CHAPTER 26

The Place of Wrong

I. Survey of Solutions

THE rule that problems of the law of torts are to be decided in accordance with the law of the place of wrong presupposes a determination of the place where the wrong has been committed. The following illustrations show some of the many situations in which this problem presents difficulties.

Illustrations: (i) A letter containing defamatory statements about B, a person residing in Y, is mailed by A in state X and received by C in state Z.

(ii) A in state X sends poison concealed in candy to B in state Y. B takes the candy to state Z where he eats some of it, falls ill in state M, and dies in state N.

(iii) A, standing in state X, fires a gun and lodges a bullet in the body of B, who is standing in state Y.

I. Theory of the Place of Injury (The American Rule)

Under the traditional American rule, the wrong is considered as being done where the injury takes place.

The Restatement has expressed this rule in the following terms:

"Section 377. The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

Applying this rule to the illustrations stated above, we are informed that the place of wrong is where the defamatory letter arrives, where the poisoned person falls ill, and where the bullet meets the body. (That these answers are not quite obvious is a separate point.)

Although this rule has met with some substantial criticism and is contrary to the prevailing opinion of European writers, it thus far has commonly been taken as firmly established and supported by an "almost unbroken line of authority." While this is written, however, Max Rheinstein in a highly suggestive study has undertaken to destroy the doctrine of the Restatement and of the encyclopedias. His detailed historical analysis of the cases results in the finding that the rule has not been applied as ratio decidendi in all jurisdictions as often as lip service has been paid to it, and that the formation of the rule was unduly influenced by precedents regarding the demarcation of ordinary jurisdiction from admiralty cases, criminal cases, and cases dealing with local actions.

After this penetrating analysis, the traditional rule, applied in a mechanical way for such a long time, will have to stand the test of an examination according to standards of convenience. In the present writer’s opinion, much is to be said in its favor, but a few modifications seem to be suggested by comparative considerations.

What idea actually supports the rule in the American doctrine? Historically it may have originated in the field of interstate transportation and communication, as a simple device to identify the applicable law at the place where the physical impact occurs. This idea seems to conform well to the old construction that a carrier’s duty of care is not

2 Restatement, Note to § 377.
3 STUMBERG 184.
4 Note, 133 A. L. R. 260. However, S. 1346 (b) of the Federal Tort Claims Act, 1946, determines liability of the United States “in accordance with the law of the place where the act or omission occurred;” cf. Eastern Air Lines, Inc. v. Union Trust Co., 221 F. (2d) 62 at 80, cert. den. as to this conflicts question, 350 U. S. 911 (see 242 F. (2d) 950 n. 1).
5 RHEINSTEIN (supra n. 1); see in particular at 171 on the political case of 1811, Livingston v. Jefferson.
6 This is a kind suggestion by Yntema.
comprised in the contract of transportation without express stipulation. The view is exclusively focused on the time and place of the actual harm. The theory of vested rights found here an apparently suitable example. For advocates of this theory, such as its last (we hope) defender, Beale, it was natural that the injured person should acquire an indefeasible right at the moment in which all elements of a tort action are existent and hence the cause of action is born. While today the vested rights doctrine may be regarded as moribund, the conception still lingers in the mind of the courts that a tort must be localized at the place where its last element is added to the others, because then only a cause of action arises. An unlawful and faulty act is not a tort until it creates an injury.

"It cannot be denied that negligence of duty unproductive of damnifying results will not authorize or support a recovery."  

"Until all the elements are present a cause of action cannot arise, and the tort is considered as transpiring as a whole in that place where the combination becomes complete."

By an interesting though erroneous variant it has been asserted that "the locality of the act is deemed at common law to be the same as that of the damage."  

2. Theory of the Place of Acting (The Civil Law Rule)

The great majority of the European writers, followed by

7 See supra Chapter 24 p. 288.
8 Alabama, etc. R. Co. v. Carroll (1892) 97 Ala. 126, 11 So. 803.
9 Schermerhorn, Tennessee Annotations to the Restatement § 377.
10 Connecticut Valley Lumber Co. v. Maine Central R. Co. (1918) 78 N. H. 553, 103 Atl. 263.
11 Institut de Droit International (Munich, 1883) 7 Annuaire (1885) 129, 156; 2 Bar 120; Gierke, 1 Deutsches Privatrecht 234; 1 Zitelmann 112; 2 id. 480 (on ground of alleged public international law, but also the most elaborate writing on the practical effects of the theories in question); Walker 526; Neumeyer, 2 Int. Verwaltungs R. 48; cf. Raape 203 and IPR. 536; 2 Arminjon (ed. 2) 342 n. 2; Bartin, 2 Principes 416 (place of the "fait illicite générateur du préjudice"); Cunha Gonçalves, 1 Direito Civil 673. Contra, for place of injury, Batiffol, Traité 607; Niboyet, 5 Traité 151; Balladore Pallieri 253. Apparently also Benelux-Draft, art. 18 par. 2.
some courts,\textsuperscript{12} and statutes\textsuperscript{12a} define the place of wrong as that where the allegedly tortious conduct was carried out by the defendant. In the case of a commissive tort, this is the place where the actor has engaged in the bodily movements resulting in the damage. Under this approach, in our examples, defamation is committed where the letter is mailed, poisoning where the candy is sent, and personal injury where the shooting person stands.

This literature objects to the law of the "place of effect" that it is often difficult to ascertain, that effects may occur in a plurality of states, and that they may obtain at a place by accidental causation, to the surprise of the actor and possibly also of the victim. It is considered unfair that conduct should be subjected to a law the intervention of which could not be foreseen. Stated positively, the argument is that the actor is entitled to count on the laws of the state where he acts. While he has to obey these laws, he should be protected by them. The educational reasons of the laws that regulate human behavior and distribute the pecuniary effect of a damaging conduct are concerned with the acts or omissions rather than the effects in individual cases.

3. Elective Concurrence of Claims (The Reichsgericht Rule)

The German Reichsgericht has combined the first two theories. This court holds that a tort is committed in both the place where the actor engages in his conduct and the place where the effects of his conduct occur. The injured person may choose to sue under one law or the other; in each case,

\textsuperscript{12} Australia: Koop v. Bebb (1951) 84 Commw. L. R. 629 (in action for wrongful death where injury was inflicted in New South Wales but death occurred in Victoria, tort was said to be committed in the former jurisdiction).


Italy: App. Milano (Sept. 19, 1881) Clunet 1883, 73 (insertion of a libelous article into a newspaper).

\textsuperscript{12a} Czechoslovakia: Law of 1948 on private international law, § 48.


United States: supra n. 4.
the chosen law is applied in its entirety on the whole facts so as to determine all requirements of the cause of action and its effects. Hence, the victim is favored by being allowed to elect the law most advantageous to his demand, but he is not permitted to cumulate the benefits flowing from more than one law.\textsuperscript{13}

The formula employed in constant practice was first established in a plenary decision of the Reichsgericht in 1909, concerning the jurisdiction of the court at the \textit{locus delicti commissi}, but was soon extended to choice of law: "a place of tort is assumed to be wherever an essential part of the tort has been committed."\textsuperscript{14}

Applying this approach to the illustrative cases described above, the defamation (i) may be localized where the letter has been sent or where it was read;\textsuperscript{15} the poisoning (ii) where the candy was sent, where it was received, and where it was eaten;\textsuperscript{16} and the shooting (iii) at both the places of acting and wounding. In addition, also the places where the victim died, and where dependent persons lost maintenance, are eligible for the purpose of choice of law.

This view has been followed by the Swiss Federal Tribunal,\textsuperscript{17} and in a case of unfair competition (a field in which also the most characteristic German actions developed) by the Italian Supreme Court.\textsuperscript{18}

The arguments advanced by the Reichsgericht were precarious and easily criticized by the advocates of the place of acting. Theoretical support has finally come forth. Neuner\textsuperscript{19}

\textsuperscript{13} RG. (Nov. 20, 1888) 23 RGZ. 305; and constant practice. See Melchior 168 n. 3.
\textsuperscript{14} RG. (Oct. 18, 1909) 72 RGZ. 41; RG. (Nov. 8, 1906) 62 Seuff. Arch. No. 150; RG. (Jan. 30, 1936) JW. 1936, 1291, 1292; RG. (Feb. 14, 1936) 150 RGZ. 265
\textsuperscript{15} Cf. 23 RGZ. 306.
\textsuperscript{16} Cf. RG., JW. 1900, 477.
\textsuperscript{17} BG. (Nov. 6, 1896) 22 BGE. 1164; (March 6, 1914) 40 BGE. I 8, 20 (sending and arrival of a deceiving letter, in a criminal case but with general argument); (May 11, 1950) 76 BGE. II 110.
\textsuperscript{19} Neuner, Der Sinn 116; see also Schelling, 3 Z.russ.PR. (1929) 866; Raape 202ff.
remarks that a person doing a part of the tortious acts in
the state, or acting from abroad but effecting an injury in the
state, sufficiently deserves to be subjected to the responsibility
established therein. A sound international distribution of the
administration of justice allows that several states may concur
in suppression of tort. If a state regards conduct as non-
tortious, it ought, nevertheless, to tolerate a different view in
another jurisdiction where a part of the facts occur.

The same doctrine has been applied in Germany and other
countries to criminal\textsuperscript{20} and civil jurisdiction\textsuperscript{21} based on the
\textit{locus delicti commissi} principle.

4. Mixed Solutions

(a) \textit{Influence of the law of the place of acting.} The Re-
statement contains a section seemingly inserted against Beale’s
theoretical view,\textsuperscript{22} which expressly refers to the place of act-
ing. Where a person is required by law or authorized by a
privilege, to act or not to act in a state, he will not be held
liable for the events resulting from his act in another state.
The comment borrows an illustration from the old English
case \textit{Regina v. Lesley}\textsuperscript{22a} where a shipmaster was forced by
Chilean authorities to take a prisoner on board. The Restate-
ment suggests that the legality of the detention by the ship-
master be determined according to the Chilean law, although
the man, by the effect of concurring circumstances, had to
stay on the ship during the entire voyage; all other require-
ments would be governed by the law of the flag (replacing
the law of the place of wrong).

The other illustrations speak of a health officer burning

\textsuperscript{20} I \textsc{beale} 317 ns. 3 and 4; \textsc{rheinstein, supra} n. 1, 19 Tul. L. Rev. (1944) 196
(as to England and most American states); Italian Penal Code of 1930, art. 6;
\textsc{lilienthal}, Der Ort der begangenen Handlung, in Festgabe für Georg Wilhelm
Wetzell, Marburg 1890; see also 72 \textsc{rgz.} 43 footnote.
\textsuperscript{21} Germany: ZPO. § 32; RG. (Jan. 10, 1936) JW. 1936, 1291, 1292.
\textsuperscript{22} § 382. See \textsc{rheinstein}, 19 Tul. L. Rev. (1944) at 10.
\textsuperscript{22a} (1860) Bell C. C. 220.
infected rags and a sheriff shooting a fleeing murderer, so near the border that injuries result on the other side of the frontier.

This rule has been regarded as an inadequate attempt to narrow down the place of injury rule. It may, however, be questioned also from the contrary view, as going too far. Commonly, the mistake is committed to treat on the same footing cases where a tort is entirely done in one territory, although effects occur elsewhere, and where the acting extends to more than one territory. Certainly, there is justification for recognizing that the arrest of a man, quite as much as the seizure of an object, is no tort if it is lawful under the law of the place where the whole act has been done and completed. Any effects happening in another jurisdiction ought not to alter this postulate which, perhaps, may be generalized into an important rule involving all acts completely done in one jurisdiction and alleged to violate the "law": the "law" in question ought only to be that of the place where the act is entirely performed. While this is a necessary modification to any theory of the place of injury, it is not exactly the place of corporal movement per se that accounts for it; if the Restatement (illustrations 4 and 5) declares that someone shooting in state X and hitting a person standing in state Y enjoys privileges conferred by law X, this is a very doubtful proposition. We shall have to discuss below acts extending over several jurisdictions. Nor does the evident equity of the postulate hold good for the entire field of privileges and duties to act. Suppose, for instance, that the Chilean law in reality did not empower the governor of the province to give the order to the British shipmaster. Whether the latter's erroneous belief that he had to obey excused him

23 Rheinstein, 19 Tul. L. Rev. (1944) at 13.
24 See, for instance, the Netherlands: App. Leeuwarden (Feb. 6, 1929) W. 12014, Van Hasselt 309.
when he helped to deprive the plaintiff of his freedom need not necessarily be, and probably should not be, determined by the local (Chilean) law, by exception to the regularly applicable law of the flag.

The inspiration received from Regina v. Lesley suggests some connection with the English rule that the act must be unjustifiable under the lex loci actus, although also actionable at the English forum. However, all supporting English cases deal with acts entirely done in a foreign country.

Indeed, in the Lesley case it was stated as a separate offense that the continuing detention of the prisoner after the vessel left the Chilean territorial water, constituted false imprisonment by application of the British law of the flag. Thus, there was no aftereffect of the Chilean privilege on the high seas to be condoned because of the Chilean law. Neither do these decisions fortify the theory of the Restatement, nor is their own theory explained by the provisions of the Restatement.

(b) Influence of the law of the place of effect. On the other hand, a few writers who believe in the decisiveness of the place of acting have made an exception in favor of the place where the effects of a tort appear, when the acting person either intends the effects in another state or recklessly does not care where his acts take effect.\(^{25}\)

On another ground, Rheinstein has recently suggested that while on principle the law of the place of acting should govern, another state where the effects take place may, in virtue of its public policy, adjudicate a claim according to its own law of tort, provided that the actor could foresee that it would cause harm in that other state. Third states would not be, therefore, in a position to apply this latter law.\(^{26}\)

(c) Differentiated solutions. A remarkable suggestion was

\(^{25}\) HABICH 95; RAPE 206 (with restriction to cases involving the state frontier).
\(^{26}\) RHEINSTEIN, 19 Tul. L. Rev. (1944) at 31.
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made by Meili\(^27\) in 1902 and regrettably fell into oblivion. He knew the difficulty of finding a good formula for all cases and advocated different rules for fixing the place of wrong in the cases of seizures, press delicts, and defamations.

5. Differences of Policies

Another important contribution to our topic has been made by pointing out that the law of torts has a threefold social function and that the local contact of a tort depends upon the function most emphasized. The three functions are said to be the following:

“A primary purpose is to fix the standards of conduct of a person so he can know what he may do and what he may not do, and so that others can know what type of conduct to expect from him. This purpose of delimiting tort liability suggests that it is for the state where a person acts to determine whether his conduct and its consequences create liability.

“Another purpose . . . is to fix the measure of protection to which each person is entitled against his fellows. This purpose suggests it is for the state where the damage is suffered to determine whether the damage was wrongfully inflicted and gave rise to a right of action in tort. The recent extension of liability without fault with consequent emphasis on the protection of the injured party rather than on the wrongfulness of any conduct involved may indicate this purpose is the fundamental one in a wide part of the tort field.”\(^28\)

Third, the purpose to give compensation is thought to lead possibly to the state of the “injured person’s domicil.”

\(^{27}\) Meili 96. Already 2 Bar 120 n. 9 recommended a special rule for the press, pointing to the publication rather than the sending of articles. I would like to refer also to the (unfortunately unelaborated) observation of Fedozzi 760: If it is true that one who acts at a certain place must respect the provisions of the local law and incurs a liability by committing an illicit act according to this local law, it is no less true that, for determining the damages due to the victim of the illicit act, the place where the harm has happened must be taken into consideration. On the other hand, 2 Zitelmann 478-480 has rejected Bar’s suggestion as unfounded, and this seems to be the general opinion.

\(^{28}\) Cheatham, Cases 424; the authors mention as a fourth purpose “civil penology” which may play an additional role.
Except for this third approach, which no law has followed and which does not appear to be commendable, these remarks are thought-provoking.

Obviously, however, the bulk of the tort laws cannot be neatly divided into two groups, one of which, by virtue of a policy protecting private interests, would be appropriately allocated to the American rule, while the other, devoted to the prevention of undesirable conduct, would belong to the place of acting theory. Most tort laws are supported by both policies in an unascertainable mixture. Besides, if the same type of tort were to be characterized separately in each state according to a particular shade of policy, new difficulties would top the old ones.

Nevertheless, it is quite true, there are types of tort such as liabilities without fault which ought to be localized in a specific manner. It will appear, however, that their particular localization is not directly due to the policy and still less to the interest of the state, but to the technical shape of the obligation, although this, of course, is conditioned by both policy and interest considerations. For example, a railroad enterprise must commonly bear the damage done to passengers in an accident on its rails without the plaintiff’s proof that the management or the agents were at fault. The policy supporting such statutes is as much intended to lay a great part of the risk on the economically stronger party, as to adjust the unequal procedural situation in litigating against a complicated big industrial enterprise or to discourage railroads from negligent methods of operation. It is impossible to infer from one part of this policy a device for localization and not from the others. Yet, the purpose of the tort rule in which the legislative considerations converge is sharply expressed in the technical shape of an absolute or strict liability directly established on the fact of the accident. This, indeed, ought to be a strong reason for localizing this kind of tort. It is directly
centered at one place through the very purpose of the legislator, brought to evidence by the structure of the specific tort.

It will be opportune, first to analyze the significance of the various local contacts that may be produced by the several elements of a tortious liability.

II. The Place of Acting

1. Preparatory Acts

As in penal law, preparatory acts are distinguishable from the elements of the cause of action. Writing a defamatory letter, loading a rifle, designing an imitated trade-mark, are outside of the essential elements of defamation, killing, or unfair competition, although they may constitute by themselves independent offenses in other categories under distinct regulatory provisions, e.g., possession of dangerous weapons, counterfeiting, industrial espionage, or make an accessory liable in addition to the principal tortfeasor. Acts preparatory to a tort do not characterize it and, hence, are unable to localize a tort. Where, for instance, damages are sought for an unfounded arrest, the place at which the defendant affixed his signature to the power of attorney authorizing his lawyer to file the petition for the arrest, is immaterial.

This simple truth refutes many Continental authors and a few European decisions advocating the place where a letter containing a libel or unfair competition has been written and mailed. It is a different case where a defamatory letter has been "published" according to Anglo-American conceptions,

29 Germany: EBERMAYER-LOBE-ROSENBERG, Strafgesetzbuch (ed. 3, 1925) § 3 n. 12.
30 MEILLI 96.
30a Still more untenable is the assumption of a domestic place of acting in the German decision BGH. (July 13, 1954) 14 BGHZ. 286: already the mailing of an instruction by defendant in Cologne to its Belgian attorney requesting him to warn plaintiff, a Belgian company, in Belgium of certain acts, constitutes more than a preparatory act of unfair competition in Germany!
by dictating it to a stenographer or delivering it to a translator before posting.

2. Acts and Omissions

(a) Omissive torts. Acting in the field of torts is ordinarily conceived as a physical movement, one of the muscles or the nerves. Thus, the health officer burning infected rags, in the previously mentioned example of the Restatement, "acts" at the place of the burning. Correspondingly, omission, as an element of a tort species, is the failure to act by bodily movement. On the basis of their theory referring to the law of the place of acting, the European writers have been embarrassed by the question, how to localize an omission. They agree that an omission is committed where a duty to act exists but disagree on the state entitled to impose this duty. Is it the state where the alleged tortfeasor is present at the time and, therefore, would be able to act bodily?\(^{31}\) Or where he is domiciled?\(^{32}\) Or, after all, that of the injury?\(^{33}\) Or, does the criterion vary according to the circumstances?

To support the third solution, the following example has been discussed.\(^{34}\) A resident of London, the owner of a house situated in Vienna, is certainly liable for an injury to a passerby caused by a collapse of the building, according to the Austrian statutory provision (deriving, like many others, from the Roman *cautio damni infecti*).\(^{35}\) The problem cannot be determined by English law, which, by the way, produced an analogous remedy only after this discussion in 1934.\(^{36}\)

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\(^{31}\) 2 ZITELMANN 490.

\(^{32}\) 2 FRANKENSTEIN 370.

\(^{33}\) WALKER 527.

\(^{34}\) WALKER 527; 2 FRANKENSTEIN 370; RAAPE 208.

\(^{35}\) Dig. Title 39, 2; Austrian Allg. BGB. § 1319 (as of 1916); French C. C. art. 1386; German BGB. § 836.

This type of liability is unmistakably tied to the local situation of the building, irrespective of the place where the owner might have written an order for inspection or repair. The problem, in fact, materialized in the Belgian courts. A Belgian company owned a building in Germany which it failed to repair. A Belgian citizen was killed by its collapse. The court applied the national law common to both parties, in this case an evident mistake.

Similarly, the failure of a locomotive engineer to give a warning signal at a distance of three hundred yards before passing a street crossing, cannot be judged under any other standards than those offered at the place of the crossing. A state boundary running two hundred yards from the crossing cannot alter the duty.

On the other hand, if a man advises a friend to go with his family to a resort where infection by scarlet fever may easily occur, his duty of warning him, if any, cannot be imposed by the state of the resort but that where the advice is given. The negligent counsel, not the injury, in this case is the only possible basis of liability.

(b) Accomplices. A seizure of goods was sought and accomplished in British India on a pretended claim that later proved unfounded. Damages were asked in a suit against a firm in Bremen, Germany, and awarded under the German law, the construction being that this firm had caused the seizure by incitement. The German Reichsgericht likewise declared a German company liable, under German law, for unfair competition committed by its American subsidiary, where the German company "caused or decisively influenced" the conduct of its affiliate. If, however, the tort committed

89 RG. (Feb. 14, 1936) 150 RGZ. 265. The decision enumerates other facts leading to a similar liability, which have been considered supra p. 298.
by the chief actor was localized in India or the United States, it seems evident that the liability of an accessory to the act should be determined according to the same law.

3. Acting in Several States

Two groups of situations ought to be distinguished.\(^{40}\)

(a) *Separate torts in several countries.* The conduct of the actor may be carried on in more states than one as in the following illustrations:

(i) Defendant has inserted a libelous statement about the plaintiff in twenty newspapers, each of which is published in a different state;

(ii) Defendant, by carrying on propaganda in several states, has induced a group of employers throughout these states to lock out their employees;

(iii) Defendant has committed continued assault upon the plaintiff while he and the plaintiff were crossing a state line on a train.

A common characteristic of these cases is the plurality of acts each of which creates a tort. By mere logic, every partial activity is subject to its own localization. The results, however, under any ordinary method of localization, are inconvenient. Thus, under the place of injury theory, where a libelous article was inserted in a newspaper published in Hamburg, then a territory of Roman law, and circulated in various other places, the Hanseatic Appeal Court applied to each defamation its own local law,\(^{41}\) the damages being assessed separately for each territory. The decision would be the same under the prevailing approach in this country. Objections to such unsound complications are obvious.\(^{42}\)

\(^{40}\) Zitelmann 486.

\(^{41}\) OLG. Hamburg (June 11, 1897) Hans. GZ. 1898, Beibl. No. 146, cf. Lewald 263.

\(^{42}\) They are the same as in the case of a broadcast heard in several states, on which see *infra* 4 sub (d), pp. 320 ff.
Again, if the place of acting in its usual meaning should be followed, each tort is characterized by the place where a libellous statement has been dispatched to be published in a newspaper or broadcast and, similarly in example (ii), by that where the defendant has mailed his letters. This may practically simplify localization, but mailing is in fact only a preparatory act and, therefore, not characteristic at all of the tort.

A more adequate approach ought to be found, abandoning both contending theories.

(b) Single tort committed by partial acts in several states. In the same way as a criminal offense, an intentional tort may be committed by several acts connected by one volition. For example:

(iv) Firm A, for the purpose of competition with B, uses an imitated trademark in state X, publishes untrue statements concerning this trademark in Y, and sues B in a vexatious suit for annulment of the latter’s trademark in state Z. While each of these acts may or may not present an independent cause of action, they are normally made the subject of one lawsuit for damages on the ground of unfair competition.

(v) A railway brakeman negligently couples two cars in state X, and the train runs with the uncontrolled defect through states Y and Z, finally derailing. Or, a truck affected by engine trouble, due to the negligence of a garage employee of the owner firm, injures a person after passing a state border. No cause of action can be found unless all the elements of partial acting occurring in several states are added together. Where is the tort “committed” for the purpose of conflict law?

The only existing answer to this question by a legal text, article twenty-eight of the International Convention on the Transport of Passengers, in the case of death, injury, or delaying of passengers, refers oracularly to “the law of the state
where the fact has occurred"—which fact, we do not learn.

From the basis of their place of acting theory, German writers have discussed whether the place of acting should be defined as where the "most efficient part" of the conduct has been carried on; or whether conduct carried on in several states should never involve the actor in liability, unless it is actionable in every one of such states. While in the United States the place of wrong is usually defined as the place where the last part of the defendant's conduct is carried on, in Europe the place of its first part also has been considered.

In this country, in fact, all places of acting are generally disregarded. In a rare attempt of justification, the Mississippi Court, deciding the case in illustration (v), explained that the railway company is present everywhere in its network of lines, and any negligence committed is felt at the place where the injury occurs. "The locality of the collision was in Tennessee. It was there, if anywhere, that the company was remiss in duty, for there is where its proper caution should have been used." If this means that the places of negligent acts or failures to act may be unknown without altering the liability under the law of the place of injury, it is convincing. If, however, a definite cause has been proved, as supposed in the example, it is difficult to see why the railway could not be sued also under the law of the state where the fateful negligence was committed.

It is noteworthy that the same decision added with respect to negligence by active conduct: "Physical force proceeding

43 Convention of Berne, of October 23, 1924, art. 28 § 1; revised at Rome, on Nov. 23, 1933, see HUDSON, 6 Int. Legislation 568 at 579.
44 NEUMEYER, IPR 32; HABICHT 95.
45 Discussed and rejected by KAHN, 30 Jherings Jahrb. 119, 1 Abhandl. 120.
46 Nashville, etc. R. Co. v. Foster (1882) 78 Tenn. 351; Chicago, etc. R. Co. v. Doyle (1883) 60 Miss. 977; Cincinnati, etc. R. Co. v. McMullen (1889) 117 Ind. 439, 20 N. E. 287; Alabama, etc. R. Co. v. Carroll (1892) 97 Ala. 126, 11 So. 803; El Paso, etc. R. Co. v. McComas (Tex. Civ. App. 1903) 72 S. W. 629.
47 The Carroll case repeats the usual argument of injuries commenced in one state and completed in another.
48 Chicago, etc. R. Co. v. Doyle, supra n. 46.
from this state and inflicting injury in another state might give rise to an action in either state." Apparently, this court would not entirely disapprove of the German practice granting a choice between the laws of all jurisdictions where faulty conduct has occurred or harm is caused.

Among the suggestions contributed by the literature, the proposition deserves attention that the most characteristic part of the tortious activity should prevail in localizing the tort. More appropriately, not just some part of the corporal movements of the tortfeasor but the most characteristic element of the entire cause of action should indicate which is the decisive place and the law best qualified to govern.

4. Acting at a distance

(a) Means of acting in foreign jurisdictions. A person is generally said to act where his bodily movements occur. But how does such an approach conform to the epoch of telephone and radio? Half a century ago, the German Civil Code had already assimilated an offer made by telephone to an oral offer. The voice may be audible only to the person addressed. Messengers were used in most remote antiquity, and the Roman common law, thoroughly adverse to contracts made by agents, i.e., acting by another free person, opposed no obstacle to declarations sent by a "muntius" or, in other words, transmitted through a person as an instrument. A third equivalent situation derives from the concepts of criminal law: a responsible person—"indirect actor"—commits a wrong by compelling another person or inciting a child or lunatic, to do the material act.

In addition to the obvious, though in conflicts matters strangely neglected, application of these devices to tortious

49 Considerations of this sort, to my knowledge, have been only expressed by RAAPE 204 and IPR. 538; KOSTERS 794, on the spur of a decision of the Dutch Hooge Raad, mentions acting by an instrument at a distant place.

50 BGB. § 147 par. 4.
conduct, it has become fully recognized that a legal person may commit a tort by the act of its representative.\textsuperscript{51} Although vicarious liability has been incorrectly construed on the basis of agency,\textsuperscript{52} it also shows a case of liability for unlawful acts done by other persons.

Hence, the theory advocating the law of the place of acting is entirely antiquated, if it stresses physical movements. Not the locality where a person operates, but that to which his operations are directed, is material. A person who slanders another over the telephone does not commit defamation in the telephone booth, but rather where the words are heard.

(b) \textit{Letters}. Although some older European decisions have favored the place where a letter is written and mailed,\textsuperscript{53} the constant practice of the Reichsgericht,\textsuperscript{54} followed by courts of other nations,\textsuperscript{55} regards both the places where the letter is sent and where it is received, as places of wrong. The latter is often identical with that where the suit is brought and the law of which is applied. In this country, the cases reach the same result upon the theory that the injury, prevailing a defamation, is inflicted at the place of arrival and reception.\textsuperscript{56} But that a sender acts through the mail as instrument until

\textsuperscript{51} \textit{Supra} p. 128, \textit{cf.} p. 74 n. 28.
\textsuperscript{52} \textit{Supra} p. 272.
\textsuperscript{53} Bavaria: Oberappellationsgericht (March 16, 1847) 12 Blätter für Rechtsanwendung in Bayern 287: an injurious letter was sent from a place under German common law to a place of the Prussian Code; the injury is \textit{completed} at the place where the letter was written and mailed, since the sender was firmly convinced that the letter would reach the addressee.
\textsuperscript{55} RG. (Nov. 20, 1888) 23 RGZ. 305 (information about credit); (Dec. 21, 1900) 36 Seuff. Arch. 308 No. 175 (unfair competition); (Dec. 22, 1902) 13 Z.int.R. 171; (Dec. 2, 1921) 22 Markenschutz und Wettbewerb 61 (unfair competition).
\textsuperscript{56} Switzerland: BG. (March 6, 1914) 40 BGE. I 8 (criminal deceit by letter); (May 11, 1950) 76 BGE. II 110.
\textsuperscript{57} Restatement \textsection 377 note 5; Haskell v. Bailey (1894) 25 U. S. App. 99, 63 Fed. 873; \textit{cf.} HANCOCK, \textit{Torts} 252 n. 3.


the letter is delivered, is a construction familiar to the courts. Consequently, with a slight difference, we may emphasize the delivery rather than the reading of the letter and obtain a rule based on a time and place more easily evidenced. This is exactly what acting at a distance involves.57

(c) Suppliers. Another important example is furnished by the liability of suppliers to third persons without contractual connection, so remarkably developed in this country from Cardozo's famous decision in McPherson v. Buick.58 In Hunter v. Derby Foods,59 fatally spoiled canned goods were shipped to Ohio. The court applied the advanced law of Ohio, the decisive place being where the victim ate and died and not where the distributor shipped the food; the court compared the case to shooting a firearm across the state line or owning a vicious animal which strays over the state line. However, in this case, the place was identical with that to which the seller had shipped the food. Another case is particularly informative. To use the résumé by Hancock: "In Reed and Barton v. Maas, a coffee urn, which had been defectively constructed in Massachusetts by the defendant was sold by him to a caterer in Wisconsin. The urn, while in use by the caterer, spilled hot coffee upon the plaintiff in Wisconsin. Wisconsin law was allowed to define the legal position of the manufacturer-defendant."60

Suppose the caterer had taken the urn to Alaska or Iran or simply sold it to a colleague overseas. Would a customer injured there have an action, too, according to the local laws of these parts? The prevailing American form of the supplier's liability requires an injury to such persons as the supplier

57 Also CuNHA GonCALVES, I Direito Civil 673, an advocate of the law of the place of acting, teaches that defamation by a mailed letter is committed at the place where it is handed to the addressee.
59 (C. C. A. 2d 1940) 110 F. (2d) 970; Note, 133 A. L. R. 260.
60 (C. C. A. 1st 1934) 73 F. (2d) 359; Hancock, Torts 254.
would expect to be in the vicinity of its probable use and, thus, may prevent surprising references in conflicts law. In fact, the place to which the manufacturer or merchant ships the defective goods, marks the point where his responsible acting ends for the purpose of choice of law.

Recently the English Court of Appeal considered the sale by a New York corporation to an English distributor, of a product for destroying vermin, the property passing in New York. The American seller supposedly should have given warning that purchasers should be given proper written instructions respecting safe use of the product. When after a subsale in England, a farmer suffered damage from the product and obtained compensation from the buyer, an action for recourse based on tortious negligence was set aside because nothing had been done by the corporation in England. This would have been a correct decision only if the warning was due to a person in New York itself.

(d) Broadcasts, newspapers, and the like. Mass communication by broadcast and newspapers present analogous problems. The Restatement declares that harm to the reputation of a person is done at the place where the defamatory statement is communicated and, in case of a broadcast, where the broadcast is heard by people conversant with the plaintiff's good repute. Evidently, if the broadcast is heard in many states, the place of wrong may be multiplied. This seems the more so, as "publication," a requirement of libel or slander, is generally held to exist wherever the defamatory statement is heard and understood by any third person. A libelous newspaper article causes injury at the place of the original publication as well as at all places of circulation. European

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61 2 Restatement of the Law of Torts § 395.
63 Restatement § 377 note 5.
64 3 Restatement of the Law of Torts § 577; Harper, Torts § 236.
65 3 Restatement of the Law of Torts § 581.
courts have decided on the same lines. The Reichsgericht has argued that communication of a newspaper is analogous to that by a letter; the paper is sent to other places as a letter is sent. But an English court, even with respect to assuming jurisdiction "at the place where a tort has been committed," has conveniently added that an inconsiderable circulation of a foreign newspaper in England may be negligible.

With this feeble correction, all theories converge in the assumption of a multitude of places of wrong and in senselessly complicated procedural burdens on court and parties. In a few recent American cases, however, the disadvantage of such "checker-board jurisprudence," as Federal District Judge Wyzanski of Massachusetts called it, has been keenly felt. Asked for a decree to enjoin unfair competition by the use of trade-marks, he excluded "writing opinions and entering decrees adapted with academic nicety to the vagaries of forty-eight states." Likewise, Judge Learned Hand, in the Federal Second Circuit Court of Appeals, refused an injunction to safeguard the exclusive right of an orchestra conductor to broadcast disks of his phonographic records publicly sold, a right recognized only in Pennsylvania, while unauthorized reproductions would be lawful in the other states. Any injunction or broadcasting under such circumstances was considered as going entirely too far, since it could not be confined to hearers in Pennsylvania.

What law, then, should be applied? Should it be the lex fori, as was the principle adopted in the first-mentioned case? The facts of this case seem to warrant another theory

66 Germany: RG. (May 15, 1891) 27 RGZ. 418; RAAPPE 205.
67 RG., supra n. 66, at 420, 421.
68 Kroch v. Le Petit Parisien [1937] 1 All E. R. 725, C. A. The court, of course, concedes that technically circulation in England has occurred, but uses its discretionary power to refuse an order for service out of the jurisdiction.
68a Illustrative to the point of absurdity is Hartmann v. Time, Inc. (1947) 166 F. (2d) 127, cert. den. 334 U. S. 838.
70 RCA Manufacturing Co. v. Whiteman (1940) 114 F. (2d) 86.
71 This has been approved in the Note, 56 Harv. L. Rev. (1943) 298, 303.
tort to the same effect of applying the local law; the competition was evidently centered in the state. When an action was brought, in the same federal district court sitting in Massachusetts, to enjoin unfair competition committed by unlawfully reproducing horse-race charts in a newspaper, the conflicts rule of the state court was supposed to be in favor of the local law, for the reason that the defendants prepared all their material, and the greater part of the competition occurred, in Massachusetts. In an older leading case discussed above on unfair competition committed by the use of a brand which was protected as a trade-mark in the United States but not in Germany, the American court took jurisdiction and applied federal law, because the fraudulent conspiracy to affix the brand in Germany on barrels to be sent there, was conceived in the United States and the barrels were manufactured and filled here and shipped from American ports; in fact, the most important part of the activities was carried out within the jurisdiction. Of particular interest is another case where the circuit court of appeals in Chicago purposefully stressed the main charge to be the misappropriation of a business system, the essential of this wrong being the manufacture and sale of certain plates in Illinois. The circumstance that no tort was committed until the plates were actually used in a foreign state by customers, was declared merely incidental to the main charge and immaterial for the choice of law. This consideration rather than the application of the *lex fori* as such conforms to the most desirable rule. The only practical and theoretically justified solution is furnished by centering the tort in its most characteristic locality. In the

THE PLACE OF WRONG case of periodicals this is clearly the publishing house,\textsuperscript{75} in that of broadcasting, the office responsible for the radio transmission. A solution aside from conflict principles is found in the Uniform Single Publications Act, 1952, endowing the single-publication rule, according to which all publications of a defamation in the state accepting the rule give rise only to one cause of action, with extraterritorial effect.\textsuperscript{75a}

III. THE PLACE OF INJURY

1. Injury and Damage

In view of the argument popular among European writers that the place where a tort takes effect is a vague and uncertain concept and that such a place may be found all over the world, it is opportune to note the elaborate concept prevailing in the American doctrine and formulated in the Restatement.\textsuperscript{76} A tort is localized at the precise place in which it is completed by “harm” to a person or tangible thing, or, in a broader term, by “injury” inflicted on a protected interest. More closely, it is the first invasion of the interest that counts, the intrusion upon bodily integrity, a personal sphere, a land or chattel. Damage may develop from there on in various ways. The harm may increase or vanish, the losses caused may vary and change by proximate or remote consequences, normal or extraordinary combinations of cause and effect, intervening acts of the parties and of third parties.

Thus, once more, the antagonistic theories, referring to the place of acting and that of injury, respectively, partly agree. The events posterior to the injury do not produce significant local connections. Only the Reichsgericht finds it relevant that a person, bodily injured in state X, incurs

\textsuperscript{75} This has already been advocated by 2 BAR 120 n. 9; 2 MEILLI 96.
\textsuperscript{75a} The Act has been adopted in six states so far.
\textsuperscript{76} Out of insufficient knowledge, RUDOLF SCHMIDT, Der Ort etc., supra n. 1, at 184 invokes the American example as though it supported the application of the law of the forum in case damage has been suffered there.
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medical expenses in state Y, loses wages in Z, and leaves dependents in states L and M. This plain exaggeration has attracted most of the attacks that have been inadvisably directed against the entire doctrine of the Reichsgericht.

The later American cases concerning railway accidents consistently declare immaterial at what place the death of the victim occurs; only the physical impact on the body counts. A drug wholesaler in St. Louis, Missouri, sent ginger extract containing poisonous wood alcohol to a grocer in Oklahoma, who himself drank a bottle, and after having been removed to Missouri, died from the beverage. The court applied the death statute of Oklahoma according to principle. Most other cases follow the same line. A death statute is not construed as intended to apply to persons dying in the state, but to persons harmed there so as to succumb subsequently to the injury. Another consideration is fairness towards the wrongdoer, as his liability possibly would be increased if another law could be substituted after the deed.

However, all this is only a confirmation of the result that, in looking for the center of tort, we cannot find it in any event subsequent to the harm done.

Strangely deviating, however, in a well-known case of a passenger boat sinking on the high seas because of negligent navigation, it has been held that a passenger drowning in the ocean was not injured on the vessel but on the high seas and that therefore no action lay against the French company under the French death statute, whereas the general

77 Van Doren v. Pennsylania R. Co. (1899) 93 Fed. 260; Crane v. Chicago, etc. R. Co. (1908) 233 Ill. 259, 84 N. E. 222; Centofanti v. Pennsylvania R. Co. (1914) 244 Pa. 255, 90 Atl. 558. See moreover the cases cited by Hancock 255 n. 12.


79 See the Annotations to the Restatement § 377, for instance, those of Maryland and Minnesota.

80 See Hancock, "Choice of Law Policies in Multiple Contact Cases," 5 U. of Toronto L. J. (1943) 133, 138.
maritime law gave no action for death.\textsuperscript{81} But even if it had been proved that he jumped overboard to save himself, the injury would have occurred on the vessel. The court required death as the “substance of the injury,” instead of regarding death as a mere effect of the injury, a confusion that was frequent in the early construction of death statutes. But if the court had simply applied the French law, which is clear on the point, it would have correctly decided on the theory that the harm was done on the vessel when a passenger was forced to leave it, and that the place of his ensuing death was immaterial.\textsuperscript{82} The true rule has been expressed in an analogous case: “The crucial test is, where was the tortious act committed, not where were the damages consummated, ... although the final injury be completed elsewhere.”\textsuperscript{83}

Also, the Swiss Federal Tribunal has recognized that, in a suit for seduction of a married woman, the place where the husband suffered mental anguish is immaterial.\textsuperscript{84}

A right of privacy is invaded where the “plaintiff’s name and X-ray picture first became public property.”\textsuperscript{85} A libelous letter to be sent to Switzerland produces an injury to the addressee as soon as it is given to a translator.\textsuperscript{86}

\textbf{Deceit}. However, how can such ulterior damage be excluded from the process of localization when the tort, such as fraud or unfair competition, consists in the invasion of pecuniary interests? As the writers who attack the Reichsgericht doctrine emphasize, in such a case the injured interest is not located at one place only. The assets of the plaintiff may be dispersed over the whole earth. “Is the plaintiff’s

\begin{itemize}
\item \textsuperscript{81} Rundell v. La Compagnie Générale Transatlantique (1900) 100 Fed. 655.
\item \textsuperscript{82} See the correct statement by the Supreme Court on the French law: La Bourgogne (1908) 210 U. S. 95, 138.
\item \textsuperscript{84} BG. (June 15, 1917) 43 BGE. II 309, 316 sub 2.
\item \textsuperscript{85} Banks v. King Features Syndicate (D. C. S. D. N. Y. 1939) 30 F. Supp. 352.
\item \textsuperscript{86} Kiene v. Ruff (1855) 1 Iowa 482, 486.
\end{itemize}
estate situated wherever there are assets, or is it at his domicile, following the maxim, *res ossibus inhaerent?*\(^{87}\)

The remarkable solution suggested by the Restatement\(^ {88}\) seems to furnish the answer. It concentrates the cause of action for fraud in the place "where the loss is sustained, not where fraudulent representations are made." Beale reached this proposition by construing the case *Keeler v. Ley*\(^ {89}\) as distinguishing the place where the defendant induced the plaintiff to sell his land from the place where he conveyed it,\(^ {90}\) the latter constituting the situs of the tort. The authority is doubtful,\(^ {91}\) but Beale’s interpretation is consistent. The most characteristic fact, indeed, is that the plaintiff was swindled out of his property. Raape by an argument *ad absurdum* against the Reichsgericht, rhetorically asks where the effect of the tort should be placed when a plaintiff domiciled in Berlin loses a law suit at a court in Lyons, France, against a Spanish firm, because of perjury of the defendant who was a witness.\(^ {92}\) The Restaters would probably not hesitate to reply that the injury occurred in Lyons, while all ensuing damages in Spain or Germany would have no influence on localization. It was the mistake of the Reichs-

\(^{87}\) *Raape 203.*

\(^{88}\) Restatement § 377 note 4. This section has been applied, by analogy, by Callman, 2 Unfair Competition and Trade Marks (1945) 1749 § 100.2 (a), to cases of trade-mark infringement: the wrong would take place "not where the deceptive labels are affixed to the goods or where the goods are wrapped in the misleading packages, but where the passing off occurs, i.e., where the deceived customer buys the defendant’s product in the belief that he is buying the plaintiff’s.” But this is only the place where the deceit of the customer occurs and neither that of the trade-mark infringement nor of unfair competition, cf. *supra* Chapter 25, pp. 295 n. 169, 296.

\(^{89}\) *Keeler v. Fred T. Ley & Co.* (1931) 49 F. (2d) 872; (1933) 65 F. (2d) 499. On the basis of the Restatement, however, Judge Goodrich, in *Smyth Sales v. Petroleum Heat & Power Co.* (1942) 128 F. (2d) 697, 699 states that in the instant case the sale of plaintiff’s business for an inadequate consideration was the loss caused by the deceit, and applies the law of the state where the contract of sale has been executed.

\(^{90}\) 2 *Beale 1287.*

\(^{91}\) Rheinstein, *supra* n. 1, 178.

\(^{92}\) See *Raape 203.*
gericht to treat injury and damage on the same footing, a view that seems to be abandoned in the latest phases of dealing with unfair competition. 93

2. Injury and Acting

The efforts of the American doctrine to localize the tort have another interesting side. Bodily harm is deemed to be suffered where “the harmful force takes effect upon the body,” as when a bullet enters the body. 94 A tort against a piece of land is committed at its situs and against a chattel at the place where it is situated at the moment of the impact. 95 These commendable solutions will in many cases be indistinguishable from the result of a theory of acting at a distance.

A slight divergence between these two theories would occur if poisoning were located (following Beale) “where the deleterious substance takes effect (that is, the poisoned person falls ill) and not where it is administered.” 96 This solution, apparently devoid of any case authority, is inconsistent with the principle and highly impractical, nobody being able to state exactly at which moment an already poisoned man falls “ill.” But the court in the Darks case, mentioned above, 97 directly declined to apply the law of the place where the shipment arrived, namely at the business place of the grocer in Missouri, and applied the law of Oklahoma where the addressee drank from the bottle. The court there followed the traditional rule in express contrast to what we may call the law of the place of distant acting.

Damage by aircraft. Where damage is done to a person or property on the surface of the earth by or from an aircraft

93 140 RGZ. 25; see supra p. 297 and RAEPE, IPR 537.
94 Restatement § 377 Note 1.
95 Id. note 3.
96 Id. note 2; 2 BEALE 1288 cites Moore v. Pywell, supra n. 78, but this case is anything but clear.
97 Darks v. Scudders-Gale Grocer Co. (1910) 146 Mo. App. 246, 130 S. W. 430; supra n 78.
in flight over the territory of a state, such as by crash landing, falling or thrown objects, including jettison, the place of wrong, if any, cannot be conveniently located except on the territory of the injury done.\textsuperscript{98}

\section*{IV. The Structure of Torts}

\subsection*{1. Liability Without Proof of Fault}

(a) \textit{Absolute liability.} In a number of states, the statutory liability of a railway company to a person injured by an accident on its lines is based on the mere fact of carrying on a dangerous activity. That the train has a collision or a derailment then suffices to constitute the cause of action. Whether such a statute intends to protect injured persons rather than to impose on the railroads the necessity of establishing the safest system of equipment, organization, and personnel, is an academic question. Important for localizing the tort is the juridical isolation of the facts composing the cause of action from the human acts and omissions that caused the mishap. Through the technical structure of these torts, the obligation is rendered more independent of its cause, more "abstract," than is an obligation written in a negotiable instrument and thereby separated from its source. The accident alone characterizes the facts of the claim; the harmful conduct vanishes from the picture. For this reason, absolute liability cannot be claimed under any statute other than that of the state where the injurious accident happens.

There is no serious reason, however, why the injured per-

\textsuperscript{98} The national laws, enacted in the 1920's, have been so different as to menace reciprocal application by considerations of public policy, see SCERNI 365. The unification reached by the Rome Convention for the Unification of Certain Rules relating to Damages Caused by Aircraft to Third Parties on the Surface, of May 29, 1933, HUDSON, 6 Int. Legislation 334 No. 329, was a necessary step, but left important matters to conflicts, and has been ratified only by five states (Revue française de Droit Aérien 1947, 183). On October 7, 1952 an improved version of this Convention was signed (Revue française de Droit Aérien 1952, 423).

Brazil: Code on Air Navigation of June 8, 1938, art. 6.
son should not be entitled to request damages under another law for negligence, if this and its place are proved. It should be considered that laws establishing liability without fault very often limit the extent of recovery in contrast with the ordinary tort actions not so limited. In addition to well-known American statutes embodying a similar system, international examples of the modern technique are furnished by the Bern Convention on the Transport of Goods by Rail, whereby the carrier irrespective of fault has to bear a limited responsibility for loss and delay while he has to pay full indemnity for fraud or gross negligence, and the Rome Convention of 1933 and 1952, granting any person injured without his own fault on the surface of a territory by a flying aircraft a limited amount of damage by virtue of the mere fact that "the damage exists and that it was caused by the aircraft," and sets the limit aside, if the damage was caused by gross negligence or wilful misconduct.

(b) Strict liability. Between pure liability for fault and absolute liability for damage, modern statutes have adhered to middle systems of varied degrees of requirements. Even at common law there are instances involving the handling of dangerous substances, where the defendant must prove that no commercially practicable precaution was omitted. Such rigid liability, just as the very frequent type of statutory inversion of the burden of proof of negligence, is distinguishable from absolute liability which admits no excuse or only that of act of God, but practically reaches the same result in the great majority of cases. Accordingly, a suit against an innkeeper, a railroad company, a car owner, a laboratory,
allowed to be based on a rebuttable presumption of negligence, needs to be supported by the statutes of the place of injury.

Whether the statutes of this place should be applied only to railroads operating in the state, as the New Hampshire court has asserted in a case as famous as unsatisfactory in principle, may well be questioned. Sparks from a locomotive on the Quebec side of a frontier river set an international bridge spanning the river aflame. The court divided the bridge into separate halves, eliminating the Canadian law (which would govern under the theory of the place of acting) with regard to the American half, but also decided not to apply the New Hampshire statute as not including Canadian railways. Such a restrictive construction of statutes seems inconsistent with the theory of the place of injury.

2. Neighborhood Relations

(a) Flood. As illustrating the problems arising through vicinity of immovables separated by a state boundary, the case of Caldwell v. Gore deserves attention. The defendant as a landowner in Louisiana, according to the local law, owed the upper owners an absolute "servitude" (better expressed, a legal burden) of drainage. Contrary to this legal duty, he built a dam across a shallow depression through which water found a natural drain, and thereby flooded the land of the plaintiff situated upriver in Arkansas. As the law of Arkansas permitted the establishment of a dam, unless unnecessary damage was caused to a neighbor, the petition for removing the dam was good under Louisiana and bad under Arkansas law. The Supreme Court of Louisiana,

103 Connecticut Valley Lumber Co. v. Maine Central R. Co. (1918) 78 N. H. 553, 103 Atl. 263.

105 Missouri v. Johnson (1932) 175 La. 501, 143 So. 387, 144 So. 151.
applying its own statute, condemned the defendant. Various annotators disagree: whether the problem was one of property, in which case the decision would be a proper application of the *lex situs*;\(^{106}\) or one relating to tort, justifying the application of the law of the place of injury, that is, Arkansas;\(^{107}\) or whether Arkansas law should govern as the *lex situs* of the dominant piece of land;\(^{108}\) or the *lex fori* should apply.\(^{109}\) The following approach is suggested.

Among the landowners of the state, the Louisiana statute declared the building of the dam unlawful. A contravention would support an action for restitution of enjoyment and damages for the obstruction, an action seemingly based on the law of real ownership, after the model of the Roman *actio confessoria*, without resorting to tort principles.\(^{110}\) But even where the action for damages is construed as a tort action, as in most modern systems, the solution depends on the existence of a limitation to the ownership of the servient estate, which naturally is governed by the *lex situs* of this latter.\(^{111}\) Hence the only problem for the court should have been whether the statutes gave rights also to landowners outside the state. This could have been reasonably denied in view of the lack of reciprocity by the neighboring states. Foreseeing such cases, Bar denied the limitation on ownership under the law of a state by which a reciprocal limitation would not be recognized.\(^{112}\) But the Louisiana court chose the most liberal construction and thereby left no room for consulting the law of the damaged immovable. The place of acting

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106 Note, 7 Tul. L. Rev. (1933) 269.
107 Note, 32 Col. L. Rev. (1932) 1426.
108 Note, 81 U. of Pa. L. Rev. (1933) 466.
109 ROBERTSON, Characterization 228 n. 24.
111 Restatement § 231; 2 ZITELMANN 317, 328ff. requires that both laws involved establish the limitation.
112 1 BAR 629 n. 14; 2 id. 114 n. 1.
alone was decisive. Hence, in the converse case, a Louisiana landowner injured by changes in Arkansas land has no actionable cause, the defendant’s act being lawful.

(b) Mine damage. In an old case, the Reichsgericht dealt with a mine situation in Brunswick. As an effect of digging a gallery shaft, the water sources of an adjacent area in the territory of the Prussian Mining Law were dried up. The two laws established different periods of limitation for the action for damages. The court reversed a decision applying the Prussian Mining Law and held that the acts complained of were accomplished exclusively in Brunswick, under whose law the mine was operated, and did not go beyond this territory, even though damage affected land in another jurisdiction. This decision has been regarded as contradicting the Reichsgericht rule that allows the injured to base his claim on the law of the place of injury, but the situation is special. Mine laws are strictly territorial, not intended to be applied to foreign mines or soil. They decide the lawful or unlawful nature of acts as well as the liability for risk. This seems to be the right decision for any country.

3. Fault

In contrast with liability per se, the tort action supported by the evidence of a faulty act has the possible double local contact of the act and the injury, if not several more provided by partial acts leading to the injury.

(a) Intentional acts. An actor who intends to inflict the injury (dolus directus) or foresees the harmful effect as possible and approves of it in case it should occur (dolus indirectus), manifestly deserves to have his act treated as tortious under both the law of the place where the act is

113 RG. (Feb. 6, 1889) 44 Seuff. Arch. 257; followed by OLG. Köln (April 21 1914) Leipzig Z. 1914, 1140: damage by a Dutch mine to a Prussian building.

114 RAAPP 203, but see 207 No. 5.
intended to have effect as well as at the place where it reaches its effect. The law under which he physically acts will ordinarily cover no more than an ineffective part of the facts.

(b) Negligence. If the injury is not intended, but the act is intended to reach another territory, such as a letter, a newspaper, a broadcast, a shipping of goods, the result should be judged according to the law of that territory. Doubts are possible when a negligent person does not, and particularly when he cannot, reasonably foresee that his behavior will have harmful consequences in other jurisdictions. However, apart from the conflicts rules on tort, it should be considered that in any modern municipal tort law the court does not assume negligence unless a prudent person in the situation of the acting person would regard the injury—not the damage— as lying within the normally possible consequences of the act. Time and place are an essential part of the circumstances to be envisaged in this hypothetical judgment.

V. Conclusion

The number of jurisdictions with which the facts of a tort may be locally connected, much extended in the opinion of German courts, is considerably reduced if we eliminate on one hand all preparatory acts, such as, in the case of defamation, the writing and dispatching of letters and bodily movements designed to affect objects at another place and, on the other hand, the effects of a completed injury, such as, in the case of personal harm, death and pecuniary losses. Choice of law, consequently, is limited to the contacts realized by:

(a) The completion of tortious acts;
(b) Injury, i.e., the invasion of interests.

The traditional American rule following the latter local

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115 See RABEL, I Das Recht des Warenkaufs 504, against GOODHART, Essays in Jurisprudence and the Common Law (1931) 113ff.
connection is essentially nearer to this view than any other present conflicts law. The two places indicated, in fact, are in most cases identical.

Considering, however, that these places are different in significant cases, it would seem desirable to stress one or the other local connection according to the characteristics of the various liabilities. We have found that tort claims based on the right of vicinity or on mining law ought to be determined by the law of the place where the physical act is done. This represents a group of liabilities based on local restrictions to the freedom of acting. On the other hand, absolute and rigid liabilities for damages should be exclusively governed by the law of the place where the injury has been suffered. This does not exclude, in addition, giving an injured person an option between the liability for risk at the place of the injury and a liability for negligence otherwise localized and correspondingly governed.

Indeed, as a general rule, intentional torts and negligence are subjected most conveniently to the law of the place where tortious acting at a distance is completed, even when an injury ensues only at another place. The defect of an automobile or of a machine originating in a factory in state X may be the object of a tort action based on the fault committed in X, but such negligence cannot properly be said to have been committed in state Y, if it causes harm there. Nevertheless, the injury in Y may raise an action on the ground of mere risk under the law of Y.

Numerous groups of torts, however, need special localizations, according to their most characteristic territorial connections. Thus, fraud has been aptly localized by the Restaters at the place where the deceived person delivers his assets. Torts committed by press or radio should be governed by the law of the publishing house or the broadcasting office
directing the transmission. Unfair competition by misappropriation has been correctly held to be subject to the law of the state in which the most essential part of the wrongful behavior takes place.

Giving paramount importance to the place of "injury," we cannot reach in all cases the same results as through this individualizing method. Moreover, the American theory has necessitated in the Restatement a separate treatment of the question of lawfulness. Exceptions of this kind will be easily avoided, when the governing law is selected more carefully and, under this law, the local contacts of the particular case are duly evaluated for judging the guilt of a defendant acting in the province of a foreign law.

More individual answers to single problems would be desirable. The courts presumably would more readily follow rules appropriate to particular situations than a radical change which, in this country, does not seem warranted.