulates the idea more correctly: the judge may hold a lunatic or abnormal person liable to pay what he would be obligated to, if he had control of his acts.
4 However, BARTIN, 2 Principes 398 § 333 would follow French public policy in the case of a French defendant.
2. Unlawfulness

Liability for tort, in contrast to other forms of liability created by law, presupposes that the conduct causing the harm be unlawful. This requirement has two phases regarding the type of interests invaded, and the circumstances of the invasion.

(a) Illicit conduct. The various legislations determine differently the spheres within which private persons are protected and those left to free action by the other members of the community. A fundamental cleavage exists between the two great systems, of which one establishes separately shaped torts and the other recognizes a general tort liability. The first is represented by the common law as well as by the Roman law and the German Civil Code, the second by the French Civil Code and its numerous followers.

The primary question to be asked under the law of wrong is, therefore, whether the facts complained of constitute forbidden conduct. In regard to omissions, which cannot be tortious without violation of a general duty, it seems to be recognized, conforming to principle, that the duty must be imposed by the law of the place of wrong. Thus, failure by a locomotive driver to signal at a railway crossing, and failure of an employer to guard dangerous machinery, are considered wrongful to the extent admitted by the law at the place. What the extracontractual duties of a bank are in paying a check, is determined by the local law.

(b) Authorized acts. An invasion of interests, not ordinarily allowed, may yet be lawful under particular circumstances constituting justification and excuse. The law of wrong determines these exceptions to liability such as self-defense, defense of other persons or of the interests of the state, consent or assumption of risk by the injured person,

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5 The question is, however, what place this is. See infra Chapter 26, p. 312.
6 See Restatement § 384; Hancock, Torts 107.
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legislative, judicial, or executive acts, or authorization by the state.\textsuperscript{7a}

The Restatement (§ 382) mentions some of these defenses for the particular purpose of assigning them to the law of the place of "acting" rather than to the law of the place where the harm is done. At this juncture, it is important only that they are not governed by the law of the forum. However, it should be noted that the existence and extent of disciplinary rights of husbands, parents, guardians, teachers, and so forth are governed by none of these laws but are subject to their proper conflicts rules. Whether, for example, a father may forcibly coerce his child or a husband may open the letters of his wife, depends on the family law applicable. As we have seen before, in American courts such incidents are usually determined by the temporary common residence of the parties, which may be, or may not be, identical with the place of wrong or the forum.

3. Causation and Fault

(a) \textit{Causation}. There are not five or more meanings of causation to deal with here, but only two, a logical and a juridical denotation. Causal nexus, causation in its only logical meaning, exists when the conduct complained of is one of the antecedents in the sequence of events resulting in the injury—a \textit{"conditio sine qua non"}—i.e., the harm would not have happened if the act had not been done. Such causal connection, although necessary for any liability, a requirement sometimes neglected,\textsuperscript{8} is not the only qualification of a juridically significant causation. The doctrines concerning its other elements vary. The Anglo-American doctrine of proximate causation, the German theory of "adequate causation," and the French view halfway between the first


\textsuperscript{8} Even \textit{Pollock}, Torts 123 fails to make these concepts clear.
two, have much in common, as they all seek to eliminate the influence of extraordinary events on the reasonably foreseeable course of things. But they vary in details.\(^9\) Also among the jurisdictions of this country, certain differences exist, for instance in regard to the scope of proximate effects.\(^10\)

The principle implies that all courts observe the rules of the courts at the place of wrong.

(b) Fault. The law of wrong further determines, whether fault is a condition of liability and, if so, whether it may be ordinary negligence (\textit{culpa levis} in Romanistic language) or has to be gross negligence or wanton recklessness (\textit{culpa lata}) or some intermediary degree of culpability (\textit{culpa in concreto}).\(^11\) A divergent standard used at the forum certainly does not involve public policy.\(^12\)

American courts, for instance, hold an automobile driver liable to a guest passenger for injury suffered, as the law of the wrong requires, either for nonobservance of ordinary care and skill or only for gross negligence.\(^13\) The law of the forum is immaterial in this regard.

Mere questions of evidence respecting negligence,\(^14\) of course, are determinable by the law of the forum. Jury findings, moreover, may be uncontrollable to the extent to which they follow a foreign view.\(^15\)

(c) Contributory negligence. The law of wrong governs any behavior of the plaintiff influencing causation or avoidable consequences. This conduct, despite such expressions as

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\(^9\) A comparative study has been undertaken in my 1 Recht des Warenkaufs 473ff.

\(^10\) Illustrations in Restatement § 383 and by HANCOCK, Torts 108.

\(^11\) Restatement § 379.

\(^12\) Expressly to this effect, in the case of a more severe standard for the forum: Loranger v. Nadeau (1932) 215 Cal. 362, 10 Pac. (2d) 63; Eskovitz v. Berger (1936) 276 Mich. 536, 268 N. W. 883.

\(^13\) See the collection of cases by HANCOCK, Torts 105. Against the usual superficial assertions that degrees of fault are practically impossible, see Trueman, J. A., in Knutson v. Rawn [1943] 2 D. L. R. 582.

\(^14\) For burden of proof and presumptions see infra 10(b) pp. 283 ff.

\(^15\) HAMSHAW, Note, 4 Mo. L. Rev. (1939) at 305; cf. the informative note by HANCOCK, Torts § 33 on determination of facts by court or jury.
contributory negligence, cannot be "fault" in the strict sense of the word, which would require the existence and violation of a duty toward another person. What the plaintiff may have infringed, was a precept for his own benefit. But his conduct is evaluated in analogy to the standards of the care due to others. The law of wrong is competent to define the effects: whether plaintiff is barred from his action according to the common law principle of contributory negligence, whether his action depends on somewhat more modern theories such as that of "last clear chance," or the recovery of damages is subject to a deduction proportionate to the plaintiff's contribution to the end result.

Illustrations: (i) A brakeman injured in the Province of Quebec suing his employer in Vermont, was permitted recovery under the Quebec theory of comparative negligence, although Vermont law shared in the common law doctrine of contributory negligence. (ii) The plaintiff's conduct having contributed to the damage, done in a place where French law was in force, the Reichsgericht applied the doctrine of the French courts of balancing the actions of both parties, although the Reichsgericht itself had developed a different theory when the Code Napoléon was in force in the Rhineland.

If under a statute a party is liable without fault, as a railway may be in case of accident, this party's own claim for damages suffered in such case will generally also be reduced by reason of having contributed to its own damage by mere causation. In any case, the law of wrong decides how to estimate the factors of the damage.

16 Cf. 2 Restatement of the Law of Tort § 463.
17 Restatement § 385.
18 The Canadian Supreme Court in Ottawa El. R. Co. v. Letang [1924] S. C. R. 470 applying Ontario law as that of the place of wrong dismissed the action, in subordinating contributory negligence (wrongly) to the maxim "scienti non fit injuria."
19 For cases, see STUMBERG 188 n. 25; HANCOCK, Torts 111 n. 6.
20 Morissette v. Canadian Pacific R. Co. (1904) 76 Vt. 267, 56 Atl. 1102.
21 RG. (March 12, 1906) JW. 1906, 297.
Illustration. A street car of the plaintiff, a Swiss company, collided on the territory of the Swiss Canton Basel with the motor truck of the German defendant. The German courts applied the Swiss law of March 28, 1905, on the liability of railroads for risk, to judge the quasi liability of the plaintiff street car company; assumed negligence of the defendant under article 41 of the Swiss Code of Obligations; and distributed the damages in the proportion of two-thirds to one, according to article 44 of this Code.22

In a singular American case, a wife was injured by a third person in an accident for which her own husband was jointly responsible. Her claim against the tortfeasor was made dependent on the question whether her husband would benefit by her recovery. This latter question was subjected to the law of the place of wrong,23 by exaggerating the usual encroachment of this law on family relations.

Characterization. All these rules are substantive and susceptible of foreign application. This has been fully realized, not only in cases where the laws of the place of wrong and of the forum agreed in characterizing their rules on contributory or comparative negligence as substantive in all respects,24 but also where the rule of the forum was regarded as “procedural for most purposes.”25 We may add that, even if at the place of wrong concurrent fault of the plaintiff is treated as a bar to his action under some procedural view, the action has to be dismissed because this is the “law” to which we are referred. This probably is true everywhere without regard to the usual fallacies of “characterization.”

22 OLG. Karlsruhe (Oct. 28, 1931) JPRspr. 1932 No. 41.
24 Fitzpatrick v. International R. Co. (1929) 252 N. Y. 127, 169 N. E. 112 (applying Ontario law); Hancock, Torts 120 n. 17.
4. Proper Plaintiff

The *lex loci delicti* governs:26

(a) *Beneficiary of the tort claim.* Thus, a Scotch court dismissed an action of a woman seduced in London on the ground that English common law gave the right of action to her parents only.27 In the United States, the death statute of the state of wrong decides the beneficiaries on behalf of whom representative action should be brought.28

Suppose an American is negligently killed in Switzerland by a German. The personal action does not disappear as under common law, nor does any American death statute apply, neither will the German rule govern, entitling the relatives having a legal claim to be supported by the deceased. Instead, all courts will apply the Swiss rule under which all persons deprived of their support by the death may sue for compensation.29

Consistently, the Quebec court has applied the domiciliary law of Massachusetts to the action of a husband for the loss suffered by himself through the death of his wife.30 Notably, the Belgian Supreme Court applying the French law of workmen's compensation to a minor's death occurring in France, has refused an exception of public policy against the French provision granting the right to sue only to the relatives living in France at the time of the accident.31

On the other hand, it is correct for a court of a civil law country to assume that the applicable statute of distribution

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28 HANCOCK, Torts 124; see ibid. his considered review of the cases dealing with the interpretation of the statutes ordaining distribution of the damages in the same proportions as personal property of a deceased intestate.

29 See Swiss Code Obl., art. 45 par. 3, of German BGB. §§ 844 par. 2, 845.


31 Belgium: Cass. (Feb. 21, 1907) Pasicrisie 1907.1.135.
determines who is the beneficiary after the death of an injured person having acquired an inheritable right against a tortfeasor. Thus, where a domiciliary of New York had suffered an automobile accident in France and died in New York, and the surrogate's court of New York appointed an executor, the French Court of Cassation recognized this executor as a successor to be the right plaintiff to enforce the tort action in France, whereas the court below had insisted that according to the French law, being the *lex loci delicti*, the heirs had to appear.\(^32\) Evidently, the courts were not aware of the American controversies regarding the application of death statutes. In any event, an American court should recognize in this case that French law, including its conflicts law, decided to whom the action belonged.

(b) *Indirect harm.* Whereas in many legislations, including the French, all persons injured by the tortious act are entitled to claim damages, in others, particularly in German law, only the person “directly harmed” may sue. If, for instance, goods sold but not delivered are injured and the title has not passed, the buyer may sue the tortfeasor under French but not under German law. Which law governs depends on the place of wrong. The same is to be said with respect to the Anglo-American rule that injury, not malicious or fraudulent, inflicted upon a person does not give rise to an action for damages by a third person suffering a loss in his contractual right against the injured.\(^33\)

(c) *Plaintiff in own name on behalf of the injured.* The question who may bring the suit on behalf of the party entitled, in the opinion of Beale, is a procedural matter,\(^34\) but this assertion conflicts with the prevailing practice of applying

\(^{32}\) Cass. (crim.) (June 4, 1941) Clunet 1940-45, 112.

\(^{33}\) KENNY, 62 C. J. 1120 § 30. On the question of whether seller or buyer or both may sue for tortious injury to the object of a sales contract, a complicated proposal appears in the Final Draft No. 1 of a Revised Uniform Sales of Goods Act § 127.

\(^{34}\) Restatement § 588; 3 BEALE 1603.
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the death statutes governing the wrong. Whether a husband may enforce the claim of his wife in his own name or a parent in the name of his or her child is also determined in this country by the law of wrong (see infra p. 265), whereas abroad the law governing marital property applies.

5. Proper Defendant

(a) Co-obligors. Although a few authorities have applied local procedural law to the question whether co-obligors must be joined in an action, it is the consistent and prevailing opinion that the entire problem of determining the persons to be sued pertains to the law of the place of wrong. This includes the questions whether several debtors are liable for the whole damage jointly, or jointly and severally, or separately, each for the damage done by him, and whether the action may, or must, be directed against the several debtors jointly or separately. Only the manner of bringing the suit against such obligors pertains to the procedure of the forum.

(b) Claim against the insurer of the tortfeasor. The injured person enjoys a direct action against the insurer of the tortfeasor, if, and only if the law of the place of tort gives it. The French law imposing direct liability on the insurer necessarily applied in a case where an automobile accident

35 See Hancock, Torts 126ff.
38 Mosby v. Manhattan Oil Co. (C. C. A. 8th 1931) 52 F. (2d) 364; Hancock, Torts 109, n. 16, 132.
39 Stumberg 245 n. 74.
occurred in France. It was needless for the French Court of Cassation to stress the public interest involved.\textsuperscript{41}

The problem, however, has been regarded as more complicated in this country. On one hand, a statute imposing upon an insurer direct responsibility to the injured third party has been held binding with respect to all contracts made in the state, irrespective of the place where an injury occurs.\textsuperscript{42} On the other hand, cases conflict on the question whether the direct recourse provided by the state of the place of wrong may be applied to a foreign insurer who has contracted outside the state.\textsuperscript{43} Although the refusal to apply the law of the place of injury certainly should not be based on the ground that it concerns only a remedy,\textsuperscript{44} both opinions have been supported by policy considerations.\textsuperscript{45} But it seems that when the insurance contract covers injuries committed by the insured party in the state where the tort occurs, there is no valid reason why

\textsuperscript{41} See the criticism of Cass. (Feb. 24, 1936) \textit{supra} n. 40, by \textsc{Batiffol}, Revue 1937, 441 and \textsc{Esmein}, 11 Z. ausl. PR. (1937) 861. Conversely, the direct action was denied when an accident between French parties took place abroad, Cass. (civ.) (July 13, 1948) Revue Crit. 1949, 94.

But a Swiss writer, Ed. \textsc{Schmid}, "Zur Frage der Rechtsanwendung bei Verkehrsunfällen Schweizerischer Motorfahrzeugbesitzer im Ausland," 35 SJZ. 248, has urged that the Swiss Law of 1932, art. 49, granting the injured person a direct suit against the insurer should be applied in the case of Swiss insurance parties and a German place of accident, while the Appeal Court of Zürich (Feb. 23, 1938) 38 Bl.Zürich.Rspr. (1939) 356 No. 145, 41 Bull. Inst. Int. (1939) No. 10753 conformed to the (German) law of the place of wrong; in accord, Cour Genève (Sept. 20, 1957) Sem. Jud. 1958, 555.

\textsuperscript{42} \textsc{Hancock}, Torts 240; Cormier v. Hudson (1933) 284 Mass. 231, 187 N. E. 625 (statute of the forum); Farrell v. Employers' Liability Assurance Co. (1933) 54 R. I. 18, 168 Atl. 911, Note, 18 Minn. L. Rev. (1933) 737 (implied).


Allowing the recourse: Kertson v. Johnson (1932) 185 Minn. 591, 242 N. W. 329 (Law of Wisconsin applied in Minnesota); cf. \textsc{Hancock}, Torts 241ff. A statute granting the action in this case is constitutional, Watson v. Employers Liability Assurance Corp., Ltd. (1954) 348 U.S. 56. See cases and discussion by \textsc{Hancock}, Torts 241 whose arguments for doubt I cannot follow.
the statute of the state of wrong should not be able to turn the claim for damages directly against the insurer.\textsuperscript{46a} Nothing more is done thereby than that the insurance claim is transferred, by operation of law, from the injurer to the injured, instead of the longer way of recourse by assignment, which may be voluntary or by way of garnishment. The insurance company does not lose any advantage and cannot complain about any mentionable extension of its liability. Any other solution jeopardizes the efficacy of the law of the place of wrong.

6. Influence of Family Relations

American courts extend the law of the place of wrong to the problems: whether a married person may sue the other spouse for tort suffered during the marriage,\textsuperscript{48} and even whether a claim for injury may be brought after the parties marry each other in another state;\textsuperscript{47} whether a claim belongs to the injured wife\textsuperscript{48} or to the husband\textsuperscript{49} or to the community property;\textsuperscript{50} whether a wife may avail herself of the claim of her injured husband.\textsuperscript{51}

Nevertheless, when New York law prohibited litigation between spouses, the Court of Appeals of New York extended the prohibition to domiciled spouses also in the case of an injury committed in a state allowing such suits.\textsuperscript{52} This


\textsuperscript{48} Dawson v. Dawson (1931) 224 Ala. 13, 138 So. 414; Howard v. Howard (1931) 200 N. C. 574, 158 S. E. 101; Gray v. Gray (1934) 87 N. H. 82, 174 Atl. 508; Darian v. McGrath (Minn. 1943) 10 N. W. (2d) 403 (injury in Wisconsin, action against husband would be allowed despite the contrary domiciliary law of the forum, hence wife is granted relief against the car owner).


\textsuperscript{52} Texas & Pac. R. Co. v. Humble (1901) 181 U. S. 57.

\textsuperscript{53} Snashall v. Metropolitan etc. R. Co. (1890) 8 Mackey (D. C.) 399; see Goodrich 328 n. 18.


\textsuperscript{55} Usher v. West Jersey R. Co. (1889) 126 Pa. St. 206, 17 Atl. 597.

\textsuperscript{56} Mertz v. Mertz (1936) 271 N. Y. 466, 3 N. E. (2d) 597; Note, 108 A. L. R. 1126. Against the argument of the court that the common law prohibition of actions between spouses belonged to procedure, see Hancock, Torts 236.
decision has been followed in some other jurisdictions. The action against the spouse or his insurer may thus fail due to one or the other of both statutes involved. The New York court has not allowed its own new policy of permitting the suit, to prevail against a foreign statute barring it.

However, the contrary approach, exclusively applying the personal law that governs the marital relations, has increasingly found sympathy with American writers. This is the common view held in all the world. In a recent case, Judge Learned Hand refused to give effect to the common law rule governing tort in Florida, whereby a husband would be liable for his wife's tort committed in Florida in his absence. Both spouses were citizens of New York, and the various reasons for exonerating this resident from vicarious liability may seem debatable. The Supreme Court of California determined the immunity of parents against a tort action of their minor children according to the law of the family domicil. The emphasis on the domiciliary law in these cases confirms the trend.

The Louisiana Court, however, abandoned its domiciliary principle in favor of the prevailing approach in a recent case where a wife, injured by the negligence of her husband in Louisiana, sued the insurance company in Louisiana. The defendant objected that under the law of Texas, the domicil of the spouses, the claim belonged to the community property

64 § 57 Domestic Relations Act, as amended by Laws 1937, c. 669 § 1.
66 Stumberg 206; Cook, Legal Bases 248, 345; Hancock, Torts 236; Rheinsteine, 41 Mich. L. Rev. (1942) 83, 95 and 19 Tul. L. Rev. (1944) 199.
69 Particularly in extending the position taken by Justice Brandeis and Judge Learned Hand in the case of an absentee-nonresident employer, on which see below pp. 267 ff. In other respects cf. Note, 52 Harv. L. Rev. (1939) 834; Hancock, Torts 255.
69a Emery v. Emery (1955) 45 Cal. (2d) 421 at 428, 289 P. (2d) 218 at 223.
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fund and only the husband was entitled to sue. The court disregarded the law of the domicil preferred hitherto. Instead, it stated that the right to sue would ordinarily be subject to the law of the forum, but that suing the husband is also concerned with a substantive problem governed by the law of the place of wrong which therefore is also to be consulted. This approach is really untenable.

7. Vicarious Liability

(a) Principle. It may be stated as a universal principle, though certain limitations are in discussion, that the law of the place of wrong determines the liability of third persons who are not tortfeasors, accomplices, instigators, or accessories.

This proviso should be noted. Vicarious liability is not in question, if the third person is a tortfeasor himself. For instance, if the general concessionaire of an amusement park has contracted with an independent manufacturer of fireworks for a display, he may be sued for his own negligence, if he did not take care that the premises were kept in a safe condition for the public invited by him. He may incur vicarious liability, however, if he is responsible under the applicable law for the negligence of the independent contractor.

The liability involves such persons as masters of servants, parents of minor children, custodians of juvenile or dangerous persons, schoolmasters or artisans in respect to pupils and apprentices, employers of independent contractors for risk inherent to the work, or owners of vessels, as the various laws may ordain their liabilities. The English case of The Mary Moxham is typical for the negative side of this principle.

63 United States: Restatement § 387; Note, 47 Harv. L. Rev. (1933) 349.
Germany: ROHG. (Jan. 19, 1878) 23 ROHGE. 174; RG. (Sept. 23, 1887) 19.
Negligent navigation in a Spanish harbor not constituting a cause of liability of the vessel's owner according to Spanish law, the court in England disregarded the English law which would have made him responsible. On the other hand, a Michigan freight transport company using the services of a truck owner by contract for hauling freight is held answerable even in Michigan courts for negligence of the independent contractor, in conformity with the law of the Ohio place of accident, whereby a common carrier cannot delegate its duties to ensure public safety.

(b) Persons out of state. Although the principle is firmly established everywhere, except under the dual requirement of English law, some doubts have arisen respecting the propriety of the imposition of liability by the state of wrong on a person, not a subject, who, according to the premises of our topic, is innocent, though a cause of the tort. These scruples have taken diverse shapes in this country and in Europe. A small group of European writers and courts have claimed that liability cannot be imposed on an innocent third person except by the law which is considered his personal law. Otherwise, it has been argued, foreigners lacking any connection with a state, might be involved, at the pleasure of the state, in heavy obligations without being able to avoid

RGZ. 382; (July 1, 1896) 37 RGZ. 181; (May 30, 1919) RGZ. 96; BGH. (Dec. 21, 1956) 23 BGHZ 65, 67. See for other cases Lewald 267 No. 324 sub (4); Raape 226.

The Netherlands: Hof Amsterdam (June 5, 1914) W. 9753 (Englishmen damaged by receipt with false signature issued in Germany by a bookkeeper beyond the course of his employment in the service of a Dutch firm in Utrecht; § 831 of the German BGB. applied); H. R. (March 18, 1938) W. 1939 No. 69 as commented by the Note (Meijers) ibid.

Switzerland: 2 Meili 94.


Switzerland: BG. (April 10, 1896) 22 BGE. 471, 486. A particular opinion has been suggested by Bartin, 2 Principes 430 § 340: the law governing the contractual relationship between master and servant. Contra: 2 Meili 94.
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them. 67 Hence, a Swiss principal employing a traveling salesman, who injures someone in France by negligently handling inflammable material, would be free from liability under Swiss law, by proving that he has chosen and supervised his agent with due care. 68 The prevailing approach allows no such exemption, the commettant (master) being absolutely liable for the fault of his préposé committed in the course of the employment in France, according to French law. 69

In this country, in the same vein, two outstanding judges have penetrated the problem from the angles either of the constitutional requirement of due process or of a peculiar requirement brought into the conflicts rule. In both cases the question was whether the owner of a car, who had been out of the state at all material times could be held liable for negligence of the driver on the ground of a statute at the place where the accident occurred subjecting the owner to liability.

The first case was concerned with the New York statute imposing absolute liability on the owner of a car, if the negligent driver was "in the business of such owner or otherwise...legally using or operating the same with the permission, express or implied, of such owner." 70 The courts of New Jersey, the domicil of the defendant owner, applied the New York statute as lex loci delicti on the ground of the owner's permission to take the car to the state of New York. 71 The Supreme Court of the United States affirmed the constitutionality of this choice of law. 72 Mr. Justice Brandeis, in delivering the judgment, reviewed the various remedies introduced in American jurisdictions to supplement the insufficient doctrine of principal and agent, among which, in

67 2 ZITELMANN 534.
68 Swiss Code Obl., art. 55.
70 N. Y. Vehicle and Traffic Law, § 59.
72 Young v. Masci (1933) 289 U. S. 253.
a few jurisdictions including New York, statutory liability has been imposed on the mere basis of the owner's permission or consent to drive the car into the state. This condition, under any circumstances, secured such due process of law as a nonresident could expect. For the defendant who lent his car to the driver, "subjected himself to the legal consequences imposed by that state . . . as fully as if he had stood in the relation of master to servant." 73

This line of thought has been transposed into the conflict of laws by the Federal Circuit Court of New York, in a celebrated decision delivered by Judge Learned Hand, in Scheer v. Rockne Motors Corporation. 74 An automobile sales corporation of Buffalo, New York, employed a sales agent, Clemens, who took an automobile owned by the firm to Ontario and there caused an accident, supposedly by negligence. The statute of Ontario, taken literally (and probably in its intended meaning), made the owner of the car liable, unless the car was without his consent in the possession of another person. 75 Since Clemens might not have acted within the scope of his employment, the problem was whether the

73 Mr. Justice Brandeis added that "A person who sets a means in movement whereby injury is inflicted, makes himself liable, whether by responsible agent or an irresponsible instrument." This is an unfortunate confusion of our case of an innocent third person with the cases of tortfeasors acting by an intervening person or by an instrument. On the other hand, 2 BEALE 1297 unnecessarily interprets this passage to the effect that someone who puts an instrument into the hand of a tortfeaseor without knowing that it is to be used in another state, should be liable under this state's law.

74 Scheer v. Rockne Motors Corp. (1934) 68 F. (2d) 942.

75 Two opinions of Canadian barristers on the construction of art. 41 (1), in the Ontario Highway Traffic Amendment Act, 1930, submitted in Scheer v. Rockne Motors, supra n. 74, contradicted each other.

No other case in point seems to have occurred. However, in the interpretation of the majority in Thompson v. Bourchier [1933] O. R. 525, [1933] 3 D. L. R. 119, the intention of the legislature was to impose liability on the owner with whose consent someone else has possession and control of the car. The court excluded the possibility for the owner to evade his liability by parting with the possession and control and renting the car under an agreement whereby the other person should comply with all duties of care. It would seem that the owner should no more be exempted by an agreement not to drive the car into New York. This broad construction of the statute agrees with the inferences by the New York court (at p. 495) from two older Ontario decisions.
Ontario statute, if understood in its more rigid meaning, could be applied by the court in New York. The court denied this: "The mere possession of the car did not suffice for Ontario to reach the defendant," and held that, only "if the defendant authorized Clemens to take the car into Ontario, it (the defendant corporation) became liable to the extent contemplated by the statute."

It is well to bear in mind that neither decision dwells on the fact that the law of the place of injury was more severe than that of the defendant's domicil or of another place. If no vicarious liability arose at the place of wrong, none would result from the law of the state in which no harm has been done, whatever this law may predicate.

Finally, the Restatement has concluded the evolution by a general rule (§ 387, comment a):

"In order that the law of the state of wrong may apply to create liability against the absentee defendant, he must in some way have submitted himself to the law of that state. It is sufficient if he has authorized or permitted another to act for him in the state in which the other's conduct occurs or where it takes effect.... For analogous situations involving this problem see §§ 343 and 344" (referring to cases of contracts made on the authority of a third person). 76

This "analogy" is a delicate point. The Anglo-American doctrine of the master's liability for torts committed by his servant has been established traditionally on the assumption of an authority, but this assumption is fictitious and not really observed. Whatever is within the scope of the employment is covered by the liability, even though it may strictly run against the express orders of the employer. 77 To refer to this old fiction confuses our problem the more as contract and tort are essentially different sources of obligation. Where a

76 Restatement, comment a to § 387. The black letter text itself is too vague and obscure to be discussed here.
77 See WEIGERT, 4 Rechtsvergl. Handwörterbuch 53.
person grants a power of attorney to contract on his behalf in another state, he fulfills an essential requirement for his becoming a party to the contract; sending his agent to Rome, he may be supposed to do as those in Rome do; it is reasonable, in this case, to argue that he has, in some sense, submitted himself to the law of the foreign state. The case of apparent authority implied by the principal’s conduct, is “analogous.” But regulations of traffic on highways and the corresponding imposition of liabilities are in no sense dependent on the consent of private persons. Only the historical connection of vicarious liability with the doctrine of master and servant has induced an enlarged concept of “agency,” broad enough to destroy its proper meaning. Judges Brandeis and Learned Hand had still to break a path for the recognition of foreign liabilities beyond the acts of a servant committing a tort within the scope of his employment. Their opinions have to be read in this historical connection and to the affirmative effect. Judge Hand took care to express that it did not matter whether the car owner knew the law of Ontario and thus plainly accepted the risk of liability under the Ontario statute. Not that he submitted himself to the foreign law but that his conduct was a contributory cause of the injury, was the basis of the New York judgment. It may perhaps be asked why the mere fact of entrusting the car to somebody else could not be equally regarded as sufficient.

In no case, however, is the problem concerned either with agency proper, which requires a legal transaction on behalf or on account of the principal, or with the proper concept of instrumentality which presupposes that the third person himself is a tortfeasor. The idea of the Restatement that a state could not make any private person liable for a tort committed on its own territory, unless this person submitted himself to this state, is antiquated. The old and universal
liability of the owners of vessels for collisions, irrespective of their consent to anything, not to speak of the ancient liabilities for slaves and cattle, should have been a warning. A county court in Pennsylvania has correctly held that the resident owner of a dog was absolutely liable for the dog's biting a person thirty miles away in New Jersey, in accordance with the New Jersey law and regardless of negligence required at the forum. Moreover, the Restatement admits that the law of the place of wrong decides whether an actor, at the time of the injury, is acting within the scope of his employment, and whether an acting person is an independent contractor or a servant. It would seem logical that the same law should determine whether a car owner has permitted his wife to use the car; what the circumstances are under which a car owner is deemed to permit his wife or son the use of the car; and whether the permission of use must refer to the particular state or only to foreign states in general, or whether the simple abandonment of "possession" suffices (as seemingly in the Ontario statute). If the foreign state's jurisdiction or law really depended upon a consent of the party, its court would have to consult his domiciliary law respecting the existence of this premise. Indeed, Zitelmann, who developed a line of thought similar to the two American decisions, considered vicarious liability governed by the personal law of the third person.

Reducing the overextended and oversimplified rule of the Restatement again to the original thought, there remains the constitutional limitation asserted by the Supreme Court, and, as the result of the New York decision, a public policy

79 Followed, Venuto v. Robinson (C. C. A. 3rd 1941) 118 F. (2d) 679, per Goodrich, J.
80 Illustrations 1 and 2 to Restatement § 387.
81 Illustration 3 to Restatement § 387.
82 2 ZITELMANN 541.
disapproving of foreign liability for risk, unfair to an absentee. But there are few, if any, foreign types of liability to be feared. Nowhere is a car owner made liable without any possibility of exemption.\(^8^3\) There exists a broad risk liability under a German law\(^8^4\) and a severe liability established by the French Court of Cassation for any injury by an "inanimate thing" (C.C. art. 1384) except when it is proved that the injury was unavoidable or caused by concurrent fault of the injured,\(^8^5\) yet in both cases not the car's owner as such is liable but its "custodian" (Halter, gardien) i.e., a person exercising all care, supervision, and factual disposition of the vehicle. An American firm sending its car to Algiers to be used there by an employee at his discretion would be liable for the latter's negligent acts as master of a servant but not because of the use of the "inanimate thing."

Thus, the case of the Ontario statute is rather infrequent. Even in this case, it has been pointed out that liability for transferring a dangerous object to another does not appear extraordinary.\(^8^6\) There is much to be said for this view. Vicarious liability, in general, has often been conceived as a special application of the doctrine that risk connected with an enterprise should be borne by the person entertaining the enterprise. Who has the profit should have the loss, on the principle of acting at one's own peril—a classical principle of English law, lately recognized on the continent.\(^8^7\) A principal's liability for his servant has usually been justified in this way, and so it may also be explained why an acquirer of a house in France becomes immediately liable for purely

\(^8^3\) See Rheinstein, 4 Rechtsvergl. Handwörterbuch 82 No. 2.
\(^8^4\) German Law of May 3, 1909 on traffic of motor vehicles, as amended.
\(^8^5\) Cass. (civ.) (July 29, 1924) Bessières, S.1924.1.321, D.1925.1.5; Plenary Decision of the United Chambers (Feb. 13, 1930) D.1930.1.57.
\(^8^6\) Goodrich 279 § 98.
Unger, Handeln auf eigene Gefahr (1904) initiated an extensive literature.
accidental injuries caused by a collapse of the house. No one will doubt that this liability extends to foreigners.

Applying the law governing the wrong to the accessory liability of third persons affords, in the eyes of the German Supreme Court, the additional advantage of consistency in deciding, under one law, the obligations of both the tortfeasor and his joint debtor in relation to the injured party. Also the assessment of indemnity and contribution between the codebtors will be facilitated thereby, although, of course, the internal recourse of one debtor against his faulty associate is governed, according to its source, by the law governing the employment contract, the bailment, the parental, or any other underlying relation.

(c) Other effects of public policy. While the New York Court has narrowed the application of a foreign tort law for the sake of public policy, the Connecticut Court has enlarged the extraterritorial effect of a statute abnormally. A statute in the latter state provides that “any person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle. . . .” The court applied the provision to an injury occurring outside the state, by the construction that the statute formed a part of every contract. Thus, by an unprecedented, broad statutory liability of the bailor to third party beneficiaries and its extraordinary extension to foreign injuries, the injured person

88 See the commentaries on French C. C. art. 1386.
89 German RG. (July 1, 1896) 37 RGZ. 181; LEWALD 268; RAAPE 226.
90 BARTIN, 2 Principes 432.

But if no such relation between the tortfeasors exists, as frequently in traffic accidents, contribution is governed by the law of the wrong, Charnock v. Taylor (1943) 223 N.C. 369, 26 S.E. (2d) 911; Builders Supply Co. v. McCabe (1951) 366 Pa. 322, 77 A. (2d) 319.
acquires a new and unexpected right. This decision has been benevolently discussed by thoughtful writers under the supposition that a true and better justification of the statute is that it may have been regarded as intended to induce renting companies to select their customers carefully. But, if so, why should not a dealer selling cars be subjected to a similar educational policy? There does not seem to exist any urgent reason for interfering with conflicts law by unusual local policies.

The famous rejection of the foreign liabilities of a shipowner for the negligence of a compulsory pilot in The Halley and by the Reichsgericht have been ironically illuminated by the English Pilotage Act of 1913, which introduced such liability into the English law, and the Brussels Convention of 1924 on the liability of owners of seagoing vessels, which provided for liability in case of definitive international arrangements.

8. Damages for Tort

At common law, the right to damages was regarded as a remedy subject to the law of the forum, with the questionable justification that it is a general right to recover such damages as the court may choose to give. At present, however, excepting some doubts in England and express provisions in some East Asian countries, prevailing opinion,

92 Stumberg 204ff.; Hancock 238.
93 Supra p. 242; see Robertson, 4 Modern L. Rev. (1941) 33 n. 35.
94 England: See, for example, Baschet v. London Illustrated Standard Co. (1900) 1 Ch. D. 73 (infringement of French copyright in France).
94a China: Decree of Aug. 5, 1918, art. 25 par. 2.
Japan: Law of 1898 on private international law, § 11 par. 3.
Siam: Law of 1939 on private international law, § 15 par. 3.
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abroad as well as in this country, does not hesitate to include the right to damages in the substance of the tort obligation or, for that matter, of any obligation. Accordingly, the law of the place of wrong governs the problem universally and in all respects. As Holmes stated in a famous dictum, the law of the place of the act, "only source" of the obligation for tort, "determines not merely the existence of the obligation but equally determines its extent," or, without the peculiar note reminiscent of the vested rights theory, "the measure of damages for a tort is determined by the law of the place of wrong." The great weight of Anglo-American authority supports this doctrine.

Thus the Minnesota court has awarded damages superior to the amount recoverable under the law of the forum, for wrongful death in an accident in Montana. In Connecticut, damages for a tort committed in New York have been regarded subject to New York law. "Remoteness" of damages finds the same treatment. In case a sailor has been negligently killed in Dutch waters, a Belgian court awards damages, estimating the circumstances and excluding funeral expenses in accordance with Dutch law. Damages for non-

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95 Bartin, 2 Principes 407 § 336.
96 See Sedgwick, i Measure of Damages (ed. 9) § 1373; Wharton §§ 427a, 478c.
98 Restatement §§ 412, 414, 415, 417, 419, 421.
99 More recently, e.g., Rauton v. Pullman Co. (1937) 183 S. C. 495, 502; 191 S. E. 416, 419; Wynne v. McCarthy (C. C. A. 10th 1938) 97 F. (2d) 964, 970 with references; Smyth Sales v. Petroleum Heat & Power Co. (1942) 128 F. (2d) 697, 702 (by Goodrich, J., speaking of tort and contract); 2 Beale § 412.2; Goodrich 251 § 91; Cheshire 673, but see 674; Hancock, Torts 113ff.
100 Northern Pacific R. Co. v. Babcock (1894) 154 U. S. 190.
101 Commonwealth Fuel Co. v. McNeil (1925) 103 Conn. 390, 405, 130 Atl. 794, 800.
102 See for England, Cheshire 673; Robertson, Characterization 270.
pecuniary loss, physical pain, and suffering, as well as for mental anguish, are accorded when granted by the law of the place of wrong, irrespective of the *lex fori*.

**Influence of lex fori.** But the last mentioned problem has sometimes been treated in another way. Although such types of damages as were not foreseen at the place of wrong will be refused, recovery has also been denied in the converse case where they were alien to the law of the forum. How much does public policy interfere in this matter? Pure penalties, certainly, may not be awarded on the ground of a foreign law. But a statute providing for recovery of exemplary damages "is not a penal law." Nor are statutory provisions that include pecuniary recovery, inestimable loss, and compensation for injured feelings, in a lump sum ("pen-ance," "satisfaction," "Busse"). An amount fixed in a death statute for all cases represents "the legislature's approximate estimate of reasonable compensation" and is enforceable in other states. On the ground of a railway or automobile accident in France, damages for "tort moral"

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105 2 BEALE § 421.1.


107 Examples are the double and treble damages and fixed monetary penalties, incorrectly refused extraterritorial application in various state decisions, see HANCOCK, Torts 118; Swiss Code Obl., art. 47, "reparation morale"; German BGB. § 847 and special laws.

in accordance with French law have been awarded in Austria and Germany.\textsuperscript{109}

It should be added that courts may easily find the desired liberty of discretion under almost any rule of the world. Modern legislations without provision for juries, which follow the pattern of the Swiss Code of Obligations,\textsuperscript{110} leave the judge a broad margin in appreciating the damage and equitably considering the reciprocal situation of the parties. Even apparently unpliant rules are usually applied in their own jurisdictions with considerable discretion.

The only serious restriction to the rule may result from insufficient procedural machinery at the forum. However, it may be questioned how rigidly the domestic procedure ought to be conceived. The Supreme Court in a famous case\textsuperscript{111} has correctly stated that the Mexican law governing the tort obligation would have granted the plaintiffs an annuity that could be judicially modified under circumstances, while the law of Texas, the forum, provided a lump sum, and that the court had to follow the conflicts principle and hence not award a lump sum. Nevertheless, by the determination that the Texas court had no power to make and superintend a decree such as the Mexican law prescribes, and the consequent dismissal of the suit, both the assumption of jurisdiction and the conflicts rule were practically frustrated. So long as courts must stumble over limitations on their power and narrowly construed procedural rules, adjustment

\textsuperscript{109} Austria: OGH. (Nov. 2, 1910) GlU. NF. 5219.
Similarly, France: BARTIN, 2 Principes 409.
\textsuperscript{110} Swiss Code Obl., arts. 43, 44 par. 2.
Mexico: Código Penal, art. 31 par. 1.
Thailand: C. C. art. 438 par. 1.
China: C. C. art. 218.
\textsuperscript{111} Slater v. Mexican Nat'l R. Co. (1904) 194 U. S. 120
of the machinery necessary for reciprocal application of laws is severely impaired. Why should any American court not be directed by its legislature to render decrees which Mexican courts are able to issue and which are perfectly similar to alimentary decrees familiar to this country? Under the constitutional conceptions of most other countries such doubts do not even appear. Otherwise, the characterization of damages as a problem of procedure, wrong as it is, would have a great practical advantage!

How simply the problem can be internationally managed is illustrated by the Warsaw Convention on International Air Transport concerned with the converse case. In the carriage of passengers, liability of the carrier is limited to the sum of $125,000 francs. "Where in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed $125,000 francs."112

9. Other Sanctions

Apart from damages, the effects of a tort may consist in a declaratory judgment or exemplary damages, specific restitution ("in integrum," "in natura"), and restraint from continuance or repetition. A lively discussion in France has been concerned with the interprovincial treatment of "astreinte," i.e., an order to pay a sum periodically so long as the cause of damage continues or so often as the cause is reiterated. Was this kind of judgment, developed in the French courts, to be applied in the case of a tort committed in France proper, by a court of Alsace-Lorraine where alongside of French private law German civil procedure was in force? The literature has recognized "astreinte" as substantive

112 Art. 22, 1, HUDSON, 5 Int. Legislation 100 at 112. The Hague Protocol of Sept. 28, 1955, set the maximum amount at $250,000 francs. We may also point to the treatment of damage in admiralty proceedings infra Chapter 27, p. 352.
despite its origin in the courts and enabled the plaintiff to elect this relief, in addition to direct enforcement provided by the procedural local law.\textsuperscript{113}

Also, all other forms of injunctive decrees or judgments serve special purposes of the substantive right and should be granted, on principle, on the basis of the law governing tort. Thus, such specific reparation as recovery of an unlawfully opened letter, public revocation of a public libel, re-employment of a worker improperly dismissed, may be decreed, unless the machinery of the forum is really unable to accommodate itself to the task.

10. Relation to Procedural Law

(a) \textit{In general}. In the traditional view, conflicts law provides for the application of rules and standards of the state considered most closely connected with the legal relations of the parties; but by what steps and in what order of activities the rights and duties thus created are to be enforced, is the object of the procedural law of the forum. This apparently simple distinction between "substance" and "procedure" has more recently revealed its difficulties in incipient special investigations; it has been materially affected, on the other hand, by a gradual reduction of the large scope assigned to procedure in the Anglo-American courts. The Restatement started with the orthodox principle, yet it seems to concede considerable space to the application of foreign law, though its statements, vague and contradictory,\textsuperscript{114} testify to the draftsmen's uneasiness. In fact, among the various problems involving demarcation between foreign substantive law and the procedure of the court seized of litigation, few are ripe

\textsuperscript{113} See the description of the controversy by J. Donnedieu de Vabres 589, 590.

for solution, and not a few arguments of contemporary discussion are debatable. The well-justified tendency to enlarge the domain of the applicable foreign law, indeed, should not be exaggerated. One would think that an Anglo-Saxon institution such as the bipartition of judicial functions between judge and jury is an exclusive concern of the forum. Despite all the influence on the decision of cases exercised by jury verdicts or by the different mentalities of learned judges and laymen, the modes of organizing matters of procedure are a part of the administration of justice. Conflicts law does not purport to counterbalance all the differences of countries and courts. We have to be satisfied with presenting to the court the requisites of the cause of action ("substance") and the final request in the form most similar to that in a court of the state referred to. A party seeking redress for a tort or even defending in a state where the tort has not been committed, must be content with the machinery and the habits of the forum in finding the facts. Nobody could seriously insist on the privilege of having a jury decide his case, despite any guarantee furnished at the locus delicti, if the forum does not allow a jury in his case. Theoretically, the two questions involved are rather simple and seem well-known to the courts. The first question concerns the set of facts forming the cause of action; this set is determined by the law governing the tort. Thus, if the plaintiff's alleged conduct, under the statutes and authorities of the foreign place of wrong, constitutes contributory negligence barring relief, the forum takes over the foreign qualification of this conduct as a part of the applicable substantive law. The

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115 On this point, after a most interesting discussion of the cases, Morgan, supra n. 114, at 171 is hesitating. He believes in a balance of arguments and refrains from advising the courts whether the forum should conform to the foreign rules concerning the use of the jury.

116 Wieden v. Minneapolis, St. Paul etc. R. Co. (1930) 181 Minn. 235, 238; 232 N. W. 109, 110; Smith v. Brown (1939) 302 Mass. 432, 433, 19 N. E. (2d) 732, 733 and later decisions of the Massachusetts court, see Morgan, supra n. 114,
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second question, procedural under all theories, is that of ascertaining the facts, and judging them according to the foreign standard. It is naturally the law of the forum that decides whether a jury is to be charged and how the verdict is to be framed.

Of course, there are difficulties inherent in the distinction between facts and law; they are enhanced by the subtle shades of distinctions concerning verdicts in the courts of this country. However, these difficulties would be considerably aggravated by their transfer into conflicts law. Maintaining the principle that the applicable law is that of the place of wrong and that the ascertainment of the facts pertains to the procedure of the court, including the intervention and direction of a jury, the task of the forum will be facilitated rather than involved.

(b) Burden of proof. At civil law, distribution of the burden of proof, always understood as fixing the burden of persuading the courts, is sharply distinguished from trying of evidence, and is considered substantive law in every regard. Therefore, no one doubts that a rule, under which a plaintiff suing a railway for injury is relieved from the burden of showing the defendant's negligence, belongs to the law governing the wrong. This is the more readily acknowledged, as this lightening of the plaintiff's task is commonly

at 166. The decision in Pilgrim v. MacGibbon (1943) 313 Mass. 290, 47 N. E. (2d) 299 seems to apply the same principle, advocated here: the Nova Scotia law of the place of the accident, including judicial decisions defining gross negligence in a comparable case, determines whether a given set of facts does or does not constitute gross negligence, requisite of an action of a gratuitous passenger; the law of procedure, however, determines whether there is sufficient evidence to take the case to the jury on the question whether the defendant conformed to the standard. Similarly, Gregory v. Maine Central R. Co. (1945) 317 Mass. 636, 59 N. E. (2d) 471, 159 A. L. R. 714.

117 RG. (April 17, 1882) 6 RGZ. 413.
Switzerland: 16 BGE. 783, 790; 20 id. 496; 24 id. II 357, 390.
Código Bustamante, arts. 398, 401.
Benelux-Draft, art. 24 par. 2.

118 2 Bar 383; 2 ZITELMANN 253; DIENA, 2 Princ. 399; MEILI-MAMELOK, IPR. 403; 1 FRANKENSTEIN 363; NUSSEBAUM, D.IPR. 413.
felt to rest half way between the traditional liability for negligence and the modern cases of absolute liability. It may be construed either as a qualified liability for fault or as a moderated liability for risk. One of the most powerful reasons for reforming the law of tort was the experience that victims of business carried on by big and complexly organized enterprises are unable to identify the source of harm somewhere in the central or local machinery responsible—an "emergency of evidence." This difficulty may be overcome by reversing the roles and presuming the negligence, without entirely eliminating the requirement of fault.

Not all "presumptions" have an analogous meaning, but they are generally deemed to present rules modifying the burden of proof. Prima facie cases, however, are often believed to pertain to the procedural field of evidence. But this does not agree, for instance, with the universally settled practice in maritime tort cases, that navigation contrary to the local port or river regulations amounts to negligence by an average experiential conclusion (prima facie case), so long as the assumption of fault is not deprived of its empirical value of counterproof. The evidence that the defendant vessel has followed the wrong side of the road or shown red instead of green lights, replacing until counterproof the evidence of negligent navigation, reverses the burden of proof for negligence, quite as a legal presumption de facto does; the judge need not be convinced of the truth of negligence, because this additional fact is supplied by experience. Likewise, negligence is assumed from the breach of a statutory duty, such as the obligation to clean the sidewalk, until a

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119 Titze, 6 Rechtsvergle. Handwörterbuch 681.
120 "Beweisnotstand," AdolF Exner, Der Begriff der höheren Gewalt (vis major) (1883) esp. 46, 50.
121 See, e.g., von Tuhr, Allgemeiner Teil des Schweizerischen Obligationenrechts (1924) 142.
122 Rabel, Der Prima Facie Beweis, in Festheft für Adolph Wach, 12 Rheinische Zeitschrift für Zivil-und Prozessrecht 428; accord, Heinsheimer, 13 id. 1.
more probable causal connection is shown by expert evidence.\textsuperscript{123} In a suit of a guest passenger injured in a territory of German law, a French court even adopted the reduction of proof resulting from the practice of the Reichsgericht, which presumes prima facie that any unlawful bodily harm is negligently done.\textsuperscript{124}

\textit{American law.} American courts, in the wake of English tradition, have long persisted in allocating all these matters to the broad procedural field of evidence.\textsuperscript{125} However, not only are "conclusive presumptions" commonly said to be of substantive nature,\textsuperscript{126} but a vigorous trend favors the same characterization for other rules regulating the burden of persuasion.\textsuperscript{127} The matter evidently pertains to those slowly shifting from informal preferences of judges hearing evidence to tight rules of law for deciding cases. The New Hampshire court has recognized as a part of the Vermont tort law the rule that the plaintiff has to show his freedom from contributory negligence.\textsuperscript{128} In other cases there may be doubt. The Restatement\textsuperscript{129} seems to reflect this uncertainty. While

\begin{thebibliography}{9}
\bibitem{123} Dawson v. Murex, Ltd. [1942] 1 All E. R. 483, C. A. Germany: RG., JW. 1904, 408; 1909, 687; 1911, 980; 1912, 390 and often since.
\bibitem{124} App. Colmar (May 29, 1934) Clunet 1936, 626.
\bibitem{126} WIGMORE, Evidence (ed. 3) § 1354, cf. §§ 2483-2491; Restatement § 595 comment c.
\bibitem{127} See Maguire and Morgan, "Looking Backward and Forward at Evidence," 30 Harv. L. Rev. (1937) 910; Hamshaw, "Conflict of Laws as to Presumptions and Burden of Proof," 4 Mo. L. Rev. (1939) 299; Hancock, Torts 112, 155. \textit{Rations dubitandi}, however, have been developed by Morgan in his important article cited supra n. 114, 58 Harv. L. Rev. (1944) at 100ff. On the difficulties wrought by (1) the Federal Rules of Civil Procedure of 1938, (2) the submission of the federal courts to the conflicts law of the state where they sit, see Uhl, Note in 37 Mich. L. Rev. (1939) 1249; Morgan, \textit{op. cit.} at 170ff.
\bibitem{129} Restatement § 595 and comment a; see also 3 BEALE §§ 595.2, 595.3; Goodrich 238 § 84; STUMBERG 136; Note, 78 A. L. R. (1932) 883.
\end{thebibliography}
it assigns "presumptions" to the law of the forum, it contrasts them with foreign requirements concerning proof of freedom of fault, which are interpreted at the place of injury "as a condition of the cause of action itself, or as affecting the nature or amount of recovery." But the comment adds as explanation, what in reality stands as a well-established rule, that foreign rules shifting the burden of proof should be applied where "the remedial and substantive portions of the foreign law are so bound together that the application of the usual procedural rule of the forum would seriously alter the effect of the operative facts under the law of the appropriate foreign state." This formula evidently is a sign of the present transitory stage in recognizing the substantive nature of permanently fixed presumptions for the purpose of conflicts law. Any rule including a presumption fixing the burden of persuasion, should always be taken as a part of the applicable law, while no such rule can be advocated with respect to other categories of presumptions.

(c) Conditions of bringing suit. If the wrongdoer in an automobile accident in Florida has died, the administrator of his estate may be sued in Tennessee despite the domestic rule of this state allowing such suit only in case the wrongdoer has been previously sued in his lifetime.

In a similar way, provisions requiring service of notice of the claim upon the defendant before suit for damages can

130 Central Vermont R. Co. v. White (1915) 238 U. S. 507; New Orleans etc. R. Co. v. Harris (1918) 247 U. S. 367; Lykes Bros. S. S. Co. v. Esteves (1937) 89 F. (2d) 528, 530.
131 Restatement § 595 comment a.
133 Approximately to the same effect, Morgan, supra n. 114, at 193.
be brought, are applicable when part of the law of the place of wrong,\textsuperscript{135} irrespective of the law of the forum.\textsuperscript{136}

11. Relation to Contractual Obligations

(a) \textit{Distinction in the municipal laws.} Tort and contract form an antithesis, but historic connections between them still persist, as in the English controversy whether an anticipatory breach of contract may not be a tort, or in the French discussion whether a breach of contract produces an obligation for damages under article 1382 of the Civil Code, the cornerstone of tort recovery. The general view of modern legal science, however, precisely separates tortious and contractual obligations. Each source of obligation is characterized by its own premises and effects. It may be that the facts of a case create a claim in contract and another in tort. The normal rule is that in such case both rights are at the disposal of the injured party\textsuperscript{137} in some kind of concurrence. If a tenant wantonly cuts the trees surrounding a rented cottage, the landlord may sue him on the contract or for destructive waste (Aquilian \\textit{culpa}, in other laws). Of course, he cannot request damages twice for the same loss. The concurrence


\textsuperscript{136} Contra: Arp v. Allis Chalmers Co. (1907) 130 Wis. 454, 110 N. W. 386 under the theory of a general statute of limitation.


France: Despite great confusion the practice tends to accumulate the benefits for the plaintiffs, as in the case of carrier liability for personal injury, see the critical review by Josserand, Les Transports (ed. 2, 1926) § 894 bis, ter. and the résumé by Esmein in 6 Planol et Ripert 683 § 493.

Germany: 88 RGZ. 317, 433; 89 id. 385; 90 id. 68, 410; 99 id. 103; 103 id. 263; 106 id. 133. The doctrine followed therein, with its exceptions (infra n. 149) was initiated by Franz von Liszt, Die Deliktsobligationen im System des Bürgerlichen Gesetzbuchs (1898) 12-15.


Switzerland: 64 BGE. II 259; 67 id. II 136.
is not "accumulative" in this sense. Sometimes, it is true, there exists reluctance to admit concurrence. Thus, for instance, the Restatement of the Law of Torts, in a modern view,\(^{138}\) recognizes a tort liability when a lessor of land fails to make repairs that his contract calls for and the lessee is bodily harmed thereby; but it denies that there is a contractual obligation for damages.\(^{139}\) In a similar thought, the same Restatement carefully states a tort liability for negligence in performing \textit{gratuitously} promised services for the safety of another person, evidently on the assumption that when services are promised for consideration, the contractual claim takes care of the damages and no tort action is given.\(^{140}\) Such exclusion of rights should be confined to certain narrow common law situations.\(^{141}\)

Another difference of views concerns the nature of the concurrence. At common law, from the times when the plaintiff had to "waive the tort" for the purpose of suing in assumpsit on a fictitious contract, there seems to exist a strong tendency to think in terms of remedy rather than of rights and to offer the plaintiff the remedies only for his selection. Sometimes, the plaintiff's declaration of choice is even said to be final.\(^{142}\) In this country, the jurisdictions are divided. At present, however, many courts allow the injured to pursue both actions,\(^{143}\) and this is the prevailing Continental doctrine.\(^{144}\) Therefore, the plaintiff is entitled to all

\(^{138}\) See Harper, Torts § 103 n. 84.

\(^{139}\) § 357.

\(^{140}\) § 325.

\(^{141}\) On the reluctance of a part of the American courts to recognize that the modern liability of carriers for safe transportation may produce contractual as well as tortious effects, see infra p. 291.

\(^{142}\) See Prosser, Torts 1127 n. 12. Similar views occur in Latin America, e.g., Carvalho Santos, 3 C. C. Brasileiro, supra n. 2, 317 No. 4.

\(^{143}\) See Prosser, Torts 202 n. 85; Williston, 6 Contracts § 1528.

\(^{144}\) Germany: 63 RGZ. 308; 87 id. 309; 88 id. 317; 88 id. 433; 89 id. 385; 90 id. 68, 410 etc.

Switzerland: 26 BGE. II 105; 35 id. II 424; 37 id. II 10; 50 id. II 378 sub (2).
advantages either remedy may afford him, as to facts to be proved, defenses, joint liability of defendants, statutes of limitation, extent of compensable material damage, reparation of nonpecuniary damage, vicarious liability of third persons, and so forth. In the United States, tort actions as a whole are considered to be the more advantageous remedies,\(^\text{145}\) while they are usually less profitable in Germany.\(^\text{146}\)

A similar relation exists with respect to the parties involved. A passenger injured in a railway accident may sue the railway company which sold him the ticket in contract, as well as the company on whose tracks he suffers harm in tort.\(^\text{147}\) Or one plaintiff may sue the defendant for tort damages, while another on the same facts claims a breach of contract by the defendant.\(^\text{148}\)

On the other hand, if the law of contracts restricts the extent of the promisor's duties, the French and German doctrines definitely infer that he cannot be deemed liable for more under tort law. Also, an English plaintiff is not allowed to disregard any limitation of liability under the contract by alleging a broader liability in tort.\(^\text{149}\) For instance, as a gratuitous deposit makes the bailee liable only for fraud and gross negligence under French and German laws,\(^\text{150}\) a simple failure of ordinary care in the custody is not enough to substantiate a tort action. The American courts that have

\(^{145}\) Prosser, Torts 1123. A similar opinion prevails in France.

\(^{146}\) Rabel (supra p. 228) 26.

\(^{147}\) Pollock, Torts 432.

\(^{148}\) Pollock, id. 437.

\(^{149}\) England: Salmond-Stallybrass, Torts 9, although not really supported by the case of 1933 cited ibid. note (i).

France: Cass. (Jan. 11, 1922) S.1924.1.105 and Note; Josserand, Les transports (ed. 2) 610 § 628: "La responsabilité contractuelle refoule la responsabilité délictuelle à laquelle elle vient se substituer, ... du moins dans la mesure où les rapports (des parties contractantes) sont fixés par la convention."

Germany: RG. (June 20, 1916) 88 RGZ. 319, 320 as generally interpreted.

Switzerland: BG. (May 21, 1941) 67 BGE. II 132, 137.

\(^{150}\) French C. C. art. 1927; German BGB. § 690.
borrowed from Roman law a similar restriction of the bailee's contractual liability, by the intermediary of Chief Justice Holt's doctrine,\textsuperscript{151} are likely to decide in the same manner on the tort aspect in the absence of statute, on the theory that the creditor has assumed the risk.

(b) \textit{Conflicts law}. Obviously, on principle, conflicts law ought to follow the described conceptions prevailing in the modern municipal laws that tort and breach of contract generate two independent and concurrent rights, also when the supporting facts (excepting the existence of the contract) are identical.\textsuperscript{151a} The correctness of this proposition is even more self-evident when the causes of action arise from a tort committed in one jurisdiction and from the breach of a contract governed by the law of another jurisdiction.\textsuperscript{152} In further conformity with this general approach, the injured may combine both actions, unless the court, following procedural rather than substantive considerations, restricts the plaintiff to a choice between the causes of action.

The American cases, unfortunately, lack consistency, but they seem to approach the same result. Apart from workmen's compensation, to be discussed separately,\textsuperscript{152a} they are mainly concerned with railway and carrier liability.

Injury inflicted on a passenger in a railway accident has always been held sufficient as a possible ground of tort. Several courts, however, following the lead of the New York Court of Appeals, have awarded damages on the ground that the plaintiff entered into a contract with the railway

\textsuperscript{151} Coggs v. Bernard (1704) 2 Ld. Raym. 909, 92 Eng. Re. 107; PROSSER, Torts 257.

\textsuperscript{151a} The Czechoslovakian Law on private international law of 1948, s. 48, expressly excludes claims based on violation of a contractual obligation from the conflict rule on torts. In accord 2 SCHNITZER (ed. 3) 598.

\textsuperscript{152} This argument has been pointed out by BARTIN, 2 Principes § 335. For Germany the obvious result has been briefly mentioned by M. WOLFF, IPR.

\textsuperscript{152a} See vol. III, ch. 42, p. 402.
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whose ticket he bought.\textsuperscript{153} Thus, the contract was a protection to the plaintiff, in the New York court, in a case in which the tort action was barred by statutory limitation at the place of wrong,\textsuperscript{154} as also in a Texas case where the tort action was frustrated by the plaintiff’s failure to give notice of his claim under the law of New Mexico, while the contractual claim was independent of this failure according to the law of Pennsylvania.\textsuperscript{155}

The contrary leading case of \textit{Pittsburgh Railway v. Grom}\textsuperscript{156} contends that “the duty of the carrier to use proper care in the transportation of the passenger is one imposed by law, and the right of action grows out of the liability which the law imposes rather than out of the contract of transportation.” The court construed this contract as evidenced by the ticket which contained no express promise of care or to transport the passenger in safety. We are, thus, in the continued presence of an ancient theory, which is evidently also connected with the idea that the tort is exclusively committed at the place where the injury occurs.\textsuperscript{157} More advanced thinking has realized that the ordinary carrier’s liability at common law also presupposes a contract of transportation, is implied in the contract, has to be read into it. The modern development needs a clear vision of the contractual fundament of accessory duties. It goes even farther, by acknowledging also the contractual ties between the customer and ulterior carriers.

It is interesting to compare with both views the international conventions on carriage of goods, and more recently also on transport of passengers, which support “actions arising out of the transport contract” against the railway of dispatch

\textsuperscript{153} See \textsc{Hancock}, \textit{Torts} 192, 193. \textsc{Robertson}, \textit{Characterization} 182 seems to advocate the same solution.

\textsuperscript{154} \textit{Dyke v. Erie R. Co.} (1871) 45 N. Y. 113.


\textsuperscript{156} \textit{Pittsburgh etc. R. Co. v. Grom} (1911) 142 Ky. 51, 133 S. W. 977.

\textsuperscript{157} \textit{Infra} Chapter 26 pp. 302ff.
or departure, respectively, the railway of destination, and "the railway on which the cause of action arose."\textsuperscript{158} The last mentioned action, despite its possible connection with the contract, is visibly based on tort.

An extreme variety of treatment appears in the cases concerned with misdelivery or delayed delivery of goods by carriers or of messages by telegraph companies, dating from the period before federal legislation regulated a large part of such business. The courts have referred to the law of the place of contracting, to that of performance, or to the law of the place of wrong, which again has been found either at the place where prompt and correct delivery should have been made or at the place where the negligent acts were done.\textsuperscript{159} The Restatement does not even mention contractual actions in this connection. The apparent inconsistency of the courts may be explained in part by their desire to help the plaintiff, because he lacks the benefit of the option that he ought to have. In the telegram cases of Arkansas, Leflar has demonstrated how this benevolence has been manifested in a striking manner. In order to allow recovery under Arkansas law, which annulled clauses exempting the telegraph company from liability, the Arkansas courts applied their own law as the law of contract to outgoing messages and as the law of the place of wrong when the delivery had to be made in the state.\textsuperscript{160}

The liability of employers for injury suffered by their employees, before the workmen's compensation legislation came into force, was clearly determined. The employee had


\textsuperscript{159} See \textit{Hancock}, Torts 194-198 and \textit{récusé} 199.

\textsuperscript{160} \textit{Leflar}, Arkansas Conflict of Laws 188 § 78.
the choice between the law governing the employment contract and the tort action governed by the law of the place of the accident. The courts maintained this liberal attitude in regard to the fellow servant doctrine and its counterparts; even if in the state whose law governed the employment the common law doctrine still barred suits on the contract as well as for the tort, the courts of this same state awarded tort damages upon the foreign law of the place of tort.\footnote{For cases see Hancock, Torts 207 n. 3.}

Stipulations for exemption from liability. Agreements "contracting out" or limiting the responsibility for tort, if they are not covered by international agreement, ought to follow appropriate conflicts principles concerning contracts. In fact, in the United States the question whether future personal injury claims can be reduced by agreement between a passenger and a transportation enterprise, is usually treated as a contract problem, although the claims themselves are regarded as tort claims.\footnote{Conklin v. Canadian Colonial Airways, Inc. (1935) 266 N. Y. 244, 194 N. E. 692; Oceanic Steam Navigation Co. v. Corcoran (1925) 9 F. (2d) 724. England: Jones v. Oceanic Steam Navigation Co. [1924] 2 K. B. 730. Quebec: C. P. R. v. Parent (1914) 24 Que. K. B. 193.}

Thus, the law governing a contract clearly is competent to answer the question whether a stipulation generally exempting the debtor from future liability is to be construed as including his responsibility under the theory of tort. Under the same rule, a waiver by which a debtor is released from his existent obligation arising out of tort, must be judged according to its own merits rather than to the law of the place of wrong. But the main problem, of course, is that concerning the permissibility of exemption clauses. This problem, commonly complicated in the courts by a rivalry between the law governing a contract and the public policy of the forum, may entail more difficulties when the law of the place of wrong prohibits an anticipatory renunciation of
responsibility for tortious negligence. Consistency and convenience require that the law governing the agreement should prevail.

12. Statutes of Limitation

In civil law countries the principle of the place of wrong extends, as a matter of course, to those limitations upon the time for bringing the action, that are regarded as a part of the substantive law of the place of wrong. The same ought to be recognized in American law.

The well-known difficulties, however, existing in this country with respect to general statutes of limitation, classified as procedural, make themselves felt in this matter. European courts, nevertheless, no longer hesitate to apply English and American limitations of this kind as a part of the English or American tort law, although some courts prefer their own periods of limitation if they are shorter than the foreign one. Certain American statutes barring suits upon an obligation barred by its proper law take the right way, provided they are not of the kind of the Wisconsin statute declaring that a claim for personal injuries shall be barred

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163 The problem has prevailingly been treated with respect to contracts, but is general. See FICKER, 4 Rechtsvergl. Handwörterbuch 386.

A problem of international procedural law concerning foreign torts has been discussed in two German cases, OLG. Stettin (Dec. 5, 1929) JW. 1930, 1882, IPRspr. 1930, No. 151, and OLG. Hamburg (Oct. 18, 1929) Hans. RGZ. 1930 A 682, IPRspr. 1930, No. 115; aff'd, RG. (July 8, 1930) 129 RGZ. 385, IPRspr. 1930 No. 156: An action brought at the foreign place of tort interrupts the period of limitation if they are shorter than the foreign one. Certain American statutes barring suits upon an obligation barred by its proper law take the right way, provided they are not of the kind of the Wisconsin statute declaring that a claim for personal injuries shall be barred

164 According to the usual formula, a statute extinguishing the plaintiff's right is applicable. More appropriate rules appear in the frequent statutes against entertaining foreign suits barred by the applicable law. See Note, 75 A. L. R. 203; HANCOCK, Torts 136, 137.

The limitation of twelve months for tort actions arising from accidents, under Lord Campbell's Act in England, has been applied, as the ground of action "entirely arose in England," Goodman v. London R. Co. (1877) 14 Scot. L. Rep. (1877) 449, 450.

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by the *lex loci delicti* "unless the person so injured shall, at the time of the injury, have been a resident of this state."166 This, indeed, is an illogical167 and narrow-minded public policy.

The topic is too broad to be discussed at this juncture.

13. Industrial Property

(a) **Territorial limitation of protected interests.** Patents are granted in every state for the territory of the state only. Hence, the rights accorded by a patent cannot be violated outside the state.168 The same is true with respect to trademarks169 and designs,170 barring the cases in which imitation constitutes liability for unfair competition. The existing international unions and treaties in these matters intend to assure these territorial limited rights to foreigners.

If, however, such a right is tortiously invaded in the territory where it is protected, a claim for damages on this ground may well be brought in a foreign court having jurisdiction over the defendant.171

(b) **Unfair competition.**171a Being of a different nature, liability arising from unfair competition is not bound to a certain territory. The law of the jurisdiction in which the competi-

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166 See 48 L. R. A. (1900) 639; 4 L. R. A. (N. S.) (1906) 1029; 51 id. (1914) 96; L. R. A. 1915 C, 976.
168 German RG. (Oct. 15, 1892) 30 RGZ. 52; WEISS, 4 Traité 502; HERM. ISAY, Patentgesetz (ed. 6, 1932) 230.
France: PICHOT, 9 Répert. 120 No. 111.
Germany: RG. (Sept. 20, 1927) 118 RGZ. 76 (against previous practice); (April 20, 1928) JW. 1928, 1456; RG. (July 1, 1930) 129 RGZ. 385, IPRspr. (1930) No. 156.
Italy: DE SANCTIS, 18 Rivista (1926) 127, 132.
170 WEISS, 4 Traité 509.
171 RG. (July 8, 1930) 129 RGZ. 385, against former cases, see NUSBAUM, JW. 1931, 428; BGH (Oct. 2, 1956) 22 BGHZ 1 (13).
tion occurs, governs the claim. When the Swiss Federal Council submitted the draft of the Swiss Law of 1943 on Unfair Competition to the parliament, it said: the law applies according to the general principles of conflicts law, that is, according to the law of the place where the wrong is committed, as well as by analogy to arts. 3ff. of the Penal Code. If an act of unfair competition is committed in Switzerland, this law applies. Hence, it applies also in case the act has effects not only on the Swiss market but also on a foreign market; the Swiss and foreign competitors are equally entitled to sue. This solution conforms to the obligations assumed by Switzerland in the Convention of Paris, of March 20, 1883. 172

The case of unfair competition alleged to have been committed by the use of a trade-mark is of particular interest. The practice of the federal courts in the United States has been recently clarified. The courts have taken jurisdiction and granted injunctions when a fraudulent scheme of unfair competition was carried out in essential part in this country, such as when upon a conspiracy undertaken in this country, barrels were sent unmarked from American ports and then marked abroad with the plaintiff's brand. 173 A complainant protected by an American trade-mark is also granted relief against a competitor who uses the mark in the United States for export to another country in which the complainant is likewise entitled to a trade-mark right against the respondent. 174 But if in the foreign country the defendant himself has the trade-mark right, the employment of the mark which will be consummated in this foreign country is

172 Message, 1942, ad C III 3 p. 19, see O. A. Germain, Concurrence déloyale (Züriich 1945) 134.
not considered to constitute unfair competition.175

The German Supreme Court, however, which had followed somewhat similar lines,176 more recently favors the application of its own domestic rules by multiple devices, on the assumption that the German rules repressing unfair maneuvers are particularly exacting. One principle held is that a plaintiff, having his principal establishment in Germany, can sue under German law, because his suffering damage there has constituted the forum a place of wrong.177 Later decisions advance the idea that, if both parties are of German nationality or domicil, they have to observe also in their foreign activities the mutual duties flowing from honesty of business as prescribed in the German law.178 Finally, places of wrong have been construed in Germany and Italy on various theories.179 The Dutch courts have resisted the temptation to adulterate the principle for any such reasons,180 but National Socialist writers made capital out of the nationalistic elements of the Reichsgericht decisions.181

175 George W. Luft Co. v. Zande Cosmetic Co. (C.C.A. 2d 1944) 142 F. (2d) 536, 540. On the difficulties of determining whether a federal court has to follow on this subject state conflicts rules, see also Kerner, J., in Philco Corp. v. Phillips Mfg. Co. (1943) 133 F. (ad) 663, and the annotation by Schoppföcher, Conflict of laws with respect to trademark infringement or unfair competition, including the area of conflict between federal and state law, 148 A. L. R. 139.

176 See RG. (June 5, 1928) Markenschutz und Wettbewerb 1927/28, 491ff.; (March 31, 1931) JW. 1931, 1904.

177 Decisions from 18 RGZ. 28, 31 (1886) to 108 RGZ. 9 (1923); see Melchior, 5 Giur. Comp. DIP. 86. The contrary thesis by Baumbach, Unlauterer Wettbewerb (ed. 2) 82 that this meant a trespass on foreign jurisdiction was approved by RG. in 140 RGZ. 29 (next note), but the theory is repeated in the literature.

178 RG. (Feb. 2, 1933) 140 RGZ. 25, 29, approving a thesis of Nussbaum, D.IPR. 340; the RG. was understood in this sense by OLG. Köln in 160 RGZ. 265. Also RG. (May 19, 1933) Markenschutz und Wettbewerb 1933, 446; (Jan. 10, 1936) JW. 1936, 129; and other decisions followed this approach. Cf. 7 Giur. Comp. DIP. Nos. 40, 41.


180 See Kosters 794 and n. 2.

181 Rudolf Schmidt, Ort der unerlaubten Handlung 183, 187 endorses all three contradictory theories of the Reichsgericht and surpasses them. A previous writer
Illustration. In a German case, 181a P. and D., both firms in Aachen, manufactured pins and needles of a certain kind and exported them to the United States. The defendant firm founded an American subsidiary corporation and advertised its needles in this country as "entirely American," "a truly American product," "buy American pins," and so forth, and agitated for boycott against the plaintiff company. The court considered that, if the defendant in Aachen participated in the acts or used the American firm as an instrument in America, it would be subject to the German law, because German merchants have to adjust their competition to this law even abroad. But also, if the defendant merely tolerated or approved the conduct in question, it violated its duty in Germany itself. Perhaps the authority of this case may be restricted to the liability of a domestic firm for torts of its foreign subsidiary companies. 182

These attempts to apply the law of the forum to foreign happenings, as usual, confuse equitable considerations with national peculiarities. What seems fair or unfair at a distant place, may not seem so at the forum. How can a German court judge foreign commerce by German standards? The court would have done better by insisting on ascertaining the American law on unfair competition, of which the published text of the decisions makes no mention. On the other hand, to burden the defendant with additional duties not owed by other merchants in the foreign market or to equip a national competitor with additional weapons, is contrary to the principles of economic equality. 183 The desirable pro-

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181a RG. (Feb. 14, 1936) 150 RGZ. 265.
182 Cf. Raape, IPR. (ed. 1) 327 n. 1.
183 De Sanctis, Rivista 1926, at 134.
motion of mercantile ethics should be pursued along the international road promisingly initiated by the Union of Paris.\textsuperscript{184}

This question whether merchants domiciled within the forum are bound to the domestic rules in competing abroad, has not yet been raised in American cases.\textsuperscript{185} It was under an essentially different aspect that certain famous decisions examined the application of the Anti-Trust laws to foreign business of American firms. In \textit{American Banana Co. v. United Fruit Co.},\textsuperscript{186} Mr. Justice Holmes, speaking for the Supreme Court of the United States, dismissed an action by an American firm against an American competitor in the banana trade, because the Sherman Act on which the action was based, being primarily a penal statute, was not intended to contemplate acts done in Panama and Costa Rica; the Court, therefore, contented itself with the statement that under the law of the place of acting, the acts of the defendant were no torts at all.\textsuperscript{187} In a later case,\textsuperscript{188} the Supreme Court granted relief by enjoining violations of the Sherman and Wilson Acts, on the assumption that the defendants had established a complete monopoly over the purchase and commerce of sisal, a product of Yucatan, obtaining excessive profits. The steps necessary to bring about these results were deliberately taken by the defendants, and the action was held to be based on "a contract, combination and conspiracy entered into by parties within the United States and made effective

\textsuperscript{184} Treaty for the Protection of Commercial Property, of Paris 1883, Bruxelles 1900, Washington 1911, and The Hague 1925 (revised London, 1934) in force in one of its phases almost throughout the world. Under article 10 bis the states are obligated to establish efficient protection against unfair competition.

\textsuperscript{185} This statement is supported by the discussion in the recent work, \textsc{Callmann}, 2 Unfair Competition and Trade Marks (1945) 1756-8.

\textsuperscript{186} (1909) 213 U. S. 347, 357.

\textsuperscript{187} The criticism of this case by \textsc{Hunting}, "Extraterritorial Effect of The Sherman Act," 6 Ill. L. Rev. (1912) 34 is inconclusive.

\textsuperscript{188} United States v. Sisal Sales Corp. (1927) 274 U. S. 268, 276. For other cases, see \textsc{Callmann}, supra n. 185, 1754, 1755.
by acts done therein.” Indeed, in the meantime between the two cases, the danger of international monopolies, frequently fostered by cartels, had been realized, and the potential weapons offered by the anti-trust laws were used more consciously. Such repression of monopolistic conspiracies is intended to protect the domestic commerce rather than the individual interests involved. The forum applies its public law with its reflections in private spheres. This development is fundamentally distinguishable from the idea of subjecting competing domestic firms to a domestic standard of behavior in foreign markets.