CHAPTER I
Development of the Law Respecting Foreign Torts in England

SECTION I
ASSERTION OF JUDICIAL JURISDICTION OVER FOREIGN TORTS

The first step taken by the courts toward the development of a choice-of-law theory was the assumption of jurisdiction to try actions for torts committed outside England. The old rules relating to the venue of actions raised an obstacle because they required the plaintiff to state carefully the place or places in which the facts of the case occurred. These rules had come into existence at a time when juries were supposed to decide issues of fact by their own personal knowledge. It was therefore necessary to summon a jury from the very place where the facts transpired. As the jury slowly became a judicial body which elicited the facts from the evidence at the trial, these rules ceased to have any purpose or value. Their strict application was relaxed in what were known as transitory actions. Distinguished from transitory actions were local actions. Local actions have been defined as those in which the facts have a necessary connection with a particular locality, e. g., an action to recover possession of a house in Trumpington. In local actions, the plaintiff had to state the venue accurately. But in transitory, i. e., non-local actions, this rule was not strictly enforced. Even in transitory actions the plaintiff was required to state some venue for the facts. But although the venue stated in a transitory action was not the true venue, the court might refuse to permit the defendant to object.

This was the state of English internal law in the sixteenth century. When the common-law courts decided to entertain
actions arising out of contracts made outside England or wrongs committed outside England, they faced the problem: how should the venue be laid in such a case? The ancient law of venue really forbade the trial of such an action. If the facts occurred outside the realm, it would be impossible to summon a jury to try the case. But the sixteenth century common lawyers hurdled the obstacle, as was their wont, with a fiction. In cases where the operative facts occurred in a foreign place, the plaintiff was permitted to state their true locality, e.g., “in the city of Paris in France” and then to add, “to wit in the parish of St. Mary le Bow in the Ward of Cheap.” Needless to say, the defendant was forbidden to question the truth of this statement.

This extraordinary fiction was, however, only permitted in transitory actions. The recital of a venue in such actions had already come to be regarded as little more than a point of form. An additional fiction was no great matter. But in local actions, the fiction was forbidden. A true venue had to be stated and if it was impossible to state a true venue within the jurisdiction the action could not be brought.¹ For instance, an action for trespass to land was considered to be a local action because it involved a particular piece of land located in a particular place. Consequently it was impossible to sue a man in England for trespass to land outside England.

The law was summed up to this effect in *Skinner v. East India Co.*² (1665). Mr. Skinner, an independent trader in


²Skinner v. East India Co., (1665) 6 How. St. Tr. 710.

A rather faint objection to the trial of foreign torts in England may be also found in Dutton v. Howell, (1693) 1 Show. P. C. 24, 1 Eng. Rep. 17. An action was brought for false imprisonment in the Barbados. For the defendant it was argued that “this Action cannot lie because the Fact is not triable here; the laws there may be different from ours.” To which plaintiff’s counsel retorted “that the Action lies, for that ‘tis a transitory Action and follows the
the Indies, complained at the bar of the House of Lords that the East India Company had seized his trading post and confiscated his goods. The House asked the judges whether or not the plaintiff would have a remedy in the common-law courts. They gave the House a unanimous opinion:

“That the matters touching the taking away of the petitioner's ship and goods and the assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon by his majesty's ordinary courts at Westminster; And as to the dispossessing him of his house and island, that he was not relievable in any ordinary court of law.”

A final and emphatic assertion of the jurisdiction to try transitory actions for foreign torts was made by Lord Mansfield in the famous case of Mostyn v. Fabrigas upon the authority of which many American courts based their decisions to exercise a similar jurisdiction. The action was one brought against an ex-governor of Minorca for false imprisonment and other injuries committed in the island; counsel for the defendant suggested at one point that “the cases where the courts of Westminster have taken cognizance of transactions arising abroad seem to be wholly on contracts where the laws of the foreign country have agreed with the laws of England, and between English subjects.” This suggestion Lord Mansfield repudiated in his judgment, saying:

“But can it be doubted that actions may be maintained here, not only upon contracts, which follow the persons but for injuries done by subject to subject; especially for injuries where the whole that is prayed is a reparation in damages, or satis-

Person wheresoever he comes under the Power of the Common Law Process: And that a Man may as well be sued in England for a Trespass done beyond Sea, as in Barbadoes or the like Place, as for a Debt arising there by Specialty or other Contract: that no body but Prynne ever denied it and he did so only in case of Bonds dated there: That many Actions have been maintained and tried here for Facts done in the Indies notwithstanding special Justifications to them and the Trials have been where the Actions were laid.”

faction to be made by process against the person or his effects within the jurisdiction of the court? We know it is within every day’s experience. I was embarrassed a great while to find out whether the counsel for the plaintiff really meant to make a question of it.”

Lord Mansfield explained the fictitious venue with his characteristic common sense:

“The law,” he said, “has in that case invented a fiction and has said that the party shall first set out the description truly, and then give a venue only for form and for the sake of trial, by a *videlicet* in the county of Middlesex or any other county. But no judge ever thought that when the declaration said in Fort St. George, viz., in Cheapside, that the plaintiff meant it was in Cheapside. It is a fiction of form; every country has its forms which are invented for the furtherance of justice; and it is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented but for every other purpose it may be contradicted. Now the fiction invented in these cases is barely for the mode of trial, to every other purpose therefore it shall be contradicted, but not for the purpose of saying the case shall not be tried.”

At this time the declaration in an action of trespass usually recited that the defendant had done the acts complained of “contra pacem domini regis.” Lord Mansfield was a little concerned over the propriety of these words in cases where the trespass was committed outside His Majesty’s Dominions:

“With regard to matters that arise out of the realm there is a substantial distinction of locality too, for there are some cases that arise out of the realm which ought not to be tried anywhere but in the country where they arise; as in the case alluded to by Serjeant Walker: if two persons fight in France and both happening casually to be here one should bring an action of assault against the other it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution, it must be laid to be against the peace of the king; but the breach of the peace is merely local
though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects.”

But in *Raphael v. Verelst*⁴ (1776) the Court of Common Pleas awarded damages for a trespass alleged to have been committed in the dominions of an Indian prince. The court said that “although in all Declarations of Trespass it is laid *contra pacem regis* yet that is only Matter of Form and not traversable.”

Thus, on the eve of the American revolution, there was substantial authority in the English cases for the view that, for injuries inflicted outside England or even outside the realm, an action might be maintained in an English court. This idea had been reconciled with the strongly territorial flavour of English procedure upon all points save one: the strict rule requiring a proper venue for local actions.

**SECTION 2**

**THE SITUATION IN WHICH THE LAW OF THE FORUM WOULD ALLOW RECOVERY BUT THE LAW OF THE PLACE OF WRONG WOULD NOT: THE JUSTIFICATION THEORY; THE OBLIGATION THEORY**

Having asserted their power to entertain these suits, the courts were faced with the more difficult problem of determining in what measure the law of the place of wrong ought to control their decision. There are two possible permutations involving differences of local and foreign law which may occur in an action upon a foreign tort. First, the law of the forum¹ may allow a recovery although the law of the place

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¹ In this study the expression “law of the forum” means the internal law of the forum, the body of rules applied by the courts of the forum in cases having no contact with any other jurisdiction. The expression “law of the place of wrong” means the internal law of the place of wrong.
of wrong would not do so. Second, the law of the place of wrong may allow a recovery although the law of the forum would not do so. The former of these two situations was the first one brought to the notice of English courts. In Blad’s case\(^2\) (1673) some English traders took proceedings against Peter Blad, a Dane, who had seized their stock of goods in Iceland. Blad petitioned the Privy Council for protection on the plea that the seizures were authorized by the King of Denmark. He apparently believed that this would be no defence in the ordinary English courts. Lord Nottingham (by his own account) stood up and said “that it was an injury to the subject to stay his proceedings at law and no injury to the Dane to let the suit go on, for whatever was law in Denmark would be law in England in this case and would be allowed as a very good justification in the action.”

This doctrine, that the defendant may “justify” his actions under the law of the place of wrong, stands out very prominently in the subsequent case of Dutton v. Howell.\(^3\) There the House of Lords had occasion to pass upon a claim by his deputy against an ex-governor of the Barbados, arising out of an attempt on the part of the governor and council to punish the deputy for his maladministration by imprisoning him. The arguments of counsel, reported at length, show clearly that both parties admitted Governor Dutton might rely upon the law of the islands to defend himself. The plaintiff merely directed his argument to proving that English common law had been imported by the first settlers as the law of the Barbados and ought therefore, to govern the case in hand. If the Governor asserted that the Barbadian law was different from the common law, let him prove it.

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\(^2\) Blad’s case, (1673) 3 Swan. 603, 36 Eng. Rep. 991. Subsequent chancery proceedings showed that the plaintiff relied upon certain treaties with the King of Denmark. Lord Nottingham decided that a matter of state was involved and enjoined the defendants from further proceedings at law. Blad v. Bamfield, (1674) 3 Swan. 604, Cas. Temp. Finch 186, 36 Eng. Rep. 992.

“It was further said, That the justification of such a Tort or Wrong ought to be according to the Common Law of England for that Barbadoes is under the same Law as England; ... For tho’ the Matter may justify him for an Act done there which would not justify him for the same Act done here, yet he must shew that he hath pursued the Rules of Law in that Place: or in case of no positive Laws, the Rules of Natural Equity: For either the Common Law, or new Instituted Laws, or Natural Equity must be the Rule in those Places.”

The House gave judgment in the Governor’s favour, without reasons.

In Mostyn v. Fabrigas⁴ the questions of jurisdiction and choice-of-law were both thoroughly discussed. To dispose of the first question Lord Mansfield merely reaffirmed the hundred-year-old doctrine of the Skinner case.⁵ Similarly his choice-of-law theory was couched in terms taken from the seventeenth century cases. “For whatever is a justification in the place where the thing is done, ought to be a justification where the case is tried.”

None of these early decisions make it clear just why the English courts were ready to recognize foreign laws as a defence. But the fact that that recognition was directed to assisting the defendant suggests that it was his interest which claimed the court’s attention. Perhaps it was felt that, if he had complied with the laws and customs of the land in which he found himself, it would be unfair to judge his conduct by English rules and standards simply because he happened to come “under the power of the common law process.”⁶ Perhaps, too, the courts were concerned, in some

⁵ Skinner v. East India Co., (1665) 6 How. St. Tr. 710.
⁶ This idea appears in the argument of counsel in Mostyn v. Fabrigas, (1774) 1 Cowp. 161, 98 Eng. Rep. 1021. They sought to have the plaintiff’s action dismissed because of the great inconvenience and difficulty which, they claimed, would be encountered in appraising the defendant’s conduct according to the foreign law.
degree, to respect the authority of the government ruling the territory where the wrong was committed. 7

In 1870 Mr. Justice Willes attempted to restate the English choice-of-law theory for torts in terms somewhat more comprehensive than those of the seventeenth-century formula. The case of Phillips v. Eyre, 8 which prompted this attempt, itself presented a nice question for legal dialectics. The defendant, an ex-governor of Jamaica charged

"The inconveniences of entertaining such an action in this country are many, but none can attend the rejecting it. For it must be determined by the law of this country or by the law of the place where the act was done. If by our law, it would be the highest injustice, by making a man who has regulated his conduct by one law amenable to another totally opposite. If by the law of Minorca how is it to be proved?"

And in Phillips v. Eyre, (1869) L. R. 4 Q. B. 225, 239, 38 L. J. Q. B. 113, Cockburn, C. J., explained the English choice-of-law rule as follows: "It appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in an English court. The rule, which obtains in respect of property and civil contracts—namely, that an act, unless intended to take effect elsewhere, shall as regards its effects and incidents, if a conflict of law arises between the lex loci and the lex fori, be governed by the former,—appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to the comity of nations in matters of law to which effect should, if possible, be given. An act might not only be lawful but might even be enjoined by the law of another country, which would be wrongful, and give a right of action by our law, and it certainly would be in the highest degree unjust that an individual who has intended to obey the law binding upon him should be held liable in damages in another country where a different law may prevail. Thus, an arrest and imprisonment might be perfectly justified by the law of a foreign country under circumstances in which it would be actionable here. It would be impossible to hold that in such a case an action could be maintained in an English court."

7 The notion that foreign law should be recognized upon the ground of comity or respect for the legal policy of the foreign state was made explicit in the case of Scott v. Seymour (Lord), (1862) 1 Hurl. & Colt. 219, 158 Eng. Rep. 865. At p. 232 counsel argued: "By the comity of nations the Courts of this country respect the policy of the foreign law and if that provides that no civil action shall be maintained for an assault, none is maintainable here." And at p. 236, Blackburn, J., said: "As at present advised, I think that when two British subjects go into a foreign country they owe local allegiance to the laws of that country and are as much governed by that law as foreigners." See also Westlake, Private International Law, Ed. 1 (1858) 222.

with assaulting and imprisoning the plaintiff in the course of a rebellion in that island, pleaded for his justification a retroactive act of indemnity passed by the Jamaican legislature. To this the plaintiff replied that, since the acts complained of were not justified at the time they were committed, there then accrued to him a vested right of action in the English courts, of which the legislature of Jamaica could not deprive him. It was, of course, a commonplace of English law in 1870 that colonial legislation could have no direct extra-territorial effect. Mr. Justice Willes met the plaintiff's argument with these words:

"This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action. The obligation is the principal to which a right of action in whatever court is only an accessory, and such accessory according to the maxim of law follows the principal and must stand or fall therewith. 'Quae accessorium locum obtinent extinguuntur cum principales res peremptae sunt.' A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. The terms of the contract or the character of the subject matter may shew that the parties intended their bargain to be governed by some other law but prima facie it falls under the law of the place where made. And in like manner the civil liability arising out of a wrong derives its birth from the law of the place and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere, unless by force of some distinct exceptional legislation, superadding a liability other than and besides that incident to the act itself. In this respect no sound distinction can be suggested between the civil liability in respect of a contract governed by the law of the place and a wrong."
His lordship discussed more particularly some of the older decisions on foreign torts and crimes. He then alluded to the well established rule in bankruptcy cases that "what is a discharge of a debt in the country where it is contracted is a discharge of it everywhere" and continued:

"So that where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, where an obligation, ex delicto, to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided."

To this conception of tort liability as an obligation created by the law of the place of wrong, a startling novelty in the English line of cases, his lordship ascribed no specific source. The analogy to a similar theory regarding contracts is explicit in the excerpt quoted and in other parts of the judgment as well. And the very same volume of reports contains the cases of Godard v. Gray and Schibsby v. Westenholz in which Mr. Justice Blackburn, following earlier decisions of Baron Parke, explained at some length that foreign judgments were enforced in England because they constituted binding obligations imposed by a court of competent jurisdiction. A similar approach to foreign tort liability had been adopted by Sir Robert Phillimore throughout his exhaustive and erudite opinion in The Halley. Another possible source of the doctrine is the first edition of Westlake, published in 1858, and cited before Mr. Justice Willes and his brothers

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9 See also Westlake, Private International Law, Ed. 1 (1858) §§ 171, 184.
12 The Halley, (1867) 2 Adm. & Ecc. 3.
in the Exchequer Chamber in 1862\textsuperscript{13} for the proposition that “every authority which traces the force of a contract, or of an obligation \textit{quasi ex contractu}, to the local law under which the agreement or the act is made or done, must of course be of equal avail to trace the obligation arising from a delict to the local law under which it is committed.”\textsuperscript{14}

But whatever its origin, this obligation theory now received the unanimous approval of the Court of Exchequer Chamber. Nor was it incorporated in its judgment as a mere ornamental display of academic learning; it stood as an integral part of the \textit{ratio decidendi}. To succeed in a suit based upon a foreign tort, the plaintiff must show an obligation to pay damages created by the law of the place of wrong. Here the obligation, if any, had been dissolved by the Jamaican act of indemnity. Hence the plaintiff failed. The court did not reach this result by an interpretation or application of the justification principle. Nevertheless it was duly rehearsed in an oft-quoted passage intermediate between the excerpts quoted above:

“As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.”

Of these two conditions, the first summarizes the doctrine of public policy announced in \textit{The Halley},\textsuperscript{15} the second is our traditional formula for the application of foreign law. To reconcile that formula with the newer theory of enforce-

\textsuperscript{13} In Scott \textit{v.} Seymour (Lord), (1862) 1 Hurl. \& Colt. 219, 158 Eng. Rep. 865.

\textsuperscript{14} \textit{Westlake, Private International Law}, Ed. 1 (1858) 222.

ing an obligation no attempt was made by Mr. Justice Willes. He let them stand side by side in his judgment where they have ever since offered a doctrinal choice for court and jurist.

SECTION 3

THE SITUATION IN WHICH THE LAW OF THE PLACE OF WRONG WOULD ALLOW RECOVERY BUT THE LAW OF THE FORUM WOULD NOT: THE FIRST RULE IN PHILLIPS V. EYRE

Hitherto in our survey we have considered only cases in which the law of the place of wrong exonerated the defendant although the law of the forum would have imposed liability upon him. In such situations the justification theory permits the defendant to make use of the law of the place of wrong as a defence. If it "justifies" him, he goes scot-free. The obligation theory indicates the same result. If the law of the place of wrong imposes no obligation upon the defendant there can be no liability.

There is, however, a second possible permutation of local and foreign law; the law of the place of wrong may give the plaintiff a cause of action although, under the law of the forum, he would have none. How should the court of the forum deal with this situation? The justification theory does not offer any very definite answer to this question. But the obligation theory clearly suggests that since the law of the place of wrong has imposed an obligation upon the defendant, the court of the forum ought to enforce it.

In the case of The Halley¹ (decided two years before Phillips v. Eyre²) the Privy Council laid down a sweeping proposition which very seriously curtails the power of English courts to enforce affirmative obligations in the tort field.

created by foreign law. The court had before it an admiralty action arising out of a collision on the river Scheldt in Belgium. Belgian law had obliged the defendant to put his vessel in charge of a special river pilot whose careless navigation had caused the accident. English common-law rules of master and servant would have exculpated the defendant, but under Belgian law he was none the less responsible. The trial judge, Sir Robert Phillimore, in a lengthy and scholarly judgment, observed that the Belgian rule, far from being contrary to natural justice, seemed to him rather more reasonable than the English one and that the latter was “founded upon special considerations of public policy applicable only to British territory.” He accordingly gave judgment for the plaintiff.3

The members of the Privy Council who heard the case on appeal did not share Sir Robert Phillimore’s views regarding the Belgian law:

“It appears,” said Lord Justice Selwyn, who spoke for the board, “that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense a servant of the Appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who, so far from being bound to receive or obey their orders, was entitled to supersede and had, in effect, at the time of the collision superseded the authority of the Master appointed by them.”

Were they under these circumstances to be held liable in an English court upon a principle unknown to English law? Lord Justice Selwyn’s answer was a quotation from Story: “it is difficult to conceive upon what ground a claim can be rested to give to any Municipal laws an extraterritorial effect

* The Halley, (1867) 2 Adm. & Ecc. 3.
when those laws are prejudicial to the rights of other Nations or to those of their subjects.” And he added that the courts of England would even disregard a foreign judgment *inter partes* “if it appears on the record to be manifestly contrary to public justice.”

When a court renders a decision upon a particular set of facts, it is always an interesting and difficult question to determine the ambit of its effect as a juristic precedent. In *The Halley* the Privy Council would appear to have decided that it was contrary to the policy of English law (as it stood in the year 1868) to enforce a particular right of action created by Belgian law. But the principle upon which this decision was reached was stated in very broad terms:

“It is, in their Lordships’ opinion, alike contrary to principle and to authority to hold that an English Court of Justice will enforce a Foreign Municipal Law and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.”

In the case of *Phillips v. Eyre* Mr. Justice Willes laid down two conditions governing actions for foreign torts, which have since acquired an almost oracular prestige in Anglo-Dominion jurisprudence. The second of these has already been discussed in the preceding section. The first epitomizes the doctrine of *The Halley*:

“The wrong,” said Mr. Justice Willes, “must be of such a character that it would have been actionable if committed in England; therefore in *The Halley* the Judicial Committee pronounced against a suit in the Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a pilot whom the shipowner was compelled by that law to employ, and for whom, therefore, as not being his agent, he was not responsible by English law.”

*Phillips v. Eyre,* (1870) L. R. 6 Q. B. 1, 28.
DEVELOPMENT IN ENGLAND

Criticism of this first rule in *Phillips v. Eyre*, and detailed exploration of its boundaries must be reserved for a later section. It may be of interest to note, however, that so far as reported cases show, the rule has never been actually applied by any English court to deprive a plaintiff of rights acquired under a foreign law. It has been frequently discussed in the courts of British Dominions.

SECTION 4

RECENT ENGLISH AND CANADIAN CASES

Although the English courts have, since 1870, enjoyed the luxury of two distinct, general choice-of-law theories, the specific problems to which these have been applied are comparatively few in number. One of the most interesting of these problems was presented by the case of *Machado v. Fontes*.¹ This was an action for libel, alleged to have been published in Brazil. The defendant sought to amend his pleadings by stating that under the law of Brazil, no civil proceedings for damages could have been maintained in respect of such publication. The Court of Appeal rejected this amendment as demurrable, on the ground that if the libel were punishable as a crime in Brazil, it would still be "unjustifiable" in the light of Brazilian law. Consequently an action could be maintained for it in England.

The court professed to reach this result by a careful consideration of the significance of the words "not justifiable" as used by Mr. Justice Willes in *Phillips v. Eyre*. Great emphasis was placed upon the two conditions which he laid down in that case. Lord Justice Rigby said he could not doubt but that the change from "actionable," in the first, to "not

justifiable,” in the second, was deliberate. From this he inferred that the latter must have been intended to be more comprehensive, covering acts which were criminal by the law of the place of wrong as well as those which would give rise to civil action. It seems rather improbable, however, that Mr. Justice Willes could have had the problem of *Machado v. Fontes* in mind when he formulated his famous sentences. His use of the words “not justifiable” might be explained more simply by the circumstance that they had been used by British judges in similar cases for almost two hundred years.

Whatever may be its relation to the justification formula, the decision in *Machado v. Fontes* can scarcely be reconciled with the obligation doctrine expounded in *Phillips v. Eyre*. What obligation did the court enforce in *Machado v. Fontes*? Brazilian law would have imposed no civil liability whatever upon the defendant. It might be argued that by attaching criminal law sanctions to the defendant’s conduct, Brazilian law had set up an obligation on his part to abstain from libelling the plaintiff. Such an argument strains the accepted meaning of the concept obligation which, as used by Mr. Justice Willes, connotes the duty to pay damages, not the duty to abstain from harmful conduct. None of the judges in the Court of Appeal made any attempt to reconcile their decision with the obligation theory, which, indeed, they completely ignored.

*Machado v. Fontes* has been criticized in many quarters chiefly because it is not consistent with the obligation theory. But however useful that theory may be, as succinctly sum-

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DEVELOPMENT IN ENGLAND

marizing the operation of choice-of-law rules in simple cases, it does not contain within itself the satisfactory solution of every problem in the field. Judicial experience shows that the obligation doctrine must be taken with qualifications and exceptions. We should not say a decision is wrong, merely because it cannot be subsumed under some sweeping principle. From a functional point of view, it might be objected that the result reached in Machado v. Fontes was unfair to the defendant. Although the law of the place of wrong would not have required him to pay damages, he was forced to do so because he happened to have assets in England. On the other hand, the court had a good reason for not letting him go free. He had (so the court assumed) broken the criminal law of the place of wrong. Perhaps, in view of this circumstance, Machado v. Fontes ought to be regarded as a rather peculiar case which called for exceptional treatment.

In Machado v. Fontes the Court of Appeal indicated that the plaintiff would recover damages measured by the ordinary rules of English law. The case has been regarded in some quarters as proving that in all actions based on foreign torts the law of the forum governs the measure of damages. But there is no need to draw this sweeping conclusion. It must be remembered that in Machado v. Fontes the law of the place of wrong did not provide any rule at all for estimat-

In M'Larty v. Steele (1881) 18 Scottish L. R. 266, 8 Rettie (Ct. of Sess.) 435, a case which was almost on all fours with Machado v. Fontes except that the acts complained of were not shown to be criminal by the law of the place of wrong, the second division of the Court of Sessions reached the same result. But M'Larty v. Steele would appear to have been overruled by the subsequent decision of the same court in Evans & Sons v. Stein & Co., (1904) 42 Scottish L. R. 103, 7 Fraser (Ct. of Sess.) 65.

3 See below, section 8.


5 See Falconbridge, Note, (1939) 17 CAN. BAR REV. 546; Willis, "Two Approaches to the Conflict of Laws," (1936) 14 CAN. BAR REV. 1, 20.

ing damages. Having decided, in the special circumstances of that case, to give a remedy notwithstanding, the court had no alternative but to resort to the law of the forum for guidance in estimating its award. It does not follow that this course would be adopted in a case where the law of the place of wrong provided its own rule for estimating damages. Machado v. Fontes, it is submitted, was an unusual case in which unusual steps were taken.

In two recent Canadian appeals, the Privy Council has found the brief justification formula equal to the complexities of such a modern problem as that created by workmen’s compensation legislation at the place of injury. Walpole v. Canadian Northern R. Co. was an action arising out of the death of a locomotive engineer. He was killed in British Columbia while working for the defendant company. Under the Workmen’s Compensation Act of that province, his dependents were entitled to compensation to be paid by the administering board out of an accident fund. This indemnity was granted in lieu of all their rights of action against the defendant. Here, however, the widow brought a common-law action in Saskatchewan. Her claim was rejected by the Court of Appeal there upon the ground that British Columbia law did not give her any rights capable of enforcement in another jurisdiction. The law of the place of wrong had provided her with a special remedy which could only be satisfactorily implemented by a particular tribunal. But Lord Cave, in formulating the advice of the Privy Council, preferred to take as his starting point the ancient precept: “the act must not have been justifiable by the law of the country where it was done.” He proceeded to interpret it as follows:

“It is unnecessary for the purposes of this appeal to consider the precise meaning of the term justifiable, as used by

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6 This problem is discussed at p. 213 below.
Willes J.; but, at all events, it must have reference to legal justification, and an act or neglect which is neither actionable nor punishable cannot be said to be otherwise than justifiable within the meaning of the rule."

Since the widow had failed to show the defendants liable to either a civil action or a criminal prosecution in British Columbia, he confirmed the Saskatchewan court in dismissing her claim. While the result seems fair and practical, there is, as Cheshire has pointed out, an unfortunate use of language in saying that a railway company may be justified (even technically) in causing the death of one of its employees. Moreover, at no point does the reasoning of the Privy Council make it clear why an act which gives rise to a claim for compensation out of a fund is "justified," whilst one giving rise to a civil action for damages is not.

Even that distinction was removed in *McMillan v. Canadian Northern R. Co.*, where, the facts being in other respects similar, the compensation act of the place of wrong (Ontario) substituted for the civil action, not a claim against the board, but a special form of proceeding to be taken before it against the individual employer. Yet the Privy Council again gave judgment for the defendant railway company. They pointed out that, before the passing of the compensation act, the doctrine of common employment would have been a good defence to an ordinary civil suit in Ontario. Hence, they argued, the liability now enforceable by proceedings before the board,

"is not to pay damages for a wrongful act but compensation for an accident. The right to compensation is founded on accident simply, not on negligence or any other actionable wrong. The act complained of in this case was the act of a fellow servant which, by the law of Ontario, is neither wrongful nor unjustifiable so far as the employer is concerned and

8 CHESHIRE, PRIVATE INTERNATIONAL LAW, Ed. 2 (1938) 301.
in regard to which the employer may be justly said to be in­
ocent or excusable."

The presence or absence of an antecedent common-law liability seems a rather flimsy criterion for determining the plaintiff's rights. Would the result really have been different if the facts had not made the defence of common employment available, or if that defence had been abolished in Ontario prior to the passing of the compensation act? Would the re­

sult in either of these cases have been different if the plaintiffs had been able to show the defendant's negligence to be of a criminal character? Strong reasons of policy and convenience obviously demand a negative answer to these questions, but in the light of the peculiar type of conceptualistic reasoning employed by the Privy Council, such an answer is by no means assured.

In these recent cases which we have just discussed, the English courts seem to have taken great pains to make their decisions appear as irresistible conclusions reached by a somewhat intensive interpretation of the justification formula. One can scarcely read these cases without wondering just why the judges were so anxious to produce this illusion of automatic deduction, like a conjuror pulling a rabbit out of a seventeenth century hat. One is also tempted to wish that they had given a little more prominence to the practical reasons of social policy which might be advanced in support of their decisions.¹⁰

¹⁰ See the remarks of Beckett in his "The Question of Classification ('Qualification') in Private International Law," (1934) 15 BRITISH YEAR BOOK INT. LAW 46, 63 (footnote).
