CHAPTER IV

Exclusion of Foreign Procedural Rules

SECTION 13

REASONS FOR EXCLUSION OF FOREIGN PROCEDURAL RULES

It is axiomatic in the conflict of laws that courts only apply foreign substantive law, eschewing that which is procedural or remedial,¹ that the law of the forum must govern all matters of procedure or remedy. The application of foreign law in compliance with choice-of-law principles is always limited by this general theory. In effect, it directs the courts to disregard certain classes of foreign rules, and to adhere instead to the ordinary principles and practices of their own internal law. An actual issue upon the point will, of course, only arise when, at some stage in a lawsuit, one party attempts to rely upon a rule of foreign law which conflicts with a rule of the local law. The question may then be raised whether or not the foreign rule ought to be excluded from the court's deliberations. This question might be phrased in any one of three ways, viz., is the local rule procedural? is the foreign rule procedural? does the subject matter of these rules relate to the remedy? But the practical issue is always the same; the court must decide whether the local or the foreign rule shall prevail.

What are the reasons for this exclusionary principle? Most authorities are agreed that it would be practicably impossible for the court of the forum to duplicate in every detail the performance which would be given by a foreign tribunal with the same suit before it. Until the court has decided that some

¹ For conflict of laws purposes the words "procedure" and "remedy" are usually assumed to have the same significance. In this study they are used interchangeably.
reference to foreign law should be permitted it has, of course,
no rules for guidance save those of its own internal law and
must conduct its adjudication accordingly. But even after the
proper external law has been selected, there may be certain
rules of that system which the court of the forum and its of­
ficers could not obey without expending a great deal of time
and effort. Thus it might be very difficult for the judges and
officials to adhere strictly to the rules of a foreign jurisdiction
in executing and enforcing judgments. If the court did not
confine its reference to foreign rules to those which it could
conveniently and expeditiously apply, the administration of
justice at the forum might be seriously hampered.

During the first three quarters of the nineteenth century
common-law courts were inclined to look askance at laws of
other jurisdictions which differed from their own. It seems
very probable that such laws were sometimes labelled “pro­
cedure” and excluded merely because they did not conform to
the law of the forum which from habit and experience the
court had come to regard as ideal.² Foreign doctrines are not
likely to be viewed with such naive hostility at the present
day. But when foreign doctrines are believed to be very harsh
or unjust, there is no need to reject them in a back door fashion
by calling them rules of procedure. They can be rejected upon
the more appropriate ground that they are contrary to the
public policy of the forum. Calling them rules of procedure
obscures the real reason for the decision to disregard them,
their repugnance to local ideals of justice.

However necessary this substitution of local principles for
foreign ones may be, it constitutes a serious impediment to
the attainment of certain objectives which choice-of-law rules
are supposed to seek. It plainly jeopardizes the ideal of
uniformity. The very fact that one of the parties to a suit has

² See STUMBERG, CONFLICT OF LAWS (1937) 147; Lorenzen, “The Statute
of Frauds and the Conflict of Laws,” (1923) 32 YALE L. J. 311, 327.
sought to introduce a particular rule of the law of the place of wrong may be taken to show that he expects to derive some advantage from its application. The importance of this advantage will depend upon the nature of the rule and the facts of the particular case. Had the suit been brought at the place of wrong, he would have obtained the advantage. The exclusion of a particular rule of the law of the place of wrong in this way may confer an abnormal benefit upon either the plaintiff or the defendant.

Sometimes a particular rule of the law of the place of wrong has been laid down by the courts or legislature of that state in order to protect an important social interest. The forum’s choice-of-law principle aims, in a measure, to recognize such interests. If a rule of this kind is excluded as procedural, the recognition of these interests will be prevented.

For these reasons certain writers have urged that the courts should try, so far as convenience in the dispatch of judicial business will permit, to apply as few local, as many foreign, rules as possible. Moreover, as we have observed, a number of recent decisions indicate that American courts are moving in this direction.

SECTION 14

THE PROBLEM OF CLASSIFICATION

The substance-procedure problem arises because the law of the forum differs from the law of the place of wrong. The problem becomes crucial with regard to particular conflicting rules of these two systems. Whenever the problem comes before a court, there is a foreign rule and a local rule which contradict one another. A lawyer, stating the question in formal language, might put it in any one of three ways, viz., Is the

8 See Stumberg, Conflict of Laws (1937) 148; Cook, "'Substance' and 'Procedure' in the Conflict of Laws," (1933) 42 Yale L. J. 333, 343.

4 Above, section 7.
foreign rule one of procedure or substance? Is the local rule one of procedure or substance? Is the subject matter of these rules one of procedure or substance? For instance, an action is brought upon a foreign tort. The local period of limitation for such a suit would be three years, the period laid down by the law of the place of wrong is five years. The defendant relies upon the local statute. It, in effect, conflicts with the affirmative rule of the foreign law that such a suit may be brought at any time within five years after the cause of action arose. The defendant might be said to have raised the question: is the local limitation of three years a rule of substance or procedure? Or, in a different form: Is the foreign rule allowing suit in five years a rule of substance or procedure? Or, in a third form: Does the subject matter of these rules (which we find to be in conflict), namely, limitation of actions, fall within the category of substance or the category of procedure? All these forms of statement are used by the courts.

Put in any of these three ways, the problem becomes what certain writers call a problem of classification (qualification, characterization). The court's task is to classify the local rule, or the foreign rule, or the subject matter as belonging to the class "substance" or the class "procedure." There may appear to be a certain discrepancy between the statements of the problem offered by various writers because they appear to be classifying different things. But no matter which formula we employ, the underlying problem is always the same. The court must decide whether the rule of the forum or the rule of the place of wrong shall prevail, and, as a consequence, whether one party or the other shall obtain the advantage.

It should be observed that all three of these formulae, although frequently used by courts and writers, are to a cer-

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1 See, e.g., Beckett, "The Question of Classification ('Qualification') in Private International Law," (1934) 15 British Year Book Int. Law 46. At p. 64 he speaks of "classification of the internal law of the forum"; at p. 72, of "classification of rules of foreign law."
tain extent incomplete and misleading. They are incomplete because they fail to make explicit the important social factors which must be considered in the solution of a substance-procedure problem. These factors we have already considered. A rule of the forum and a rule of the place of wrong conflict. To give effect to the rule of the forum will serve the court's administrative convenience. But choice-of-law policies demand the application of the place-of-wrong rule. None of these factors finds its way into any of the three classification formulae. These formulae suggest that the problem is merely one of logic. A rule or its subject matter is either substance or procedure. We must ascertain its true nature and classify it accordingly. To talk of the "problem of classification" is to accentuate this unfortunate notion that the problem is simply an exercise in deduction. An analysis of the problem which adopts this terminology is apt to focus the judge's attention upon the mental process of assigning legal rules to abstract categories. He may forget all about the social factors involved; in any event, the tendency of this terminology is to minimize their importance.

This is merely another particular instance of that recurrent phenomenon of legal thought which has been called "mechanical jurisprudence," "the tyranny of labels," "the squirrel cage of conceptualism." In discussing, in thinking about legal problems of all kinds, we are liable to become too much engrossed with the meaning of verbal symbols or formulae and the process of deducing logical consequences therefrom. Our concern with such matters may lead us to forget the social interests which are involved in our problems. The suggestion is ventured that, in conflict of laws, the dangers of me-

2 In section 13, above.
chanical logical thinking are greater than in other fields. The basic social functions of that collection of legal theories which we call the conflict of laws do not seem to be very generally understood by the legal profession. One does not expect a judge to give all the reasons for his decision in his opinion. But it is not an infrequent experience to feel, after reading an opinion in a conflicts case, that the judge who wrote it did not have a very clear conception of the policies and purposes which choice-of-law principles have been created to achieve. Perhaps the social interests underlying the conflict of laws are unusually obscure or subtle. However this may be, a court which does not fully appreciate the social implications of the case before it is very likely to fall into the rut of automatic deduction. It is accordingly submitted that if we must, in conformity to established usage, speak of the classification of legal rules or their subject matter, we should, at the same time, keep clearly in view the various conflicting aims and policies which ought to govern that classification.

The dangers inherent in the established terminology and the type of thinking which it engenders have been fully demonstrated by Cook. As he points out, the words "substance" and "procedure" are used by lawyers in a number of different connections. For example, we may say a certain rule is a rule of procedure because it is usually taught in a law-school course on procedure. Or we may say that a constitutional prohibition of retrospective laws does not apply to statutes which merely affect matters of procedure. But we must not assume that the word procedure, when used in connection with these internal law problems, has the same meaning as it has when used in the conflict of laws. The symbol is the same, but the problems are different. For example, statutes shifting the burden of proving contributory negligence have generally been classified as pro-

4 Cook, "'Substance' and 'Procedure' in the Conflict of Laws," (1933) 42 Yale L. J. 333. See also Cheatham, "Internal Law Distinctions in the Conflict of Laws," (1936) 21 Corn. L. Q. 570.
cedural in the sense that such statutes may be given a reto-
spective effect without infringing a constitutional prohibition
of retrospective laws. But it does not follow that a statute of
the forum disposing of the burden of proof ought to be classi-
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tions of expediency which lead the courts to permit the revival of statute-barred debts are totally different from those bearing upon the question whether or not a given rule of foreign law should be adopted. The word remedy should not be juggled about in such a way as to make the judicial solution of the first problem affect that of the second. Yet this dismally mechanical type of reasoning appears to have influenced an English court in one of the early cases⁷ and has probably affected the decisions of other courts too.

The suggestion is therefore offered that a court, in resolving a substance-procedure problem, ought not to be influenced by the fact that the word "procedure" or "remedy" has been applied to a particular rule of law in the process of determining some question which is purely a question of internal law. In other words, classification ought not to be governed by the internal law of the forum nor by the internal law of the place of wrong. It ought to be governed by conflict of laws policies.

SECTION 15

POSSIBLE BASES OF CLASSIFICATION CONSIDERED

In dealing with the so-called problem of classification, certain writers discuss extensively the question whether the classification ought to be determined by the internal law of the forum or by the proper law of the case, i.e., for the purposes of this treatise, the law of the place of wrong. As we have seen, there are three alternative modes of stating the classification problem. The elements of the problem are a rule of the forum’s internal law and a rule of the internal law of the state of wrong which conflict with one another. We may purport to classify the local rule, the foreign rule, or the subject matter of these rules. Our problem is to make a classification in order properly to apply the forum’s choice-of-law principle.

We must assign the conflicting rules or their subject-matter to the category of substance or the category of procedure, for the purposes of the forum’s conflict of laws rules. If we view this classification as a purely logical operation, there are three ways in which it might be carried out.

(1) We might adopt as the basis of our classification some classification of the local rule which has been made for some internal law purpose at the forum.

(2) We might adopt some classification of the foreign rule which has been made for some internal law purpose in the law of the place of wrong.

(3) We might adopt the classification of the foreign rule (if any) which the court of the state of wrong has made in dealing with a conflict of laws problem analogous to that which is now before the court of the forum.

In reading the works of writers on this subject it is not always easy to be sure which of these last two alternatives they have in mind when they speak of classification by the proper law. Let us consider, in order, each of the three methods which have been suggested.

The first method is classification according to the internal law of the forum. It is not very favourably regarded by most writers but Cheshire suggests that it must be adopted under some circumstances:

"It is clear that with one important exception secondary classification must be effected according to the lex causae. The exception is this, that if the result of classifying some English or foreign rule in the manner adopted by the foreign lex causae is to infringe a rule of English internal law which is

1 In speaking of classification according to the internal law of the forum we do not mean to imply that the rule of the law whose classification is in question will have been classified as substance or procedure for all internal law purposes. Within the internal law of the forum a particular rule may be regarded as "procedure" for some purposes and "substance" for others.

The same is true of the conflicting rule of the law of the place of wrong so far as its classification in the internal law of the place of wrong is concerned.
regarded in this country as a rule of procedure, then the Eng­lish classification must be followed.

"That this exception is justifiable cannot be doubted. It is inevitable that in the sphere of substance and procedure an English Court which encounters an English rule of procedure should adhere rigidly to its own principles of classification. No Court can be expected to disregard one of its well-established procedural rules merely because the particular action happens to contain a foreign element. . . .

". . . Normally the *lex causae* should be omnipotent, but this cannot be so if the result is to contravene an English rule of procedure. A Court which has consistently acted on the assumption that one of its own rules is procedural in nature can scarcely allow its view to be disturbed in a limited class of cases merely because a foreign court would have acted on a different assumption."²

No doubt Dr. Cheshire’s statement gives us a fairly accu­rate description of the usual practice of English courts. It is impossible to agree with him that this practice is justifiable or necessary. In the light of Professor Cook’s arguments it appears to be not only unnecessary, but undesirable because (as Dr. Cheshire admits) it often frustrates choice-of-law policies. What is necessary is that English courts (and perhaps Dr. Cheshire himself) should recognize the fact that “procedure” may have one meaning in English internal law and another in English conflict of laws. It is not, of course, suggested that the court of the forum should not take into account the policy and the practical effect of a rule of its own internal law. If, for example, a tort action were brought which would be barred by the forum’s statute of limitations (though not barred by the law of the place of wrong) the court might feel that the policy of the forum forbade the trial of such a stale claim. But the court should not rigidly adhere to its own statute of limitations merely because the statute had been said to “pertain to the remedy.”

⁸Cheshire, Private International Law, Ed. 2 (1938) 38.
The second method which has been proposed is classification according to the internal law of the place of wrong. This method is also within the gravamen of Professor Cook's argument. Suppose the court of the state of wrong has, in the course of solving some problem of internal law, called its statute of limitations a rule of "procedure." Why should that fact determine the classification of the rule for conflict of laws purposes? The court of the forum is not concerned with the nature of the rule in the abstract. Its problem is to decide whether or not the rule can conveniently be applied so as to further choice-of-law policies. Choice-of-law policies require the maximum possible application of the law of the place of wrong. The court of the forum could easily follow the foreign statute of limitations. Why should it decline to do so because, under very different circumstances, the foreign statute has been called a rule of "procedure?"

In addition to the criticisms which Professor Cook has levelled at all schemes for classification which are based upon internal law, this method is open to a further objection. It does not take any account of a very important practical matter, the administrative convenience of the forum. Suppose a particular rule of the law of the place of wrong has been classified, for some internal law purpose, as "substantive." Notwithstanding such classification, the court of the forum would have to reject the rule if its enforcement by the courts and officials there could not practicably be carried out.

An individual and special method of classification according

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9 When a writer speaks of classification by the foreign law or by the proper law of the transaction it is not always clear whether he means classification by the internal proper law or classification according to the conflict of laws principles of the proper law. For a suggestion of classification according to the proper law, see McClintock, "Distinguishing Substance and Procedure in the Conflict of Laws," (1930) 78 Univ. of Pa. L. Rev. 933; Harper and Taintor, Cases on Conflict of Laws (1937) 655; Robertson, Characterization in the Conflict of Laws (1940) 246. This method of classification appears also to be advocated by Cheshire with certain limitations. See Cheshire, Private International Law, Ed. 2 (1938) 38.
to the law of the place of wrong has been suggested by Harper. He appears to argue that the court of the forum ought to classify a particular rule of the law of the state of wrong as "substance" and so adopt it, if it embodies an important social policy of that jurisdiction. He puts the matter thus:

"If the policy of a state in regulating social intercourse within its borders and affording legal protection to certain interests of persons within the state represents such deep-seated convictions of fairness and justice as to require the same legal consequences by way of judicial action wherever recovery is sought, whether in the local courts or those of other states, this policy is expressed by characterizing a particular rule of law as a rule of 'substance' rather than 'procedure'. In such a case, the state having legislative jurisdiction over the acts or events and the parties involved, attempts to extend the application of the rules of its law to actions brought in the courts of other states.

"Accordingly, it would seem that the law of each state should determine what part of its own law is procedure and what part is substance. The policy of each state is expressed in its laws. Therefore, whether the policy of the state is of such a character that any given rule of its law should be regarded as substance or procedure is properly determined by the law of that state. Whether a particular rule of any state is by it characterized as substance or procedure very often presents an extremely difficult question. Several factors may indicate the policy which a state expresses in its legal rules." \(^4\)

It is impossible to quarrel with Harper's premise that the purpose and ideals underlying a particular rule of the state of wrong should serve as an inducement to the court of the forum to assist in its enforcement. But the substance-procedure problem cannot be solved upon this basis alone. There are other and more important factors to be considered also. In the first place, we must always take into account the administrative convenience of the court of the forum. No matter how preg-

nant with social policy a rule of foreign law may be, it must be classified as "procedure" and rejected if the technique of its application is beyond the competence of the forum's officials. In the second place, the important choice-of-law policy, uniformity, has its bearing upon the problem also. Suppose a certain rule of the state of wrong is brought forward by one of the parties. Nothing in the law or policy of the state of wrong indicates that this rule is there regarded as representing "deep-seated convictions of fairness and justice." If the sole purpose of the forum's resort to the law of the state of wrong was to respect and enforce the basic policies of that law, the court might safely classify this rule as "procedure" and ignore it. But there is still the ideal of uniformity to be considered. Neither party should be permitted to gain any advantage which the law of the state of wrong does not confer upon him. Hence the rule in question, notwithstanding its insignificance in relation to the policy of its home state, ought to be classified as "substance" and adopted at the forum.

Let us now consider the third possible method of classification: classification according to the conflict of laws principles of the law of the place of wrong. This would mean that any given rule of a state's internal law would always be placed, for conflict of laws purposes, in the same category. At first sight it might be thought that this method of classification would produce a desirable uniformity in the conflict of laws. Uniformity in the definition and application of choice-of-law principles is a very important conflict of laws ideal. But the rule that the law of the forum governs procedure is not a choice-of-law principle, it is the negation of choice-of-law principles. What is wanted is not its uniform application everywhere but its contraction to the minimum practicable limits. Classification by the conflict of laws principles of the state of wrong is just as objectionable as classification by the internal law of the place of wrong. Let us assume
that the court of the state of wrong treats its statute of limitations as a rule of procedure in conflicts cases. This means that the court will dismiss all suits barred by the statute regardless of their place of origin. If the court of the forum adopts this classification, it will disregard the state of wrong's statute of limitations in cases arising there. Such a course of action would directly contravene all choice-of-law policies. It would deprive the defendant of a clear ground of defence which would have been available to him if the case had been litigated in the courts of the place of wrong. Classification by the conflict of laws rules of the law of the place of wrong is also subject to the criticism that it is unworkable where the foreign rule is unsuitable for expeditious application at the forum. Under such circumstances the foreign rule would have to be rejected no matter how it had been classified in conflicts cases at home.

In the light of what has been said, we venture to conclude that a court, confronted by a substance-procedure problem, need not concern itself with any of these three proposed schemes for classification, nor with the question which one should be adopted. All of these schemes are deficient and unsatisfactory because they fail to take account of the social purposes of choice-of-law principles and the practical purpose of the doctrine that foreign rules of procedure cannot be adopted. They are also undesirable because they tend to obscure these important purposes and to draw the court's attention away from them. We venture to agree with Cook and Stumberg that the answer to the so-called problem of classification is, in reality, a very simple one. The court of the forum ought to restrict the category of procedure as much as possible and to give the law of the place of wrong the maximum possible application consistent with the due and effective administration of justice. American courts seem to be working slowly
toward this result. It is to be hoped that they continue to do so, and do not allow themselves to be led astray by any of the three theories whose defects we have attempted to demonstrate.

Another criterion, suggested by certain writers, for determining whether a foreign or local rule of law ought to be placed in the category of procedure should be noted. These writers divide the work of courts of law into two parts: (a) the process of ascertaining physical facts; (b) the ascription of legal meanings to those facts, the predication of legal relations. Only those rules and practices which relate to the fact-finding process ought to be regarded as procedural. Unquestionably this definition places emphasis upon a very striking distinction which it is possible to make between the various legal precepts coming into play in the course of litigation. In everyday argument and exposition lawyers almost invariably state their problems in terms of facts which are supposed to exist in the physical world. It can, therefore, be plausibly urged that the application of foreign law might most conveniently begin at the point where the court has before it a clear picture of acts and events. Before this point could be reached, however, the court might have to investigate a mass of evidence and decide disputed issues of fact. If this part of the proceedings were governed exclusively by the rules of the forum, and not by those of the proper law, one of the parties might gain a very decided advantage thereby, or some important rule of the proper law, pregnant with social policy, might be disregarded. In view of these undesirable possibilities, some courts have taken the trouble to follow certain rules of foreign law although they appeared to regulate the process of proving facts.

6 See sections 33, 35, below.
If we adopt complete uniformity as our theoretical norm we may say that whenever a rule of the law of the place of wrong is excluded as procedure an abnormal burden is placed upon either the plaintiff or the defendant. When the burden is placed upon the plaintiff, one of two things may happen. Notwithstanding his loss of whatever advantage the application of the foreign rule might have brought him, the plaintiff may succeed and recover a judgment. With this situation we are not presently concerned. The other possibility is that the plaintiff may lose his case. For example, the court may decline to follow the law of the place of wrong relating to limitation of actions and dismiss the plaintiff’s suit because it is proscribed by the forum’s statute of limitations.

Under these circumstances the plaintiff may desire to institute a second suit in some more favourable jurisdiction. It will then become necessary for the court there to decide whether the adverse judgment given in the former proceedings should be regarded as having settled the merits of the controversy. In order to ascertain exactly what matters were decided in the first suit the court will probably turn to the formal judgment and to the law of the first forum. In the example we have taken, the first judgment really decides very little except that the plaintiff cannot bring an action in that particular forum. It is important that the second court should know this. The suggestion is therefore offered that a court which, in dismissing an action, follows some local rule of procedure ought to make the basis of its decision perfectly clear. In this way it will facilitate the work of other tribunals which are called upon to determine the effect of its judgment.

This does not mean, of course, that in cases of this type the
court before whom the second action is brought will always allow it to proceed. Other factors would have to be taken into consideration besides the conclusiveness of the first judgment. In the statute-of-limitations illustration which we have used most lawyers would probably agree that the plaintiff ought to be given a second try.\(^1\) But there are good arguments to the contrary. He chose the forum for the first suit; ought he not to be content with the “procedure” there? Protracted litigation is undesirable for both parties. The plaintiff should not be allowed to whip the defendant from state to state, looking for a favourable forum. A court’s view regarding the propriety of a second suit would probably also be influenced, to some extent, by the nature of the procedural rule involved in the first one. Suppose the first court substituted its own rule relating to the burden of proving some particular issue for that of the state of wrong. It is most unlikely that another court would, under these circumstances, allow the plaintiff to retry the entire case. Such problems, although interesting, have been little explored as yet by courts or writers. We take note of them because they relate, indirectly, to the problems of this treatise.

SECTION 17

EFFECT OF EXCLUSION OF FOREIGN LAW: BURDEN ON DEFENDANT

The operation of the doctrine that foreign rules of procedure must be excluded will in some instances subject the defendant to an abnormal burden. The plaintiff, in such cases, is permitted to profit by his selection of a particular forum whose procedural rules help him to a recovery. Since the defendant will have no redress against an adverse judgment,

\(^1\) For discussion of this problem and citation of authorities, see FREEMAN, JUDGMENTS (1925) vol. 3, § 1397; PIGOTT, FOREIGN JUDGMENTS AND JURISDICTION (1908) part 1, p. 78.
this result is highly undesirable. Nevertheless, it has occurred in a good many cases. Perhaps the most notorious are those in which courts have disregarded the statute of limitations and allowed actions which would there be barred to proceed to judgment at the forum.¹

On the other hand, there is authority of a very high order for the view that when the operation of local procedure would press too hard upon a defendant, the attempt to enforce principles of the law of the place of wrong through the medium of that procedure should be completely abandoned. Without giving any final pronouncement upon the rights of the parties, the court ought to dismiss the action. It is not very easy to say just when this alternative course should be pursued because there are so few cases on the subject.²

The authority referred to is Slater v. Mexican National Railroad Co.³ Suit was brought in a Texas federal court to recover damages for a death occurring in Mexico. It appeared that in a Mexican court, the deceased's dependent relatives would have been awarded a series of periodical payments during the probable period of his life, terminable upon any one of several contingencies such as the marriage, majority, or attainment of economic independence of the beneficiaries. In the Supreme Court of the United States Mr. Justice Holmes wrote for the majority:

"The present action is a suit at common law and the court has no power to make a decree of this kind contemplated by the Mexican statutes. What the Circuit Court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong and was ex-

¹ See below, section 30.
² For further discussion of the problem of this chapter, see Consolidated Coppermines Corp. v. Nevada Consolidated Copper Co., (1926) 127 Misc. 71, 215 N. Y. Supp. 265.
³ See also the workmen's compensation cases discussed below, section 46.
cepted to specifically. But we are of opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statutes required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce a liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by article 225 concerning alimony, the right cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability."

Three members of the bench dissented. They inclined toward the view that the Mexican law of damages should be characterized as procedural and disregarded. "The extent of damages," they argued, "does not enter into any definition of the right enforced or the cause of action sought to be prosecuted." Mr. Justice Holmes rejected this fissiparous notion:

"The theory of the foreign suit," he wrote, "is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which like other obligations, follows the person and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. . . . Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving
the consequences to be determined according to the accident of the place where the defendant may happen to be caught." The plaintiff's action was accordingly dismissed.

This decision promulgates an important principle of conflict of laws and raises several interesting questions. Why did the court not carry on the adjudication in the customary fashion, substituting, where necessary, the rules of the forum for those of the place of wrong? Mr. Justice Holmes makes the answer quite plain; such a course would be unfair to the defendant. He would, in all probability, have been forced to pay higher damages than a Mexican court would have exacted. The case rests upon the basic ideal that the defendant's fate should not be determined according to the accident of the place where he "may happen to be caught." This reasoning suggests a further query. If the defendant can have the plaintiff's suit dismissed because the use of the forum's procedure might increase the bill of damages, may there not be other situations in which the defendant could claim to be protected against a very unfavourable procedural rule of the forum? Whenever the substitution of a local for a foreign doctrine deprives him of an unanswerable defence or renders his position especially precarious, the theory of the Slater case would appear to at least provide a basis for arguing that the court should decline jurisdiction.

Following the same theory in the opposite direction, we may be permitted to conclude that, if the element of hardship to the defendant had been removed from the constituent circumstances of the Slater case, the final result would have been different. Had the court been of the opinion that a common-law recovery could not possibly place a greater burden upon the defendant than would a Mexican decree, they would very likely have allowed the action to proceed. Such a result would be fair enough to both parties.4

4 See Conflict of Laws Restatement (1934) § 609.
Although the *Slater* case upholds one major conflict of laws policy, it does so at the expense of another. The defendant is secured against a liability more onerous than that imposed by the law of the place of wrong. But the plaintiff has been denied a remedy in at least one forum. The Supreme Court laid some stress upon the accessibility of the Mexican courts as a convenient place for him to wage his claim. Suppose he had shown that the Mexican courts would not exercise jurisdiction over the defendant or that the latter had no property there to satisfy their decree. Perhaps, under those circumstances, the court would have been willing to weigh the injustice to the plaintiff of leaving him without any effective remedy against the injustice to the defendant of subjecting him to a possibly heavier penalty. On such a basis a different decision might have been pronounced.

In *Mexican National R. Co. v. Jackson* the plaintiff suffered personal injuries in Mexico for which he sought to fix liability upon the plaintiff in a Texas court. The case differed from *Slater v. Mexican National R. Co.* in that the injuries to the plaintiff did not result in death. The Supreme Court of Texas dismissed his suit upon grounds similar to those adopted in the *Slater* case. The court also decided that the enforcement of the Mexican law would be contrary to Texas public policy. These two theories seem to have become merged in subsequent Texas decisions.

