CHAPTER III

Choice-of-law Policy

SECTION II

UNIFORMITY AS A CHOICE-OF-LAW POLICY

It is frequently said that choice-of-law principles are designed to secure uniformity. Perhaps the precise significance of this objective and its relation to choice-of-law principles can best be visualized in the light of a specific problem. A takes his friend B for an automobile ride. Due to A's careless driving the car runs into a ditch and B is injured. Having decided to bring an action against A, B will proceed to choose a suitable forum. He must be sure that the forum selected will undertake to exercise jurisdiction over A. And he will probably want to bring his action in a place where A has sufficient assets to satisfy a judgment. Let us suppose that he elects to sue in state X. It would be easy for the court there to decide the case according to the rules of its own internal law without considering how the courts of any other state might have decided it. But if every court took this attitude, B's power to recover damages would depend entirely upon his choice of a forum. A might be a man of means with property in a number of states. B could then select the state whose law was most favorable to him. Such a possibility would strike many persons as unfair. "Fairness to the parties," says Goodrich, "requires that the obligations created between them remain unchanged by fortuitous changes in the geographical locations of either until such obligations are settled or otherwise discharged."\(^1\) It seems desirable, therefore, that the court

of state X should attempt to cooperate with those of other states in arriving at a uniform solution of the A-B controversy. The court can do this by invoking some choice-of-law principle indicating a single legal system to whose rules all courts might resort in dealing with that controversy. The principle that tort claims are regulated by the law of the place of wrong would obviously be appropriate. Following out this principle, the court ought not to decide the case according to its own internal law unless the accident occurred within the bounds of state X. If it occurred in any other state, the law in force there should govern the decision.

Let us assume, however, that the accident occurred outside state X. Yet the court disregards the established choice-of-law principle, settles the case according to the law of the forum, and so reaches a result different to that which a reference to the law of the place of wrong would have prompted. If we accept the premise that justice requires uniformity, that result will be, to some extent, unfair to either the plaintiff or the defendant. It should be observed that the possibility of hardship to the defendant is greater than that of hardship to the plaintiff. A judicial decision in favour of a defendant which contravenes an established choice-of-law principle works a certain hardship upon the plaintiff. But a judicial decision in favour of a plaintiff which contravenes an established choice-of-law principle works a much greater hardship upon the defendant. This proposition, although perhaps not readily apparent, is one of fundamental importance in the conflict of laws. It deserves further elucidation.

We have supposed that the accident occurred outside state X but that the court of state X, disregarding the choice-of-law rule, has applied the law of the forum. Let us suppose further that whilst the law of the place of wrong would have permitted the plaintiff to recover, the law of the forum directs a contrary result. Thus the plaintiff is deprived of the opportunity to litigate his claim in this particular jurisdiction. But
he may have other strings to his bow. Perhaps he can bring a successful suit in some other jurisdiction, e.g., the place of wrong. His power to bring a second suit in some other jurisdiction would, of course, depend upon the attitude of the court there. The court of the jurisdiction in which the second suit was brought might take the view that the adverse judgment given in the first suit by the court of state X had settled the merits of the A-B controversy once for all. It might say that that judgment was res judicata against the plaintiff. But the court of state X can render this result a highly unlikely one. It can, if it wishes, make it perfectly clear that its judgment is based solely upon the rules of the internal law of state X. The court of state X has decided that, under the internal law of state X, the plaintiff has no cause of action. Nothing is said regarding his rights under the laws of other states. If he can convince some other court that his claim should be governed by the laws of state Y, the judgment rendered by the court of state X ought not to impede him. That judgment does not purport to determine in any way what the plaintiff's rights under the law of state Y may be. Thus the court of state X can refuse to enforce the plaintiff's claim according to the law of the place of wrong and, by making explicit the theory of their decision, leave him free to pursue his remedy in other jurisdictions.²

Suppose now, on the other hand, that the court of state X, in disregard of the choice-of-law rule, gives judgment against the defendant. He will be forced to pay plaintiff according to the terms of the judgment and he has no further means of redress. His liability is irrevocably fixed. Hence it would

²This attitude was taken by the Supreme Court of the United States in Slater v. Mexican Nat. R. Co., (1904) 194 U. S. 120, 24 Sup. Ct. 581.

In the United States the effect of a judgment as a conclusive determination of facts and legal rights between the parties is usually referred to the law of the state where the judgment was rendered. See Freeman, Judgments (1925) vol. 3, §§1394-13973 Conflict of Laws Restatement (1934) 533.

For further discussion of this problem, see section 16, below.
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seem to be particularly important that a court should not set aside a choice-of-law principle, the proper application of which would have the effect of protecting a defendant.³

This distinction between a foreign law which favours the plaintiff and one which favours the defendant is believed to have considerable significance in the conflict of laws although it has been frequently overlooked. We shall recur to it at various points in the subsequent pages of this treatise. At this point a few illustrations may not be inappropriate. Let us turn first to our historical review. We saw that in England, as early as the seventeenth century, the courts adopted the justification theory, which protects the defendant. In an English court the defendant may with certain exceptions employ any defence available under the law of the place of wrong. A plaintiff, on the other hand, can apparently get no advantage at all from the application of foreign law.⁴ He must in all cases show that “the wrong was of such a character that it would have been actionable if committed in England.” In brief, although English courts have long seen the importance of allowing a defendant to rely upon defences not recognized by English internal law, they have been notoriously slow to let a plaintiff collect a claim in England which English internal law would not give him. Does not this history suggest that the recognition of foreign defences is more pressing and important than the recognition of foreign claims?

When we considered the history of extraterritorial torts in America we found evidence of a development analo-

³ In Bradford Electric Light Co., Inc. v. Clapper, (1932) 286 U. S. 145, 160, 52 Sup. Ct. 571, Mr. Justice Brandeis said: “A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff’s substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defence under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.”

⁴ See above, section 3.
gous to that in England. Almost all the earlier cases involved the problem of a defendant who seeks to justify himself according to the law of the place of wrong. Dozens of decisions upon the death statutes established the proposition that the death statute of the forum imposed no liability upon a defendant who had caused the decedent’s death in an outside jurisdiction. Yet when suits were brought to enforce foreign death statutes, to establish claims by foreign law, they met numerous objections. For many years a plaintiff claiming under a foreign death statute had to surmount that judicial hurdle of uncertain dimensions, the similarity doctrine. And although that obstacle has vanished in most jurisdictions, its function is filled by an even more nebulous theory—“public policy.” The decisions which have clustered about this concept lend further support to our suggested distinction. “Public policy” often frustrates a plaintiff but it rarely hurts a defendant. There are many cases in which an action based upon foreign law has been dismissed on the ground that it is contrary to the public policy of the forum. But instances in which a court has struck down a defence based on foreign law for this reason are extremely rare.

A similar pattern is found in the cases on damages. Not infrequently a plaintiff’s compensation, estimated according to the law of the place of wrong, has been cut down to the amount which he would have recovered if his claim had been governed by the internal law of the forum. But the cases are few in which a defendant has been forced to pay damages greater than those which the law of the place of wrong would have authorized. In Slater v. Mexican National R. Co. it

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5 See above, section 6.
6 See below, section 18.
7 See below, section 26.
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appeared that the limitations of common-law procedure made it impossible for an American court to award the same damages to the plaintiffs which they could have recovered in the courts of Mexico, the place of wrong. In a Mexican court they would have received a long series of periodical payments. A Mexican court would have had power to stop these payments in the event of certain specified contingencies. The Supreme Court decided that it would be preferable to dismiss the plaintiff's action rather than to give him some substitute award which might be more burdensome to the defendant than the Mexican procedure.

To sum up the argument: ordinary notions of justice and equity suggest the desirability of uniformity in the settlement of legal controversies, wherever they may be litigated. Since each jurisdiction has different laws, courts have devised a number of choice-of-law rules which attempt to allocate the decision of each individual case to a particular legal system. One of these rules is that matters of tort liability ought to be referred to the law of the state where the alleged tort occurred. For the sake of uniformity this rule ought to be followed. If a court, in a given case, refuses to follow it and applies the internal law of the forum, the resulting decision will be inconsistent with the general choice-of-law practice and therefore, unfair to the party who would have succeeded had the choice-of-law rule been adopted. If that party is the plaintiff he may still be able to succeed elsewhere. If he is the defendant, however, he will be forced to pay damages according to the unjust judgment and will be unable to do anything more about it. Hence a court should be especially careful not to give an affirmative judgment awarding damages in violation

9 When a decision is given which is inconsistent with choice-of-law principles the responsibility usually lies with the court of the forum. It may, however, lie with the legislature of the forum.
of a general choice-of-law principle. That English and American courts have generally been careful to avoid such a result is shown by our historical survey of the subject and by various groups of cases.

Even in cases with an obviously foreign setting, courts often follow the law of the forum unless one of the parties requests a reference to some foreign law.\footnote{See Beale, Conflict of Laws (1935) vol. 3, p. 1679.} This practice would seem to indicate that such references are primarily made in the interest of the parties to the suit. Adherence to a choice-of-law theory may also be said to benefit the court slightly in the following way. If a court always applied its local rule in a particular class of cases and that rule favoured the plaintiff, the world would make a beaten path to its door.\footnote{See Shaw v. Postal Telegraph & Cable Co., (1901) 79 Miss. 670, 684, 31 So. 222.} It might be embarrassed by the great volume of business thus thrust upon it.

Two observations may be made regarding uniformity as an objective in the conflict of laws. In the first place, it will not guide us to a complete solution of the choice-of-law problem because it does not indicate any particular legal system. Where a well established practice of selection exists we may, presumably, approach uniformity by following it. But where the question presented is without precedent, we must go further afield for an answer. Secondly, the ideal of consistency in the treatment of conflicts cases is very incompletely realized. Sometimes different states apply different choice-of-law principles to the same fact problem. And even the most complete unanimity in choice-of-law theory is apt to be frustrated by a divergence in rules of procedure affecting the ultimate result. It would seem, therefore, that the obstacles to securing the identical decision of conflicts cases in all jurisdictions are formidable enough to warrant a willingness to
sacrifice it in some instances for other and less difficult objectives.\(^{12}\)

**SECTION 12**

**THE INTEREST OF THE STATE WHERE THE WRONG OCCURRED; THE NEED FOR A SIGNIFICANT CONNECTION WITH THE CONDUCT OF THE PARTIES**

With particular reference to the field of torts, the theory has been advanced that a controlling rule should be imported from the place of wrong because that jurisdiction appears to have the greatest social interest in securing conformity to it.\(^1\)

To a great extent tort liability, like criminal liability, is imposed by a state to secure compliance with prescribed rules and standards of conduct on the part of those who enter its borders. Whether or not those rules are there obeyed is a matter of greater importance to it than to any other state. Hence its laws ought to determine the legality of conduct within its boundaries wherever that issue may be raised. Of course, a state's interest in regulating behaviour there will not always find expression in the imposition of duties and liabilities. The community there may also deem it expedient to create privileges in favour of certain types of conduct, as where police officers are authorized to use force in preventing an escape, or injury necessary to save human life is permitted. In either event, other states, recognizing the paramount concern of that community in penalizing or exonerating a defendant, should attempt as far as possible to give effect to its policies.

This theory is reminiscent of the old doctrine that states


\(^1\) See STUMBERG, CONFLICT OF LAWS (1937) 182; Note, (1935) 44 YALE L. J. 1233; CHEATHAM, DOWLING and GOODRICH, CASES ON THE CONFLICT OF LAWS (1936) 411.
referred to one another's laws for the sake of international courtesy or comity. But the modern theory is more specific. The law of the place of wrong is not merely rehearsed by the court in a spirit of friendly deference. It is actually enforced by the court because the matter in hand is felt to be of more acute concern to the foreign community than to the community of the forum.

The reasonable expectations of the parties are not the least of the various factors to be considered in choosing a proper law. It would be inequitable to determine their rights and duties upon a principle whose application to their affairs they had no reason to anticipate. From this point of view the law of the place of wrong would seem to be a satisfactory choice. Most persons realize when they enter a jurisdiction that they are bound to comply with the laws in force there. A man who failed in this duty might well expect to be mulcted in damages. On the other hand, a man who succeeded in it might justly complain if he were compelled to answer for his conduct in a jurisdiction where different laws prevailed.