DETERMINATION OF THE NATURE OF DEFENDANT’S CONDUCT

ONE of the prime factors which the courts take into consideration in imposing tort liability is the character of the defendant’s conduct which has caused harm to the plaintiff. For analytical purposes it is customary to distinguish three broad categories of conduct causing harm. A defendant may be held liable for harm which he has caused intentionally. Or he may be held liable for harm which, although unintended, was caused by reason of his negligence. Or he may be held liable for the harm which he has caused, irrespective of his intention or the care which he has exercised. Sometimes, for certain purposes, additional special categories are used; under certain circumstances a defendant’s liability may be made to depend upon whether or not he has been guilty of “gross negligence” in causing harm.

In various instances the rules of the state of wrong have been allowed to determine the species of conduct of which the defendant must be proven guilty in order to make him liable for harm which he has caused. A recent, and very clear example may be found in the “guest cases.” In some states the driver of an automobile is liable to a guest passenger for any injury suffered by the guest passenger which is due to the driver’s failure to use ordinary care and skill in handling the automobile. In other states the host driver’s liability has been diminished, sometimes by statute, sometimes by a process of judicial interpretation. To succeed in an action against the host driver the injured guest must show, not merely the lack of
ordinary care but something further; "gross negligence," "wanton recklessness," "culpable negligence." A number of cases have been decided in which the rule of the forum and the rule of the place of wrong were different. It has generally been held that the law of the place of wrong ought to determine the type of conduct on the part of the host driver which would give rise to liability.

When the rule of the place of wrong required only ordinary negligence and the rule of the forum required some further element, the rule of the place of wrong was applied. Some cases explicitly decide that the rule of the forum minimizing defendants' liability is not a rule of public policy in the conflict of laws sense. An Iowa court has held that it is not a rule of procedure. Conversely, when the law of the place of wrong required something more than ordinary negligence, the court of the forum upheld that requirement.

In Boneau v. Swift an action was brought in Missouri to recover damages for a tort committed in Illinois. The plaintiff had been injured by a swinging iron door while walking across the defendants' premises. He was accustomed to walk there without any objection from the defendants but they did not invite him to do so, nor could it be said that he was there in the defendants' interest. According to the law of the place of wrong (Illinois) the plaintiff's status was that of a licensee and the defendants owed him no duty except "to refrain from

---


3 Redfern v. Redfern, (1931) 212 Iowa 454, 236 N. W. 399.


injuring him wilfully or wantonly, or by such gross negligence as is the equivalent of wilfulness or wantonness." The court of the forum (Missouri) applied this general rule to decide whether the defendants' conduct was of a liability-creating character.

In *Dallas v. Whitney*⁶ blasting operations carried on in West Virginia seriously damaged the plaintiff's property in Ohio. The action was brought in West Virginia. The court there decided that Ohio should be regarded as the state of wrong so that its law would control the decision. Under the law of Ohio a defendant who caused damage in this way was liable for it, whether he had been guilty of ordinary negligence or not. This rule of Ohio law, determining the effect of the defendant's conduct upon his liability, was applied by the West Virginia court.

As we have indicated, the internal law of the place of wrong may describe the conduct necessary to make the defendant liable in very general terms such as "lack of ordinary care," "wanton disregard of the interests of others," etc. Under these circumstances the court of the forum will decide for itself in each particular case whether or not the facts, as proved, fall within the general category of liability-creating conduct established by the law of the place of wrong. Sometimes, however, the law of the place of wrong is more specific. It may say that under certain circumstances a defendant must do certain things. If he fails to do them, he is guilty of negligence. The general definition of negligence is supplemented by a specific rule for a particular situation. For example, the law of state X may say that a motorist who exceeds a certain speed limit is guilty of negligence and so liable for any injury caused by his excessive speed.

Specific rules of this character may be imposed either by legislative enactment or by a series of judicial decisions dealing with a specific problem.

What is the status of rules of this character in the conflict of laws? The reports are full of instances in which such rules forming part of the law of the place of wrong have been applied, usually without question, by outside courts. On the positive side, this treatment has been accorded to rules which made the following omissions, taken with their attendant circumstances, negligence *per se*: failure of a locomotive driver to signal at a railway crossing,7 failure of railway employees to operate gates at a crossing,8 failure of a locomotive driver to look out for pedestrians on the line,9 failure of an automobile driver to observe a speed limit,10 failure of employer to guard dangerous machinery.11

Specific rules defining the duty of the defendant in particular circumstances may be negative as well as positive in character. A court may say that a defendant who, under certain circumstances fails to do certain things shall not, for that reason only, be deemed guilty of negligence. For example, some state courts have said that a locomotive driver is not guilty of negligence merely because he fails to keep a lookout for trespassers walking on the railway track. Such negative rules have often been imported from the law of the place of wrong. Following a rule of the law of the place of wrong it has been held that the following omissions, taken with their attendant circumstances, did not in themselves constitute negligence:

8 Cox v. Terminal R. Ass'n., (1931 Mo.) 43 S. W. (2d) 571.
failure of a locomotive driver to look out for trespassers on the track,\(^\text{12}\) failure of a locomotive driver to slow down at a crossing,\(^\text{13}\) failure of a locomotive driver to signal at a private crossing,\(^\text{14}\) failure of a railroad company to block switches.\(^\text{15}\)

**SECTION 24**

**CAUSATION**

Section 383 of the "Conflict of Laws Restatement" tells us that "whether an act is the legal cause of another's injury is determined by the law of the place of wrong."\(^\text{1}\) There is no reason to doubt the substantial accuracy of this general principle but explicit judicial authority for it is not easily found.

_Connole v. East St. Louis R. Co._\(^\text{2}\) deals with the question of legal cause in express language. The action was brought in Missouri to recover damages for the death of a truck driver who collided with one of the defendant's trains at a crossing in Illinois. An Illinois statute obliged the truck driver to come to a stop before crossing the railroad track, and, according to the Illinois decisions, a failure to comply with the statute would be negligence _per se_. However, the Illinois decisions also supported the rule that a failure to stop would not bar the plaintiff's recovery if that failure was not the proximate cause of the accident. If compliance with the statute would not have obviated the accident (because, had he

\(^{13}\)Gannett v. Boston, etc., R. Co., (1921) 238 Mass. 125, 130 N. E. 183.
\(^{15}\)Newlin v. St. Louis, etc., R. Co., (1909) 222 Mo. 375, 121 S. W. 125.

\(^{1}\)CONFLICT OF LAWS RESTATEMENT (1934).


See also Louisville, etc., R. Co. v. Keiffer, (1908) 132 Ky. 419, 113 S. W. 433.
stopped, the driver could not have seen or heard the train approaching) then the failure to stop would not be the proximate cause of the accident. The Missouri court carefully considered and applied these rules of Illinois law.

In *Mosby v. Manhattan Oil Co.* a an action was brought in Missouri to recover damages for pollution of a stream in Kansas. Several defendants, acting separately, had dumped salt water and crude oil into the stream from which the plaintiff, a rancher, obtained his supply of water. Under Kansas law each defendant was, in these circumstances, legally responsible for the entire damage caused by the acts of all of them. Apparently Kansas law treated each defendant’s acts as the legal cause of the total damage. The Missouri court followed the Kansas doctrine, although, under Missouri law, the result would have been different.

The problem which forms the theme of the present section must be distinguished from another problem also involving the use of the conception of causation. This second problem arises when a court is called upon to determine whether the facts of a particular case are so connected with a particular state that it would be fair to apply the law of that state in determining the rights of the parties. In some cases it is possible to argue that the defendant is not responsible for the occurrence of events in a particular state, that there is not a sufficient causal connection between the act of the defendant and the fact that certain events have occurred in a particular state. If this is so, the argument proceeds, it would be unjust to make the defendant’s liability depend upon the law of the state in question. This problem and the relation of its solution to the causation conception are discussed in section 39, below.

In deciding whether or not to impose tort liability, courts frequently give some consideration to the character of the plaintiff's conduct and its relation to the harm for which he seeks to make the defendant liable. In some jurisdictions the courts follow the general principle that a plaintiff whose failure to use proper care for his own safety has been a contributory cause of his injury cannot recover any damages; what is known tersely as the doctrine of "contributory negligence." Certain well-known exceptions to this general principle are recognized in many states; notably, the doctrine of "discovered peril" or "last clear chance" and the doctrine of the "inattentive plaintiff" sometimes called "the humanitarian rule."¹ If the facts of a case bring it within the ambit of one of these exceptional doctrines, the plaintiff will recover full damages, notwithstanding his contributory fault. In some jurisdictions, however, a plaintiff's contributory negligence does not completely bar him from recovery in any case but merely reduces the amount of his damages. The court or jury merely deducts an amount proportionate to the degree of the plaintiff's negligence so far as that is capable of measurement. This principle is often referred to as that of comparative negligence.

In the conflict of laws the law of the place of wrong is usually permitted to determine whether or not the plaintiff has been guilty of contributory negligence. The law of the place of wrong may describe in general terms what conduct on the part of a plaintiff shall be regarded as contributory negligence. The court of the forum will determine in each case whether the plaintiff's conduct should be so classified. Sometimes the law of the place of wrong describes, in specific terms and with reference to a special fact situation, the conduct

¹ For general definitions of these exceptional doctrines, see Torts Restatement (1934) vol. 2, §§ 479, 480.
on the part of a plaintiff which will constitute contributory negligence. For example, in many jurisdictions the rule has been laid down that a motorist approaching a railway crossing must “stop, look, and listen.” If he fails to do so and an accident ensues, his failure will be held to constitute contributory negligence *per se* or contributory negligence as a matter of law. If this “stop, look, and listen” rule is found in the law of the place of wrong, the court of the forum will give effect to it. Similar treatment has been accorded to other rules which make the following acts, taken with their attendant circumstances, contributory negligence *per se*: driving an automobile in the dark too fast to stop within the range of the headlights, use by an employee of a patently dangerous machine, parking an unlighted vehicle on the highway at night.

In jurisdictions where the plaintiff’s contributory negligence prevents him from recovering anything, an exceptional principle is usually recognized, the doctrine of “discovered peril” or “last clear chance.” A number of conflicts cases have come before the courts in which this doctrine formed a part of the law of the place of wrong. The courts have usually endeavoured to apply the doctrine in the sense in which it would have been applied by the courts of the state of wrong.

*Missouri Pac. R. Co. v. Coca-Cola Co.* is a good illustrative decision. A truck belonging to the plaintiff was demolished by

---


4 St. Louis, etc., R. Co. v. Rogers, (1927) 172 Ark. 508, 290 S. W. 74.


one of the defendant railway company's trains at a crossing in Oklahoma. The defendant contended that the driver of the truck was guilty of contributory negligence in failing to perceive the approach of the train. The plaintiff contended that it was entitled to recover, notwithstanding the contributory negligence of its driver, basing its contention upon the doctrine of discovered peril. Upon this point the law of the forum (Arkansas) and the law of the place of wrong (Oklahoma) differed. According to Arkansas law, if the persons running the train could, by keeping a proper lookout, have discovered the perilous situation of the truck in time to avoid the collision, the plaintiff was entitled to recover in spite of his own contributory fault. The Oklahoma law was not so favourable to the plaintiff. Under Oklahoma law the plaintiff, having been guilty of contributory fault, could not succeed unless he proved that the persons in charge of the train did discover his helpless peril in time to avoid the collision but failed to do so. The Arkansas court applied the Oklahoma law.

As we have indicated, the law of contributory negligence has been amended in many jurisdictions so that a plaintiff whose negligence has been a contributory cause of his injury is not completely barred from any recovery. His contributory negligence merely has the effect of diminishing his recovery, the damages being proportioned according to the degrees of fault of the parties. When the law of the forum and the law of the place of wrong are different, the law of the place of wrong determines the legal effect of the plaintiff’s contributory negligence. The cases may be grouped according to the permutations of local and foreign law. First, the law of the forum allows the plaintiff a partial recovery on a comparative negligence basis but the law of the place of wrong gives him nothing. There is authority for the view that in this situation the law of the place of wrong controls and the plaintiff’s action
must fail. The converse of this situation is that in which the law of the forum makes contributory negligence an absolute defence but the law of the place of wrong is more lenient with the plaintiff and allows him to recover part of the damages which he has suffered. Here, too, the law of the place of wrong is usually applied; the court of the forum awards partial damages upon a comparative negligence basis.

SECTION 26

MEASURE OF DAMAGES: AMERICAN JURISPRUDENCE

In this section we are concerned with rules of various types determining the amount of the monetary award which the plaintiff may obtain in an action. A rule of this character may generally be regarded as expressing a policy of the state creating it. If, for example, it permits a person to recover damages for mental anguish it indicates a desire of the government to give protection against this type of injury. Obviously, the aims of choice-of-law principles can best be served by giving the plaintiff exactly what the law of the place of wrong allows him,—no more and no less. But when the law of the place of wrong and the local law are different, various obstacles to the enforcement of the law of the place of wrong may be raised.

The law of the place of wrong and the law of the forum may differ in two ways. First, the law of the place of wrong may allow the plaintiff less damages than he would recover, in a similar case, at the forum. Second, the law of the place of wrong...
wrong may allow the plaintiff more damages, a more ample recovery than he would get in a similar case at the forum.

Let us consider these problems separately. When the law of the place of wrong allows a less ample recovery, the situation is not unlike that in which the law of the place of wrong allows no recovery at all. If we give the plaintiff damages on the liberal scale of the forum and abandon the meagre measure of the law of the place of wrong, the plaintiff gets a very obvious advantage from the fact that he has been able to bring suit at this particular forum. Such a result is most unfair to the defendant. It would seem therefore that a court should "on principle" refuse to grant the plaintiff an award bigger than that which the law of the place of wrong allows him.

Slater v. Mexican National R. Co.\(^1\) presented this problem in a most striking fashion to the Supreme Court of the United States. The action was for damages for death. The law of the place of wrong (Mexico) required them to be paid out over a long period of time. The courts there were empowered to relieve the defendant from making further payments upon the happening of various contingencies. The Texas federal court in which the action was brought had no power to make and superintend an elaborate decree of this nature. The plaintiff suggested that the court should follow the ordinary rule of the forum and order the defendant to pay a lump sum. But because of the possibility that the defendant might thereby be forced to pay more than the law of the place of wrong would have required, the Supreme Court refused to make such an order. "To reduce liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess," said Mr. Justice Holmes. The plaintiff's suit was dismissed.

The Slater case, therefore, stands unequivocally for the proposition that a court should not make an award of damages which exceeds, or which might exceed, that permitted by the

law of the place of wrong. To do so would be contrary to one of the basic policies of the conflict of laws. Following this principle, courts have frequently refused to permit the recovery of damages upon a theory of measurement not sanctioned by the law of the place of wrong. Damages for physical pain and suffering, consolation money for mental anguish, interest upon damages have all been refused because they were not authorized by the law of the forum. ²

_Galef v. United States_ ³ appears to be in conflict with the doctrines of the _Slater_ case. The libelant, an American citizen, claimed damages for the loss of a cargo on board a German lighter which had been struck by a United States Shipping Board vessel in German waters. For the United States government it was argued that, under German law, they were only liable for part of the damages in proportion to the degree of their fault. The court, following the American principle, allowed the cargo owner full damages upon three grounds. (a) The German rule was contrary to public policy. (b) The German rule dealt with the remedy only. (c) The German law should not be applied to a vessel owned by the United States. Foreign laws allowing cargo owners part damages only have been applied by American admiralty courts in other


³ Damages for pain and suffering allowed by law of the forum but refused because not allowed by law of the place of wrong. Louisville, etc., R. Co. v. Graham’s Adm’r, (1896) 98 Ky. 688, 34 S. W. 229.


TORTS IN THE CONFLICT OF LAWS

cases. Unless something is made of the fact that the wrong-doing vessel was owned by the American government, the decision must be regarded as a very anomalous one.

Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro also sounds a discordant note. It arose out of a collision in Belgian waters. Both Belgian and American law would have permitted the respondent to limit his liability. But under Belgian law he would have been liable for a smaller sum than that fixed by American law. The court refused to allow him the benefit of the Belgian limitation. Thus the plaintiff received a large sum of money merely because he brought suit in the United States. It is well-established that even in cases governed by foreign law, an injured party cannot recover any greater amount than that permitted by the American limited liability laws. It does not necessarily follow, however, that a foreign law of similar character should be disregarded. The court overlooked the important distinction between declining to enforce a foreign liability and declining to recognize a foreign defence.

Let us consider now our second problem: the law of the place of wrong gives the plaintiff a more liberal allowance of damages than the law of the forum would give him. Under these circumstances, choice-of-law policies would favour the idea that the plaintiff should recover the full amount authorized by the law of the place of wrong. To limit his recovery to the amount authorized by the law of the forum may in some cases be almost as hard upon him as to refuse recovery alto-

---

6 See below at p. 119.
SOME SPECIFIC PROBLEMS

together. On the other hand, the law of the place of wrong may sometimes conflict with the public policy of the forum. When this occurs the court will tell the plaintiff that he must take what the law of the forum gives him or else go empty handed. Such a decision does not, of course, violate the doctrine of the Slater case because it is the plaintiff, not the defendant, who suffers by the court's failure to apply completely the law of the place of wrong.

There are a few cases in which courts refused to enforce a foreign law governing the measure of damages on the broad ground that the measure of damages "relates to the remedy." But the facts of these cases show clearly that there was no practical obstacle of convenience to impede the application of the foreign law. The courts appear to have reached their results by a purely mechanical deduction from an oversimplified and erroneous general theory. Perhaps they really felt that the enforcement of the foreign law was inconsistent with the forum's public policy.

Claims for damages based upon foreign law have also been rejected or cut down on the ground that they were penal laws. We have already discussed this peculiar notion in section 20, above.

Sometimes the law of the place of wrong not only attempts to compensate the plaintiff for his injuries but authorizes the court to award him an additional sum as exemplary or punitive damages. A judicial power of this kind indicates that the foreign community is anxious to prevent the conduct penalized. At the same time the court of the forum might feel that such conduct ought not to be penalized. It is not surprising to find that exemplary damages, allowed by a foreign law,

have been refused for reasons of policy. And some courts have taken the view, advocated by Minor, that such damages are penalties. But since they are not recovered by the state or its representative, they are not penalties as defined in *Huntington v. Attrill*, and the Supreme Court has so held. In a good many cases foreign rules conferring a right to a punitive award have been enforced without objection.

Analogous to exemplary damages are double or treble damages and fixed monetary penalties. Some death statutes set a definite sum to be paid by the tortfeasor in all cases. Granting that each of these remedies inflicts liability upon the defendant over and above reparation of the plaintiff's injuries, they all appear, like exemplary damages, to fall outside the Supreme Court's definition of a penalty. But they have all been classified as penal laws by various state tribunals.

---


Contra: Boyce v. Wabash R. Co., (1884) 63 Iowa 70, 18 N. W. 673.

Additional money penalty held to be penal. Taylor v. Western Union Tel. Co., (1895) 95 Iowa 740, 64 N. W. 660.

Contra: Coryell v. Atchison, etc., R. Co., (1918) 273 Mo. 361, 201 S. W. 77.

SOME SPECIFIC PROBLEMS

Atchison, etc., R. Co. v. Nichols. the Supreme Court approved the extraterritorial enforcement of a death statute fixing the amount of damages for all cases. The court did not even admit a punitive purpose behind the statute but pointed out that, since a precise assessment of the loss caused by death would be impossible, the fixed sum represented the legislature's approximate estimate of reasonable compensation for all cases.

Rules of the forum limiting liability in particular cases may also restrict the application of foreign law. A local statute provides that the damages awarded in certain classes of cases shall not exceed a fixed sum. Should the court obey this rule even in cases governed by foreign laws? The answer to this question would seem to depend upon the court's opinion regarding the policy of the local limitation. Some courts have disregarded such limitations to permit the plaintiff a full recovery according to the foreign laws. The restriction imposed by the law of the forum might, however, be deemed to embody some very important policy of that law which the court could not properly ignore. This appears to be the view of American courts regarding limitations upon the liability of shipowners. In The Titanic, a number of actions for death and personal injuries were brought against the owners of a

---

The American limited liability laws have also been applied to collisions in foreign territorial waters. See The State of Virginia, (D. C. N. Y., 1894) 60 Fed. 1018.
British ship which had gone down on the high seas after colliding with an iceberg. The Supreme Court held that although these actions were governed by British law, the owners of the ship were entitled to the benefit of an American statute fixing the maximum amount recoverable:

"It is true," said Mr. Justice Holmes, "that the foundation for a recovery upon a British tort is an obligation created by British law. But it is also true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose."

Despite the possible obstacles of public policy and the now almost obsolete theories of "procedure" and "penalties," foreign rules for measuring damages are regularly applied in tort cases. Damages for mental anguish, damages for physical pain have been awarded because authorized by the law of the place of wrong.\footnote{Damages for mental anguish. Texas, etc. R. Co. v. Gross, (1910) 60 Tex. Civ. App. 621, 128 S. W. 1173; Davis v. Gant, (1922 Tex. Civ. App.) 247 S. W. 576.}

Stream polluted by several joint tortfeasors; each one held responsible for full amount of damage. Mosby v. Manhattan Oil Co., (C. C. A. 8th, 1931) 52 F. (2d) 364.

Many jurisdictions have adopted the rule that when the plaintiff and defendant have both contributed to the plaintiff's injury, the loss should be borne by both in proportion to their respective degrees of fault. When this rule forms part of the law of the place of wrong it is usually enforced in other states.\footnote{Plaintiff partly responsible for damages; damages borne by plaintiff and defendant according to respective degrees of fault. Fitzpatrick v. International R. Co., (1929) 252 N. Y. 127, 169 N. E. 112; Jarrett v. Wabash R. Co., (C. C. A. 2nd, 1932) 57 F. (2d) 669; Caine v. St. Louis, etc., R. Co., (1923) 209 Ala. 181, 95 So. 876; Louisville, etc., R. Co. v. Whitlow's Adm'rs, (1897) 105 Ky. 1, 43 S. W. 711; Keane Wonder Mining Co. v. Cunningham, (C. C. A. 9th, 1915) 222 Fed. 821.}
There is no case in the Anglo-Dominion jurisprudence squarely deciding that the damages allowed for a foreign tort should not exceed the amount authorized by the law of the place of wrong. The situation is complicated by the bifurcate nature of English choice-of-law theory examined in section 2. The justification doctrine which originated in a group of early English cases can hardly be regarded as throwing any light on the matter at all. Focusing attention upon the juristic character of the defendant’s conduct, it is silent regarding the measurement of his penalty. On the other hand, the obligation doctrine, announced by Mr. Justice Willes in Phillips v. Eyre\(^1\) would seem to require that the law of the place of wrong should determine the extent of the plaintiff’s recovery.

The situation is further complicated by the case of Machado v. Fontes\(^2\). There an action was brought in England for a libel published in Brazil. The English court assumed that Brazilian law made this act punishable as a crime but would not have compelled the defendant to pay damages. They indicated that under these circumstances they would not permit the defendant to go scot free but would give the plaintiff damages measured by the rules of English internal law. This was a very exceptional case.\(^3\) Having decided to give the plaintiff relief, the court had no alternative but to follow the law of the forum in computing damages, since the law of the place of wrong gave no civil remedy at all. It does not follow that this course of action ought to be taken in all cases. Such a proposition would go directly against basic choice-of-law policies.

\(^1\) Phillips v. Eyre, (1870) L. R. 6 Q. B. 1.

\(^2\) Machado v. Fontes, [1897] 2 Q. B. 231.

\(^3\) See the discussion of Machado v. Fontes at p. 16.
In Story v. Stratford Mill Building Co., a workman sued his employer in Ontario for injuries sustained in Quebec. There was no question of criminal liability and the workman had a clear cause of action under the law of Quebec. It was suggested that the amount awarded by the jury should be reduced to the maximum permitted by Quebec law. The court admitted that "were the matter res integra, it might not unreasonably be held that the plaintiff, by suing in another jurisdiction, cannot put himself in a better position than if he had sued in the country delicti commissi." But they felt constrained by the decision in Machado v. Fontes to allow the plaintiff the larger sum permitted by Ontario law. This inference seems far-fetched and unfortunate.

An ingenious counsel in an Anglo-Dominion courtroom dealing with the problem of damages for a foreign tort would probably be able to make some use of the first of the two rules in Phillips v. Eyre. "The wrong must be of such a character that it would have been actionable if committed in England." It might be argued that the strict application of this principle requires that English courts should never award greater damages for a foreign wrong than those which English internal law would authorize in the same circumstances. We have already observed the unfortunate effects of the first rule in Phillips v. Eyre itself. Its sweeping and automatic exclusion of foreign law often needlessly frustrates choice-of-law policies. A derivative doctrine regarding damages would be equally objectionable.

There are a few other decisions and dicta which an Anglo-American court might wish to take into consideration in dealing with a conflict between foreign and local rules governing damages.

\footnote{Story v. Stratford Mill Building Co., (1913) 30 Ont. L. R. 271.}
\footnote{Phillips v. Eyre, (1870) L. R. 6 Q. B. 1.}
In *Cope v. Doherty*\(^6\) an American shipowner took proceedings in Chancery to have his liability limited in accordance with the British Merchant Shipping Act of 1854.\(^7\) His ship, the Tuscaroca, had become involved in a collision on the high seas. The long point of the case was whether or not that statute protected alien owners; the court decided that it did not. It was sought in argument to obtain a decision in favour of the petitioner upon the short ground that the statutory limitations upon damages affected only the remedy and must, therefore, be applied as part of the law of the forum in every controversy before a British court. Refusing to accede to this contention, both Vice-Chancellor Wood and Lord Justice Turner affirmed in the clearest terms that a limitation on damages affected the substance of the plaintiff's rights. In this case there was really no question of applying foreign law. The court purported to make its selection between the internal law of the forum and the so-called "general maritime law" governing collisions on the high seas.

In *Livesley v. Horst*\(^8\) the Supreme Court of Canada decided, in an action upon a foreign contract, that the proper law of that contract should determine the extent of the damages to be recovered. Speaking for the court, Mr. Justice Duff referred to *Cope v. Doherty* as "authority, both unmistakable in effect and of a high order, for the proposition that the measure of damages in an action for reparation in respect of a tort in a foreign country, is not matter of procedure but matter of the substance of liability."

*Ekins v. East India Co.*\(^9\) was an action brought in England for conversion of a ship in the East Indies. Lord Chancel-

---


\(^7\) British Merchant Shipping Act, (1854) 17 & 18 Vict. c. 104. The law is different today; any owner, British or foreign, may limit his liability in an English court. See *The Amalia*, (1863) 1 Moo. N. S. 471.


lor Cowper allowed the plaintiff to recover interest from the
date of the conversion at the high rate then obtainable in the
East Indies. Nothing was said, however, regarding East
Indian law.

SECTION 28

PROPER PLAINTIFFS TO THE ACTION

The law of the place of wrong may be said to decide who is
the proper plaintiff to an action in the sense that it determines
whether the plaintiff bringing the suit has any claim at all
against the defendant. Thus, in *Ross v. Sinhjee*,\(^1\) an action
brought in Scotland alleging the seduction of the plaintiff by
the defendant in London was dismissed on the ground that
English common law gave the right of action in such circum-
stances, not to the seduced woman, but to her parents. It was
argued that this rule was remedial only but without success.
Assuming, however, that the law of the place of wrong does
give the plaintiff some claim against the defendant, it may be
necessary to decide whether other formal parties should be
added to the record, such as next friends, guardians, assignors,
husbands, etc. There is authority for the view that, in general,
the law of the forum should answer this question.\(^2\)

Problems of both types are raised by suits based on death
statutes, which often provide that a representative action shall
be brought by the deceased’s personal representative on behalf
of a group of designated beneficiaries. Since the latter are the
real parties in interest it has been uniformly held that the

\(^1\) *Ross v. Sinhjee*, (1891) 29 Scottish L. R. 63. See also Buckles v. Ellers,
(1880) 72 Ind. 220, 37 Am. Rep. 156.

\(^2\) *Conflict of Laws Restatement* (1934) § 588; *Beale, Conflict of

See *contra*: *Lucas v. Coupal*, (1930) 66 Ont. L. R. 141.
SOME SPECIFIC PROBLEMS

Statute of the state of wrong shall determine their identity and the shares which they are to receive.³

Sometimes the statute ordains that the damages shall be distributed in the same proportions as personal property of a deceased intestate. A question of construction is then raised; does the statute refer to the distribution statute of the state of wrong or to that of the deceased man's domicile? Both views have been taken in the decisions.⁴ A similar question is raised by the use of the words “heirs,” or “next-of-kin,” in the death statute of the state of wrong. Several courts appear to have assumed, rather than consciously determined, that the denotation of these terms should be ascertained by considering the inheritance laws of the state of wrong.⁵

The cases dealing with these problems all accept the principle that the law of the place of wrong should be allowed to say who shall divide the damages. But some courts, having re-

³ An anomalous case is Re Hertell's Estate, (1929) 135 Misc. 36, 237 N. Y. Supp. 655, where a New York surrogate divided the damages according to the law of the forum.


See Note, (1920) 29 YALE L. J. 798.


The Supreme Court has held that the membership in the class of “next-of-kin,” as that term is used in the Federal Employers' Liability Act, should be determined according to the inheritance laws of the state where the cause of action arose. Seaboard Air Line Ry. v. Kenney, (1916) 240 U. S. 489, 36 Sup. Ct. 458; see also Meisenhelder v. Chicago, etc., R. Co., (1927) 170 Minn. 317, 213 N. W. 32.
ferred to that law, find themselves carried by a species of renvoi to a third system of law, the law of the deceased person's domicile.

In Re Degaramo's Estate⁶ the wrongful death occurred in Ohio. A New York court had to decide whether a certain claimant was the husband of the deceased within the terms of the Ohio death act. This issue turned upon the effect of a divorce obtained in Michigan. The court did not refer the validity of the divorce to Ohio law. They referred it to the law of the forum (New York) and decided that the judgment ought not to be recognized.

In several cases the court found that the law of the place of wrong authorized the trial judge to apportion the damages among the beneficiaries. This procedure was followed at the forum.⁷

What law should indicate the proper formal plaintiff to represent the beneficiaries in an action for wrongful death? Conceivably the view might have been taken that this was a matter of procedure to be determined by the law of the forum. But at one time many jurisdictions had no death statute and consequently no procedural rule to apply in this connection. Hence there has grown up a general practice of insisting that the formal plaintiff in a death action should be the person prescribed by the statute of the state of wrong. There are a few decisions to the contrary.⁸


⁸ In Stewart v. Baltimore etc. R. Co. (1897) 168 U. S. 445, 18 Sup. Ct. 105, the Supreme Court held that an action might be brought in the District of Columbia by an administrator appointed there although the statute of the place of wrong, Maryland, prescribed suit in the name of that state. This was followed in Hollenbach v. Elmore & H. Contracting Co. (C. C. N. Y., 1909) 174 Fed. 845. A contrary ruling had been given in Stone v. Groton Bridge & Mfg. Co. (1894) 84 N. Y. S. Ct. (77 Hun) 99, 28 N. Y. Supp. 446.
If the statute of the state of wrong decrees that suit shall
be brought by a relative-beneficiary, he or she and not the
personal representative is the proper plaintiff. If the statute
provides for a representative action by the personal repre­
sentative, the beneficiaries may not sue for themselves.

When the statute of the state of wrong provides for a repre­
sentative action a further question may arise: By what state
must the proper administrator to maintain the suit be ap­
pointed? It seems to have always been taken for granted that
an administrator appointed in the state of wrong would come
within the terms of the statute in force there. But in a number
of early cases an administrator appointed in a state other than
the state of wrong was refused permission to sue on the ground
that the statute of the state of wrong authorized a suit by one
administrator only: the administrator appointed in the state
of wrong. This attitude, which greatly hindered the transi­
tory enforcement of death statutes, was emphatically rejected
in 1880 by both the Supreme Court of the United States and

The question of the proper formal plaintiff was held to be a matter of pro­
cedure, governed by the law of the forum, in Teti v. Consolidated Coal Co.
(D. C. N. Y., 1914) 217 Fed. 443; Bussey v. Charleston, etc., R. Co., (1906) 73

9 McCarthy v. Chicago, etc., R. Co., (1877) 18 Kan. 46; Brown v.
Sunday Creek Co., (C. C. Ohio, 1908) 165 Fed. 504; Vicksburg, etc., R. Co. v.
Williams, (1912) 102 Miss. 735, 59 So. 883; Lower v. Segal, (1896) 59
N. J. L. 66, 34 Atl. 945; s. c., (1897) 60 N. J. L. 99, 36 Atl. 777; Rankin v.
Central R. Co., (1908) 77 N. J. L. 175, 71 Atl. 55; Johnson v. Phoenix Bridge
Co., (1910) 197 N. Y. 316, 90 N. E. 953; Limekiller v. Hannibal, etc., R.
Co., (1885) 33 Kan. 83, 5 Pac. 401.

Coal & Iron Co., (1890) 90 Ala. 13, 7 So. 756; Selma, etc., R. Co. v. Lacey,
(1873) 49 Ga. 106; Oates v. Union Pac. Ry. Co., (1891) 104 Mo. 514, 16 S.
W. 487; La Bar v. New York, etc., R. Co., (1907) 218 Pa. 261, 67 Atl. 413;
Thorpe v. Union Pac. Coal Co., (1902) 24 Utah 475, 68 Pac. 145; Casey v.
Hoover, (1906) 197 Mo. 62, 94 S. W. 982; Western, etc., Ry. v. Strong, (1874)
52 Ga. 461; Patton v. Pittsburgh, etc., Ry. Co., (1880) 96 Pa. 169; Schueren
v. St. Louis, etc., R. Co., (1917 Mo.) 192 S. W. 965.

Central R. Co., (C. C. N. Y., 1876) 14 Blatchf. 65; Taylor's Adm'r v. Pennsyl­
vania Co., (1880) 78 Ky. 348.
the New York Court of Appeals, after which it rapidly went out of fashion. These courts took the position that where the death act of the state of wrong provides, without special qualification, that the action shall be brought by the deceased's personal representative, it may be brought by a duly qualified administrator appointed in any state.

So far as the terms of the death statute are concerned, then, the defendant may be attacked in any convenient forum. But there are two rules of local policy with which the plaintiff may have to contend in certain jurisdictions. In many states the general rule that a foreign administrator cannot sue is applied in actions for wrongful death. The chief purpose of this rule is supposed to be the conservation of assets for local creditors of the deceased. Normally they have no interest whatever in the proceeds of actions for wrongful death, since such proceeds form no part of the estate and are distributed directly to the beneficiaries. Accordingly some courts have held that the general rule has no relation to actions of this kind and have allowed a foreign representative to proceed

---


But the rejected construction was adopted at a much later date in Manitoba. See Couture v. Dominion Fish Co., (1909) 19 Man. L. R. 65; Johnson v. Canadian Northern Ry., (1909) 19 Man. L. R. 179.


In many states the rule that a foreign administrator cannot sue has been abolished in whole or in part by statute.

with his action. Where this privilege is denied, however, the only alternative is to secure ancillary letters of administration at the forum. Here a second obstacle may be encountered. If the deceased did not reside within the jurisdiction and left no assets there, the court may possibly refuse to appoint a local administrator for the sole purpose of litigating a claim for damages for death.

The existence of several administrators for one deceased, each empowered to bring an action, may raise a problem regarding the effect of a prior judgment. Suppose a death action is brought by one administrator. The defendant sets up as a defense a prior judgment given in an earlier action brought by another administrator. This prior judgment might be pleaded either (1) as a merger of the cause of action or (2) as having conclusively determined some issue of law or fact in the defendant’s favour. Would this previous judgment be a good defence to the present action by a different adminis-


In Kansas a foreign administrator may sue for wrongful death, Kansas Pac. R. Co. v. Cutter, (1876) 16 Kan. 568, provided that he could have maintained the same type of suit in the state of his appointment, Limekiller v. Hannibal, etc., R. Co., (1885) 33 Kan. 83, 5 Pac. 401; Chicago, etc., R. Co. v. Mills, (1897) 57 Kan. 687, 47 Pac. 834; Hulburt v. Topeka, (C. C. Kan., 1888) 34 Fed. 510.

See also Metrakos v. Kansas City, etc., R. Co., (1914) 91 Kan. 342, 137 Pac. 953.

36 Re Yarbrough’s Estate, (1923) 126 Wash. 85, 216 Pac. 889; Louisville, etc., R. Co. v. Herb, (1911) 125 Tenn. 408, 143 S. W. 1138; Perry v. St. Joseph, etc., R. Co., (1883) 29 Kan. 420; Hall’s Adm’r v. Louisville, etc., R. Co., (1897) 102 Ky. 480, 43 S. W. 698; Jeffersonville R. Co. v. Swayne’s Adm’r, (1866) 26 Ind. 477.

See also Schueren v. St. Louis, etc., R. Co. (1917 Mo.) 192 S. W. 965; Connor v. New York, etc., R. Co. (1908) 28 R. I. 560, 68 Atl. 481.
trator? Hesitation and doubt upon the point are expressed in a few early opinions.\(^{17}\) But there is substantial modern authority for the view that if the first court had proper jurisdiction over the parties, its judgment would be recognized in the second suit though the formal plaintiffs be different.\(^{18}\)

In *Spokane, etc., R. Co. v. Whitley*,\(^{19}\) a death action, controlled by the law of Idaho, was brought in that state by one of the beneficiaries. A satisfied judgment for $9,500 obtained in a Washington court by the deceased’s administratrix was set up as a defence. The plaintiff beneficiary replied that since she had never given her consent or been made a party to the Washington suit she was not bound by the judgment terminating it. The Idaho court allowed the plaintiff to recover and the Supreme Court affirmed its decision. Since the beneficiary was not a party to the Washington suit, the Washington court did not acquire judicial jurisdiction over her cause of action, and the Washington judgment was not entitled to full faith and credit in Idaho. The Supreme Court indicated that the beneficiary might have been bound by any judgment obtained by a duly appointed administrator, even without the beneficiary’s concurrence in the action, if the statute of the state of wrong (Idaho) had so provided. But the Idaho statute, as construed by the Idaho courts, made no such provision. The law of the state of wrong (Idaho) gave the administratrix no


\(^{19}\) Spokane, etc., R. Co. v. Whitley, (1913) 23 Idaho 642, 132 Pac. 121, aff'd (1914) 237 U. S. 487, 35 Sup. Ct. 655.
power to bind the beneficiaries without their sanction. Hence the Washington judgment, obtained by the administratrix without the consent of the beneficiary did not effect a merger of the beneficiary’s cause of action:

“The question,” said the Supreme Court, “is one of jurisdiction, that is, whether the mother—Mary Elizabeth Whit­ley—was represented by the administratrix in the Washing­ton suit. The mother was not a party to that suit, and if she was not represented by the administratrix, the Washington court was without jurisdiction as to her, and the Idaho court was not bound to treat the judgment as a bar to her recovery in the present suit. [Citations.] The matter is not one of mere form or procedure, and it is manifest that the authority of the administratrix to represent the mother without her con­sent, if that authority existed, could be derived only from the Idaho statute. . . . The Supreme Court of Idaho having authority to construe the Idaho statute, has held that the ad­ministratrix did not represent the mother, and, consequently that the mother’s right was not barred.”

SECTION 29

PROPER DEFENDANTS TO THE ACTION

The law of the place of wrong indicates the proper defend­ant as it does the proper plaintiff in the sense that it shows whether a particular defendant has incurred any liability whatsoever. Where that law imposes liability for an injury upon several persons, a question may arise as to whether they may or must be joined as defendants in a single action. Is the answer to be given by the law of the forum or the law of the place of wrong?

This very problem was dealt with at an early date in the English case, General Steam Navigation Co. v. Guillou. The

action was brought against an alleged owner of a French ship which collided with plaintiff's ship upon the high seas. The defendant set up a plea which the judges considered to be patient of two different meanings. Some of them interpreted it as averring that the defendant, being a member of an association which owned the erring ship, could only be sued in France in a joint action prosecuted against all members of the association simultaneously. Others thought it meant that under French law the association bore the responsibility alone, like an English limited company. Assuming on demurrer that French law was the proper law of the case, the court expressed the unanimous opinion that, taking the second view of the plea, it expressed a good defence to the action but that, on the first interpretation, the plea was bad. "It is well established," said Parke, B., "that the forms of remedies and modes of proceeding are regulated solely by the law of the place where the action is instituted—the lex fori; and it is no objection to a suit in proper form here, that it would have been instituted in a different form in the Court of the country where the cause of action arose or to which the defendant belongs."

The theory of this case would seem to be that once it is admitted that the proper law creates some obligation to pay damages, the local law will decide whether or not co-obligees must be joined in an action to enforce it. Although other authorities support the doctrine, it seems at least questionable whether the forum's administrative convenience really requires it.

It was rejected in Mosby v. Manhattan Oil Co. While carrying on drilling operations, a number of oil companies polluted a stream in Kansas by dumping crude oil into it.

---

This practice injured cattle belonging to the plaintiff, a riparian rancher. Under Kansas law the companies were each liable to the plaintiff to the full extent of the damage. This liability could be enforced by joint action against all the companies. Under the law of the forum (Missouri) each company was responsible only to the extent of the damage caused by its activities and a separate suit would have to be brought against each company.

Conceivably the court might have split the issues, and, while holding that each defendant was liable for the whole damage according to the law of the place of wrong (Kansas), have referred the propriety of a joint action to the law of the forum (Missouri). It appears, however, to have followed the law of the place of wrong on both points and to have decided that the companies were properly made co-defendants to a single action, as they would have been in Kansas.

SECTION 30
LIMITATIONS UPON THE TIME FOR BRINGING AN ACTION

A rule of the forum limiting the period of time within which an action must be brought may conflict with a rule of the state of wrong in either one of two ways. The rule of the forum may prescribe a shorter period of time than that permitted by the rule of the state of wrong. Or the rule of the state of wrong may prescribe a shorter period than the rule of the forum allows.

Let us consider the first of these problems. An action is brought at a time when it would be barred by the law of the forum but not by that of the place of wrong, which allows a longer period. If the court follows the local law, the plaintiff will be deprived of a remedy at the forum although he might have succeeded at the place of wrong or some other jurisdiction. Such a result is prima facie undesirable. Is there
any reason why the court should not depart from its usual rule and follow that of the foreign law? A foreign rule of this character should not be particularly difficult to apply. But it has been argued that the law of the forum ought to govern for another reason. Statutes of limitation are intended to protect the courts from stale claims. The investigation of facts which are supposed to have occurred long ago necessarily involves the sifting of meagre and unsatisfactory evidence. Justice, long delayed, sometimes has the appearance of injustice. The policy of the forum requires that its courts should not be burdened with this kind of litigation. This interest must be weighed against that of making all courts available to the plaintiff upon the same conditions.¹

This problem was first presented in connection with actions for breach of contract during the first half of the nineteenth century. Both in England and America the doctrine became established that such actions must be brought within the period prescribed by the statute of the forum. The same doctrine has been applied in the field of tort.²

In a number of cases an important exception to this general principle has been developed.³ In each instance the legislature at the forum had created a new form of statutory liability. The constituent statute specified that actions to enforce it should be brought within a certain period of time. The courts held that the legislature did not intend the limitation to control actions

¹ See Lorenzen, Comment, (1919) 28 Yale L. J. 492, 497.
³ See also Annotation, (1930) 68 A. L. R. 217.
brought to enforce a similar statute of another jurisdiction. They distinguished the special statutory provision from the general statutes of limitations which were involved in the older cases. There does not seem to be any functional basis for this distinction. Presumably the special limitation, like all limitations, was established to protect the courts from stale claims. When this protection is afforded by a general statute of limitations it is deemed to be more important than choice-of-law policies. Why should it be neglected when it is provided in a particular statute governing a single type of liability? Some courts have adopted this argument and refused to recognize the distinction. But these courts assume that the general principle produces satisfactory results. The distinction, though groundless, is probably symptomatic of dissatisfaction with the general principle and of a desire to limit its sphere of operation.

Let us now consider the second problem. The law of the place of wrong prescribes a shorter limitation than that allowed by the law of the forum. The plaintiff brings suit within the intermediate period. Such a suit, if brought at the place of wrong, would not have succeeded. If the court does not adopt the rule prevailing there and dismiss the instant suit, the defendant may be subjected to a liability which the law of the place of wrong does not sanction. His misfortune will be due to the fact that he is amenable to suit at the forum. To avoid this result, the court ought to adopt the foreign rule. This could be done without difficulty. No important policy of the forum would be affected.

This problem was first raised in actions for breach of a contract governed by foreign law. Common-law courts both in England and America took the view that the limitation of the foreign law should be disregarded. One cannot read the early

cases without receiving the impression that the judges failed to distinguish the instant problem from the situation where the forum demands that suit be brought in a shorter time than the foreign law allows. There, as we have seen, the policy of the forum may require the observance of its rule. Even if the court observes the local rule and dismisses the action, the plaintiff may still be able to succeed in another forum. In the instant situation, however, the application of the local rule imposes an obligation upon the defendant against which he has no redress. The solution adopted in the early cases neglects this important consideration.

To the general doctrine excluding foreign statutes of limitations there is one recognized exception. It is said that a statute which not only bars the plaintiff’s remedy but extinguishes his “right” should be enforced in other jurisdictions. But when does such a statute “extinguish the right”? It is well established in common-law jurisdictions that a contract debt barred by a statute of limitations may be revived by a subsequent promise to pay it. There is some authority for the theory that such statutes do not “extinguish the right” because they leave open this possibility of revival. On this theory it would seem that, so far as tort claims are concerned, the ordinary statute of limitations of a common-law jurisdiction does “extinguish the right” because, after the statutory period has elapsed, such claims cannot be revived. They continue to exist in the juristic imagination as metaphysical essences, devoid of practical consequence. But this reasoning does not seem to have been adopted in any of the decided cases. In a number of these a tort action has been allowed to continue.


although, according to the law of the place of wrong, it was begun too late. A good many states have passed legislation to prohibit their courts from entertaining suits which have been barred by the appropriate foreign law.

In one particular situation a limitation provision is usually regarded as "extinguishing the right" for conflict of laws purposes. If the legislature of an outside jurisdiction creates a new form of liability and directs that actions to establish it shall be brought within a specified period, that direction will be enforced at the forum. A foreign limitation of this kind is commonly said to be a "condition of the right of action" conferred by the legislature. It is not essential that it should be contained in the same statute with the constituent clauses creating the right.

There is also some authority for the view that a foreign statute ought to be regarded as "extinguishing the right" if, by its express wording, it purports to do so.

Story maintained that a statute which extinguished the right


9 See Annotation, (1931) 75 A. L. R. 203.


should not be enforced unless it were shown that both the parties concerned had resided in the state where the statute was in force for the full period of time prescribed by the statute.\textsuperscript{13} To illustrate: A injures B in state X. More than a year later B brings action in state Y. A pleads a rule of the law of state X which is regarded by the court in state Y as extinguishing B’s right to compensation at the end of one year. To get the benefit of this rule A must also show that both A and B resided for one year in state X.\textsuperscript{14} One can well understand this requirement being insisted upon at the forum if it were part of the law of state X. Otherwise, as Goodrich points out, it seems to be a needless refinement.\textsuperscript{15} Why should the defendant have to surmount another hurdle in order to secure the benefit of a rule of the place of wrong? If the residence requirement fulfilled any useful function we would expect to find it employed in cases of the type discussed above, where the courts adopt the time limit attached to a newly-created foreign cause of action. Yet in many of these cases it is never mentioned.

The application of rules restricting the time for suit may give rise to incidental problems. In Murray v. New York, etc., R. Co.,\textsuperscript{16} an action to recover damages for a wrongful death occurring in Pennsylvania was brought in New York by the father of the deceased. The Pennsylvania death statute

\textsuperscript{13} Story, Conflict of Laws, Ed. 8 (1883) § 582B.


Some doubt is expressed regarding the theory of these decisions in Wood & Selick v. Compagnie Générale Transatlantique, (C. C. A. 2nd, 1930) 43 F. (2d) 941.

\textsuperscript{15} Goodrich, Conflict of Laws, Ed. 2 (1938) 202.

provided that such actions should be brought in the name of both parents and within a specified period of time. After this time had elapsed it was sought to join the deceased's mother as a party plaintiff. The court decided that the time limitation was a "condition of the right" which ought to be enforced. They were then faced with a second problem: could an additional and necessary plaintiff be joined after the time for bringing suit had passed? General choice-of-law policy would seem to require that this question be determined, if possible, by the law of Pennsylvania. This course was adopted by the court. Following the Pennsylvania cases, they ruled that a new party to the action might be added although the statutory period had run out.

The same question arose in Knight v. Moline, etc., R. Co.\textsuperscript{17} where the plaintiff sought to amend his pleadings at a time when a new action would have been extinguished (not merely barred) by the statute of the place of wrong. It was not shown that the courts there would have refused such an amendment but the court of the forum simply decided the question according to their own rules, saying that it was one of procedure. The amendment was allowed.

A very interesting variation of this problem is found in Louisville, etc., R. Co. v. Dixon.\textsuperscript{18} The action was brought in Mississippi by a workman to recover compensation under the Louisiana compensation act for an injury received there. A Mississippi court dismissed the action on the ground that the judicial machinery of the forum was not adequate for the proper administration of the Louisiana statute. Subsequent decisions of the higher Mississippi courts departed from this theory and held that the Louisiana statute in question could

\textsuperscript{17} Knight v. Moline, etc., R. Co., (1913) 160 Iowa 160, 140 N. W. 839. See also Lassiter v. Norfolk, etc., R. Co., (1904) 136 N. C. 89, 48 S. E. 642.

be enforced in Mississippi. The plaintiff then brought a second action in Mississippi. By this time the period for bringing suit laid down by the Louisiana statute had run out. The court decided this time limit was "a condition of the cause of action." The plaintiff attempted to rely upon a curative principle of Mississippi law which would have permitted the second action to be maintained because the dismissal of the first did not settle the merits of the controversy. The court held that this rule could not affect the operation of the Louisiana statute and dismissed the second suit also.

This result seems unsatisfactory. One cannot quarrel with the court for its reluctance to resort to the law of the forum. That shows a due and proper regard for choice-of-law policies. But this case was an exceptional one and required special treatment. Let us examine it more closely. The problem presented in the second suit was based upon two facts. First, a previous suit at the forum had been dismissed because it was brought to enforce a foreign created right and the court thought that the administrative machinery of the forum was inadequate. Second, the time for bringing the action allowed by the law of the place of wrong had run out. What should be done in a case like this? Choice-of-law policies suggest that we turn to the law of the place of wrong for an answer. But we turn to the law of Louisiana in vain, because this problem could not have arisen in Louisiana. Had the first suit been brought in Louisiana it would not have been dismissed; no question would have been made of the competence of Louisiana courts to enforce their own statutes. Since Louisiana law offered no solution of the problem and the solution provided by the law of the forum was a fair and reasonable one, it is submitted that the court would have been justified in adopting the curative principle of the law of the forum. 19

Several conflict of laws cases have involved the consideration of statutes which had the effect of compelling an injured person to serve notice of his claim upon the tortfeasor within a limited time period on pain of losing his right of action if he failed to do so. In their practical operation such statutes are not unlike statutes of limitation. A statute requiring a notice of action may form a part of either the law of the forum or the law of the place of wrong. Let us consider the latter situation first.

The law of the place of wrong forbids the bringing of an action unless the defendant has been notified of the plaintiff's claim within a stated time. The law of the forum makes no such restriction. The plaintiff fails to comply with the law of the place of wrong. If the court of the forum allows the action to proceed, the plaintiff will gain an improper advantage by his selection of a forum. Choice-of-law policies will obviously be best maintained by dismissing the plaintiff's suit. In dealing with the analogous problem of a foreign statute of limitations which bars the plaintiff's suit, the courts refused to enforce the foreign statute, saying it was merely a rule of procedure.¹ We suggested that this was an unfortunate result. Decisions upon the instant problem have not been affected by statute-of-limitations cases. There is authority for the view that if the notice required by the law of the place of wrong has not been given, the plaintiff cannot bring an action anywhere.²

Suppose the law of the forum requires notice of the plaintiff's claim and the law of the place of wrong does not. The plaintiff fails to give the notice. Under these circumstances

¹ See above, section 30.
the court can best assist in the realization of choice-of-law policies by enforcing the plaintiff's cause of action as it would be enforced in the state of wrong. But the court may feel that the policy underlying the local rule requiring a notice is so important that it should be applied even in cases which have a foreign proper law. The court will then have to weigh the local policy against the choice-of-law policies. ③

SECTION 32

THE MARITIME LIEN

Under both English and American law, many maritime torts give rise to a maritime lien upon the ship concerned in favour of the person wronged. The lien attaches to the ship at the time of the injury. As a rule, it cannot be displaced by a sale of the ship to a bona fide purchaser for value. An admiralty court will enforce the lien by seizing the ship and, if necessary, selling it to pay off the lienholder. ①

The position of these maritime liens in the conflict of laws is extremely doubtful. At the threshold of our discussion, it may be well to distinguish a lien upon a vessel from the power to arrest the vessel at the commencement of a suit in admiralty. The latter is obviously a matter which could only be governed by the local law. At the commencement of the suit the court's officers would not know all the facts of the case. They could not tell what foreign law or laws to apply. They could not apply a foreign law because they would not know its provisions. Hence, in deciding whether or not a ship may be seized, an admiralty court can only be governed by its own local rules. After the case has been tried, the facts proved,

③ The rule of the forum requiring notice was applied to a foreign cause of action in Arp v. Allis Chalmers Co., (1907) 130 Wis. 454, 110 N. W. 386.

① Under the Constitution of the United States a state court cannot enforce a maritime lien by proceedings in rem. See Robinson, Admiralty (1939) 359.
and the relevant foreign laws established, the situation is different. The court has before it all the materials necessary to decide what law should determine the rights of the person wronged and whether that law gives him a lien upon the vessel in question which may be enforced by selling the vessel.

In considering the conflicts aspect of the maritime lien we have, as usual, two problems. (1) Will the admiralty court of the forum enforce a lien in a case where the law of the forum would create a lien but the law of the place of wrong would not? (2) Will the admiralty court of the forum enforce a lien in a case where the law of the forum would not create a lien but the law of the place of wrong would? Attacking the first problem from a conflict of laws point of view we must conclude that the forum ought not to enforce a lien which the law of the place of wrong does not authorize. To do so is to put an extra burden upon the defendant (the claimant, in admiralty terms) or perhaps upon some innocent bona fide purchaser of the ship, which burden is solely due to the fact that his ship has entered the waters of the forum. So far as the court's administrative convenience is concerned, a mere refusal to enforce the plaintiff's (in admiralty, the libellant's) claim should not involve any difficulty upon that score.

But in dealing with the conflicts aspect of the maritime lien we must reckon with that ancient and formidable tradition of admiralty courts, the conception of a universal maritime law. The conflicts argument which we have outlined clashes with this conception. We are apt to be told that when an admiralty court of the forum enforces a maritime lien for tort, it is not enforcing the internal law of the forum, it is enforcing the law of the sea which is common to all civilized sea-going nations. Admiralty courts do not seek the ideal of uniformity through choice-of-law principles; they have their own uniform system. The notion that admiralty law is the same in all countries appears today to be merely a pleasant
fictio.

But it has had considerable influence upon the treatment of the instant problem by admiralty courts.

The classic American decision is *The Eagle* (Supreme Court, 1868) which arose out of a collision in Canadian waters. For the claimant it was argued that Canadian law gave the libellant no lien. Dealing briefly with the point, the Supreme Court indicated that the question was to be decided by "the practice and principles of the courts of admiralty in this country, wholly irrespective of any local law."

The same problem came before Judge Emmons in *The Avon* (1873) and was discussed by him at considerable length. His opinion shows plainly the reluctance of admiralty judges at that time to follow choice-of-law principles where maritime liens were concerned. After wavering between the choice-of-law principle and the so-called universal maritime law as conceived by American courts he chose the latter.

*The Eagle* and *The Avon* do not seem to proceed upon the ground that the maritime lien is a part of American admiralty procedure which must be followed in all cases for the convenience of the court. Such a view is expressly rejected in *The Avon*. The basis of decision is that the lien is part of the general maritime law which American courts administer in all cases, whether they have a foreign setting or not.

There is a group of tort cases in which American courts have refused to enforce a maritime lien on the ground that to do so would be inconsistent with the foreign law by which the case ought to be governed. Most of these cases involved personal injury or death aboard single ships, in foreign waters or

---

2 See below, section 55.

3 *The Eagle*, (1868) 8 Wall. (75 U.S.) 15. Robinson explains this decision as proceeding upon the ground that the vessels were merely passing through Canadian waters but were not entering or leaving a Canadian port. See ROBINSON, ADMIRALTY (1939) 825.

4 *The Avon*, (1873) 1 Brown's Adm. 170, 2 Fed. Cas. 255.
on the high seas. The courts which decided them do not make it clear whether or not the injured person or the deceased person's dependents would have had a lien on the ship under the general maritime law as applied by American courts. Probably, in most of these cases, he would not. They are not, therefore, in irreconcilable conflict with *The Eagle* and *The Avon*. The most that can be said of them, in relation to the general maritime law theory, is that they damn it with faint praise.

Outside the field of tort liability there are several American decisions dealing with the effect of foreign contractual transactions to raise a lien upon a vessel. These decisions emphatically announce that no lien will be enforced which is not sanctioned by the proper law of the transaction in question. In *The Kaiser Wilhelm* the libellant sought a lien for repairs and supplies furnished to a German ship in England. The court said:

> "The laws of Great Britain and of Germany have both been pleaded, and, if no lien or right to proceed against the vessel is given under either of them, it is immaterial whether or not the libellant is entitled to proceed in rem, under the general maritime law as recognized in this country."

It would appear, therefore, that the general tendency of American courts is to deny a lien in cases governed by foreign law unless the proper law creates one. But there are older au-

---


English courts incline to the simple view that "lien or no lien" is a question of procedure. In *The Milford* 8 (1858) the master of an American ship, hired in the United States, claimed a lien for his wages. American law gave no such lien. A British statute provided, in very general terms, that "every master of a ship" should have such a lien. Dr. Lushington applied the British statute, saying:

"It was very ingeniously contended that the law of the United States formed part of the contract; but I cannot think so; the proceedings originated in this country; it is a question of remedy, not of contract at all. Now the law as to contract and remedy was settled by *Donn v. Lippmann* to the effect that the remedy must be according to the law of the forum in which it is sought. . . . Now in this case the legality of the arrest of the freight is the whole matter in dispute."

These remarks evince a confusion of two things; the lien and the arrest. As we have indicated, the seizure of the res by the court would have to proceed according to the law of the forum; no other course would be practicable. 9 But the right of the master ultimately to enforce a lien on it might well have been referred to the proper law of the case. *The Milford* is an old decision, as conflicts decisions go; the opinion displays the diffidence and distaste for foreign law which is characteristic of the period. It was criticized by Sir Robert Phillimore, who did not share the hostility of other English judges toward foreign laws. 10 But it has been followed 11 and approved 12 in subsequent cases.

9 Above, p. 142.
10 In *The Halley*, (1867) L. R. 2 Adm. & Ecc. 3, 12.
Let us consider now the second problem of maritime liens: will the admiralty court of the forum enforce a lien in a case where the law of the forum would not create a lien but the law of the place of wrong would? From the conflict of laws point of view, an affirmative answer is desirable. If no obstacle of policy or inconvenience intervenes, the court should allow the libellant the same remedy which he would have under the law of place of wrong.

There is very little direct authority in the United States. As we have seen, American courts favour the application of foreign law, as a general doctrine. But only one case has been found in which a foreign lien was enforced under circumstances in which the local law would not create a lien. In *The Maud Carter* the libellant claimed liens upon a ship for insurance premiums and materials used in her construction. The lien transactions occurred while the vessel was in a British port. Neither transaction would have given rise to a lien under the general maritime law of the United States. The British law gave liens in both cases. The court held that they should be enforced.

Turning to the British Empire we find a diversity of opinion. In *Clark v. Bowring and Co.* certain persons claimed a lien in a Scottish court for moneys expended upon a ship while it was in the port of New York. They based their claim upon American law. The court refused to consider the American law, holding that the matter must be determined by the law of the forum which gave no lien.

In *The Strandhill* the same problem came before the Supreme Court of Canada. Goods were furnished to the ship

---


American admiralty courts will enforce a lien for wrongful death created by the laws of an American state in cases occurring within the territory of the state in question. See *Lewis v. Jones*, (1928) 27 F. (2d) 72. But no lien is enforced unless the state death act so provides.


in the port of Boston. American law gave a lien; Canadian law
gave none. After considering the matter at some length, the
court enforced the American law, saying:

"Indeed it is difficult to perceive any reason why an Ameri­
can citizen, the owner of a ship which is by American law
subject to a maritime lien for the price of necessaries purchased
by him in an American port, could avoid the enforcement of
the lien by sending his ship to Canada, if there be a Canadian
tribunal having jurisdiction to enforce it."

The court distinguished the decision in Clark v. Bowring
on the ground that it involved a question of priorities among
competing claims against the ship. This is perfectly true but
the Scottish court's decision proceeded upon the very broad
ground that the court would not recognize any liens which
were not created by the law of the forum.

SECTION 33
DETERMINATION OF FACTS BY COURT OR JURY

In common-law courts an issue of fact is commonly disposed
of in one of three ways. It may be entrusted exclusively to the
court, whose decision is final unless reversed by a higher
court. It may be entrusted exclusively to the jury, whose de­
cision cannot be changed or questioned by the court. Generally,
however, an issue of fact is passed upon by both the court
and the jury in the following manner. The judge first con­
siders all the evidence relating to the fact in question. If he
thinks the evidence overwhelmingly favours one conclusion
so that no reasonable jury could make a different finding, he
will assume that conclusion to be correct and proceed to de­
cree legal consequences accordingly. But if he thinks that the
evidence is so conflicting that a reasonable jury might come to
either one of two conclusions, he will then permit the jury to
give the final decision.¹
Rules defining the respective functions of court and jury are in a sense ancillary to other legal principles. The problem of determining which of these bodies should pass upon a particular question of fact arises because the court has resolved to enforce some principle of law which declares that certain defined operative facts shall have certain legal consequences. In order to apply such a principle it is necessary to decide whether or not those operative facts are present. For example: a court desires in a particular case to apply the general principle that a defendant shall only be held liable for injuries caused by his negligence. Two issues of fact must therefore be decided: (a) was the defendant's conduct negligent? (b) did it cause the injury complained of? The question arises: are these issues to be decided by the court, by the jury, or by both acting in concert? To answer this question we must resort to some ancillary rule.

In a conflict of laws case, the primary principles requiring the investigation and proof of facts may be derived from either the law of the forum or the law of the place of wrong. In applying a principle of this kind taken from the law of the forum, a court would very probably decide the factual issues involved or submit them to the jury according to its usual practice in non-conflicts cases. But who is to decide the questions of fact which are raised by primary principles of the law of the place of wrong? A solution for this problem might be sought in the rules of either the law of the place of wrong or the law of the forum. If the law of the place of wrong emanated from a jurisdiction where trial by jury was part of the judicial machinery, it would no doubt be possible to derive a controlling rule from that legal system.

But the court might also resort to the law of the forum for guidance. Often the primary principle of the law of the place of wrong with which the court is dealing can be matched with an apparently similar rule of the local law. As between two common-law jurisdictions, the law of the forum
and the law of the place of wrong frequently concur in making liability depend upon the defendant’s "negligence," the plaintiff’s "contributory negligence," "assumption of risk," etc. In such a situation the court of the forum might feel inclined to follow its own secondary rule governing the assignment of the issue to court or jury.

For example: the primary principle that a plaintiff who has by his own negligence contributed to his own injury cannot recover damages is law in both state X and state Y. In state X the jury decides whether or not the plaintiff has been guilty of such negligence, subject to the usual supervision by the court. In state Y the question of contributory negligence is determined by the jury alone. An action is brought in the courts of state Y arising out of a highway accident in state X. Following the primary principle of the law of state X, the court of the forum resolves to investigate the question of the plaintiff’s contributory negligence. But who is to decide that question, the court or the jury? As we have suggested, the court might turn to the law of the place of wrong for an answer and follow the procedure laid down by the law of state X. But since the jurisprudence of the forum contains a similar principle, raising the same general issue of fact (was the plaintiff guilty of contributory negligence?) the court might adopt the secondary rule of the forum making the question exclusively one for the jury.

It is quite possible that a court might be called upon to enforce some primary principle of the law of the place of wrong which had no counterpart in the law of the forum. The opportunity to employ a secondary rule derived from the law of the forum would not be so clearly available in such a case. But the court could still obtain assistance from the law of the forum. It might treat the factual issue defined by the law of the place of wrong in the same manner that it would treat analogous or similar questions of fact arising in the course of ordinary non-conflicts litigation at the forum, This par-
ticular variety of the general problem does not seem to have been canvassed in the decided cases.

In discussing other types of legal rules and their relation to the substance-procedure problem, we have usually drawn a distinction between the situation where the application of the rule of the place of wrong would help the defendant and that in which it would help the plaintiff. In the present context it may not always be possible to say whether the trial of an issue by the tribunal and in the manner prescribed by the law of the place of wrong would assist the plaintiff or the defendant. But one thing is clear. To dispose of the question in the manner prescribed by the law of the place of wrong will at least bring the court as near as possible to the hypothetical result which the foreign court would have reached had the case been tried before it. Choice-of-law policies direct us to go as far as we can in this direction. On the other hand, it must be admitted that the delimitation of the functions of judge and jury is a matter of intimate concern to the court of the forum. One can well understand its reluctance to adopt the rule of another jurisdiction upon the matter.

Some states have enacted statutes providing that the question of contributory negligence should be entrusted exclusively to the jury. These statutes usually operate to diminish the defendant’s chances of success because they deprive him of the opportunity of getting a directed verdict upon this issue. Even if the court believes that no reasonable jury could exonerate the plaintiff from contributory fault, the question must go before the jury. In Atchison, etc., R. Co. v. Spencer a federal court refused to apply a local statute of this type because the case had a foreign setting.

"It cuts deep," said the court, "into the right observed at common law by which a defendant can obtain a decision by the court upon a proven state of facts. What is, at common law, within the power of the judge to decide, is in all cases left

*Atchison, etc., R. Co. v. Spencer, (C. C. A. 9th, 1927) 20 F. (2d) 714.
to the jury and their finding is conclusive on the court. Thus, although by the law of the place where an injury has been inflicted the power and duty of the judge are to pass upon a clearly established state of facts, a litigant may avoid the consequence of the exercise of those functions by going into a jurisdiction where the fundamental local law strips the court of that power by making the jury the sole arbiter of the question with conclusive force upon the court."

The court refused to countenance that state of affairs. They therefore asserted the power, which a court sitting at the place of wrong would have possessed, to pass upon the evidence and decide whether or not it showed the plaintiff to be guilty of contributory negligence beyond all reasonable doubt. They decided that it did show such guilt and directed a verdict for the defendant.

The converse situation where the statute forbidding the court to control the jury is in force at the place of wrong has arisen in several cases. Here the law of the place of wrong ostensibly favours the plaintiff. It enables him to escape the risk of a directed verdict which would be possible under the law of the forum. Under these conditions some courts have applied the statute of the place of wrong. But others have refused to do so on the ground that the foreign statute dealt with a matter of procedure.


See also Massachusetts Benefit Life Ass'n v. Robinson, (1898) 104 Ga. 256, 30 S. E. 918 (the court refused to follow the rule of the law of the place of contracting that in actions upon insurance policies the materiality of a misrepresentation should be decided by the court); Higgins v. Central, etc., R. Co., (1892) 155 Mass. 176, 29 N. E. 534 (here the court assumes rather than decides that it would not follow the practice of the law of the place of wrong permitting the jury to assess damages when a different practice prevailed at the forum).

In common-law jurisdictions most issues of fact are settled by the jury working under the judge's supervision. This means that the power of the jury to decide the issue depends upon the judge's opinion of the evidence. If he considers that it leaves no room for difference of opinion regarding the facts, he will not ask the jury for their conclusion. The control exercised by the judge may also be governed by a class of rules, commonly known as presumptions. These rules direct the judge to presume the probable truth of one fact from the existence of another. If sufficient evidence is put in to justify the jury finding the basic fact, they should also be allowed to pass upon the presumed fact. This is not, however, the only consequence produced by presumptions. Their status in the conflict of laws is discussed in other sections.

SECTION 34

NATURE AND FUNCTION OF RULES RELATIVE TO BURDEN OF PROOF

The term "burden of proof" has, as every lawyer knows, two meanings. It may refer to the duty resting upon the proponent of some factual allegation, to convince the jury, as triers of the facts, that the allegation is true—what Wigmore has called the risk of non-persuasion. It may also be used simply to denote the duty of adducing enough evidence in support of some factual allegation that the court will permit the jury to decide whether or not that allegation is true. At the beginning of a trial, the burden of proof in the first sense will be placed, with respect to each of the spe-

specific allegations raised and disputed in the course of pleading, upon either the plaintiff or the defendant. The burden of proof in the second sense, that of adducing sufficient evidence to get to the jury, is almost invariably assigned, with respect to each issue, to the party bearing the risk of non-persuasion. This allocation of the burdens of proof at the outset of the trial is governed by various rules of law which, according to writers on the law of evidence, are based upon considerations of convenience, fairness, and social policy.²

There is a second species of rules affecting the incidence of the burden of proof, known as presumptions. A presumption, as generally understood, is a direction to the trier of the facts that, whenever a certain basic fact or group of facts has been proved, the truth of another specified fact must be assumed. According to Wigmore and Thayer, the normal operation of a presumption should be to shift the burden of adducing evidence from one party to the other. When once the required minimum of evidence upon which the jury might find the basic facts has been introduced, the party who was originally obliged to bring in enough evidence of the presumed fact to get before the jury ought to be relieved of that obligation. And at the same time his opponent ought to be required to adduce sufficient evidence to justify a finding against the presumption. If such evidence is not forthcoming, the jury should be told that in the event they find the basic facts they must find the presumed fact.

No doubt every presumption has the effect of shifting the duty of producing evidence in this manner. But Morgan and Bohlen have pointed out that, in the decided cases, a number of further consequences have sometimes been attributed to them. These consequences are often much more onerous for the party against whom the presumption works than those suggested by Thayer and Wigmore. Some presumptions have

² References by Wigmore and Morgan cited in footnote 1 above.
been held to shift the risk of non-persuasion. Moreover, it is not always easy to say whether a given rule ought to be classified as a presumption, or as a rule fixing the risk of non-persuasion at the outset of the trial. Where the circumstances which bring the rule into operation are of a somewhat general character, it may be regarded as belonging to either category.  

Morgan and Bohlen have also examined the functions which presumptions are designed to fulfil and found them to be quite as diverse as their immediate effects. Some presumptions are created to serve the convenience of the court and the parties by expediting the trial. If experience shows that fact A usually supplies a safe basis of inference for fact B, time, money, and effort will be saved by acting upon this inference, in the absence of countervailing proof. Again, conclusive evidence upon certain types of factual issues is very difficult to obtain. Here the courts might find themselves utterly unable to reach a definite conclusion if they did not make use of a presumption in one direction or the other.  

But a presumption is often something more than a device to secure procedural convenience. It may represent a judicial conception of fairness in deciding which party should assume the task of accumulating sufficient relevant evidential data. Where one party has the better opportunity to obtain such data he ought to be forced to produce it. An unfavourable presumption will work this result. A presumption may also be used to enforce a general social policy. A statute which forces railroad companies to disprove their own negligence in actions brought by their employees obviously has the effect of imposing a stricter standard of care upon such companies. Statutes which make the doing of certain acts prima facie evidence of negligence would seem to be intended to dissuade people in general from doing those acts.

* For examples of such dubious rules, see Helton v. Alabama, etc., R. Co., (1893) 97 Ala. 275, 12 So. 276; Southern R. Co. v. Robertson, (1909) 7 Ga. App. 154, 66 S. E. 535.
Rules regulating the burden of proof are, like rules defining the functions of court and jury, ancillary to other legal principles. A court decides to give effect to some primary principle of law which declares that certain defined operative facts shall have certain legal consequences. It then becomes necessary to allocate the burden of proving or disproving those facts. For instance, it is a general rule of law that a plaintiff who has by his own negligence contributed to his own injury cannot recover damages. The application of this primary principle requires a secondary rule which will tell us whether the plaintiff must show that he was not guilty of such contributory fault, or the defendant must adduce proof that he was.

The position of such rules in the conflict of laws is somewhat analogous to that of rules assigning issues to court and jury. Primary principles requiring the proof of certain facts may emanate from either the law of the place of wrong or the law of the forum. Where the primary principle in question has its source in the law of the forum, most courts and lawyers would probably take it for granted that the secondary rules of the forum ought to decide who should prove the facts necessary to bring the primary principle into play. Where the principle in question has its source in the law of the place of wrong, the incidental burden of proof problem might be solved by a reference to either the law of the place of wrong or the law of the forum.

Reference to the secondary rules of the law of the place of wrong requires no explanation. The possibility of a reference to the secondary rules of the forum is presented when the primary principles of the two systems appear to be similar. Often the law of the forum and the law of the place of wrong agree in laying down some general principle, such as that the defendant shall be liable for harm caused by his negligence, the defendant shall not be liable for harm caused
by the plaintiff's negligence, etc. Here the court of the forum is very likely to say: "We shall recognize and give effect to the principle of the foreign law prescribing the investitive facts which must be found in order to impose liability. But the burden of proving those facts we shall dispose of according to our own rules."

For example: an action is brought in the courts of state Y against a railroad company for injuries received in a collision with one of the company's trains at a level crossing in state X. The primary principle that a railroad company is only responsible, under such circumstances, for damage caused by the negligence of its servants is law in both state X and state Y. State X has an ancillary burden-of-proof rule that the plaintiff must prove the defendant's negligence, while in state Y the defendant company is expected to prove its freedom from fault in such a case. Following the primary principle of the law of X, the court of the forum resolves to investigate the question of the railroad company's negligence. But to whom should the court assign the burden of proof upon this issue, the plaintiff or the defendant company? As we have suggested, the court might refer the problem to the law of the place of wrong, and assign the burden of proof to the plaintiff. But since the law of the forum contains a similar primary principle, raising the same issue of fact (was the defendant company guilty of negligence?), the court might decide to follow its own secondary rule requiring the company to show affirmatively that it was not guilty of negligence.

A slightly different situation would be presented if the court of the forum were called upon to enforce a primary principle of the law of the place of wrong which could not be matched by any duplicate doctrine of the local law. Here the possibility of using a secondary burden-of-proof rule derived from the local law would not be so apparent. Perhaps
the facts put in issue by the primary principle of the law of the place of wrong could be dealt with in the same fashion as some analogous factual issue defined by a primary principle of the law of the forum. But in the cases where this problem has come before the courts, they have taken the alternative course of adopting the appropriate secondary rule provided by the law of the place of wrong.

*Lemieux v. Boston, etc., R. Co.* illustrates this situation. A workman, injured in Vermont, sued his employer in Massachusetts. By the law of Vermont there could be no recovery in such a case if the harm was due to some danger of which the plaintiff had knowledge. Upon him rested the burden of showing that he did not know of the danger. By the law of Massachusetts there could be no recovery if the plaintiff voluntarily assumed the risk which produced his injury, a fact which the defendant was required to prove. It will be seen that the Massachusetts burden-of-proof rule concerned an issue of fact which was quite different from that raised by the law of Vermont. The law of Massachusetts really did not provide any rule for deciding which party should carry the burden of proof upon the single issue of plaintiff's knowledge. The court applied the Vermont rule. The plaintiff was required to prove that he did not know of the danger which caused his injury.

A somewhat subtler problem of the same kind was presented in *Fitzpatrick v. International R. Co.* In New York where the case was tried, contributory negligence is a complete bar to recovery. The onus rests with the plaintiff to prove that he was not guilty of such negligence. In Ontario, the place of wrong, contributory negligence is not an absolute defence; even though it be proved, the plaintiff is entitled

---


to have a share of his damages paid by the defendant upon a comparative negligence basis. And the defendant is expected to establish the plaintiff's culpability. Here again it seems clear that the rules of law in the two states, defining the crucial issues of fact to be determined between the parties, were substantially different although they both contained the same symbol "contributory negligence." The New York rule requiring the plaintiff to show his own freedom from fault was never intended to be applied in conjunction with a rule of comparative negligence such as that prevailing in Ontario. Had the Ontario law coincided with the New York law in making the existence of contributory fault a complete bar to the plaintiff's recovery, the New York court would probably have substituted its ancillary doctrine for that of the Ontario courts and demanded that the plaintiff satisfy the court of his innocence. But in view of the outstanding difference between the primary principles of law involved, the New York court held that the trial judge had properly charged the jury upon the burden of proof question in strict accord with the Ontario law.

SECTION 35

ARGUMENT FOR THE APPLICATION OF THE LAW OF PLACE OF WRONG RESPECTING BURDEN OF PROOF

In the previous section we observed the fact that it is very often possible to apply a rule of the forum in dealing with the burden of proving some fact put in issue by the law of the place of wrong. The law of the forum and the law of


1 Above at p. 156.

On the subject of this section, see generally Hamshaw, "Conflict of Laws as to Presumptions and Burden of Proof," (1939) 4 Mo. L. REV. 299.
the place of wrong may concur in making ultimate liability depend upon some question of fact, such as: Was the defendant guilty of negligence? Was the plaintiff guilty of contributory negligence? Did the plaintiff assume the risk? If the forum and the state of wrong have different rules for dealing with the burden of proof upon the issue in question, the court of the forum may feel inclined to follow its own rule. Admitting that the law of the place of wrong should be allowed to prescribe that liability depends upon a certain issue of fact, the court of the forum may allow its own domestic rule to say who should prove or disprove that fact.

But although it may often be possible to apply a burden-of-proof rule of the forum in foreign litigation, there are a number of reasons for arguing that the foreign burden-of-proof rules should prevail. Such rules undoubtedly affect, in some degree, the strategic balance of power between the parties. In collision cases, where conflicting testimony is common, the burden of proof may become crucial. A rule of the law of the place of wrong affixing the burden of proof may, on occasion, reflect an important social policy which the forum should be concerned to recognize. And the fact that certain courts have adopted such principles from another jurisdiction suggests that it can easily be done.²

Against such a course of action an argument of policy may be raised in one instance. Where the court of the forum habitually employs a presumption of the type intended to obviate delay and uncertainty in settling the facts, it may be reluctant to abandon this expedient in the face of a contrary doctrine of the law of the place of wrong. Suppose A brings suit in state Y for injuries suffered in state X while riding on the B railroad. By the law of state X the plaintiff in such a suit must allege and prove the railroad company’s negligence. But the courts of state Y in such cases always assume that the company was negligent until the company proves that it exercised due

² See cases cited below.
The courts of state Y do this because their experience has lead them to believe that personal injuries to passengers or employees caused by the operation of railroads are generally the result of negligence on the part of the company or its servants. Hence this inference is made to save the time and trouble which the accumulation of full proof would entail. But if the courts of state Y apply the rule of state X requiring the plaintiff to prove the defendant’s negligence, they will have to abandon their helpful inference and undertake an investigation of the B company’s conduct. This they may well be unwilling to do. When the tort has been committed in Y, however, there is no reason why the courts of outside states should not act upon the state Y presumption in the interests of uniformity.

Some little show of authority might be mustered to support the thesis that rules determining the incidence of the burden of persuasion are entitled to recognition by an outside forum whilst less effective rules are not. Rules assigning the burden of persuasion are, no doubt, more likely to affect the final result of a contest than those of less importance. But even the humblest presumption may carry the day for one of the parties on a proper state of the evidence. It may be doubted whether the slight advantage which might be gained by discarding the less significant foreign presumptions would be commensurate with the effort expended in applying the suggested distinction.

In considering the various interests involved in a conflict

---

2 See Southern R. Co. v. Robertson, (1909) 7 Ga. App. 154, 66 S. E. 535, where a local presumption of this kind was applied. The point is also discussed in Precourt v. Driscoll, (1931) 85 N. H. 280, 157 Atl. 525.

4 In some cases where a foreign rule was applied the courts have stressed the fact that it fixed the risk of non-persuasion. See Hiatt v. St. Louis, etc., R. Co., (1925) 308 Mo. 77, 271 S. W. 806; Olson v. Omaha, etc., R. Co., (1936) 131 Neb. 94, 267 N. W. 246.

In a number of cases where the foreign rule was disregarded the courts stressed the fact that the local rule did not go so far as to alter the risk of non-persuasion. Levy v. Steiger, (1919) 233 Mass. 600, 124 N. E. 477; Gould v. Boston & M. R. Co., (1931) 276 Mass. 114, 176 N. E. 807.
of rules governing the burden of proof we shall have to make our customary distinction. The substitution of the forum’s rule for that of the state of wrong may assist either (a) the plaintiff or (b) the defendant. Let us consider the first situation. The application of the forum’s rule assists the plaintiff. The very statement of the problem suggests the unfairness of allowing the plaintiff to increase his chances of recovery by “catching” the defendant in such a forum. Choice-of-law policies emphatically require that the rule of the place of wrong and not that of the forum be applied. Opposed to choice-of-law policies may be the court’s conviction that it cannot abandon its own rule without undue procedural inconvenience.

It has been suggested that a way out of this dilemma might be found by resorting to the expedient of the *Slater* case. If the court of the forum cannot see its way clear to follow the foreign rule, and the application of the local rule would seriously prejudice the defendant, the court might simply dismiss the action without determining its merits. Such a result seems preferable to forcing upon the defendant a burden of proof which the proper law would not have put upon him. But the suggested solution does not seem to have been adopted in any reported case.

Let us consider some species of local burden-of-proof rules, which may jeopardize a defendant’s position. At the present day it is not uncommon to find statutes, forming part of the forum’s internal law, which provide that, under certain circumstances, a defendant shall be presumed guilty of negligence unless he makes the contrary appear. A passenger is injured in a railway train. The railway company is presumed to have been guilty of negligence. An employee is injured by defective machinery. His employer is presumed to

---

6 See *Conflict of Laws Restatement* (1934) § 595, comment a; *Precourt v. Driscoll*, (1931) 85 N. H. 280, 157 Atl. 525.
have been negligent. Such rules raise a presumption which the defendant must rebut. They must be carefully distin­guished from rules which say that certain acts constitute neg­ligence per se. The defendant cannot overcome the effect of a rule of the latter type by adducing evidence to show that he was not negligent. A rule of this type is not a burden-of-proof rule; it is what we have called a primary rule of law. It directs that certain facts, if proved, shall have certain legal conse­quences. Such rules are sometimes said to raise a conclusive or irrebuttable presumption of negligence. This description is accurate enough, but by introducing the idea of a presump­tion it may lead to confusion.

Our concern here is with the type of rule which raises a rebuttable presumption of negligence upon certain basic facts. We assume such a rule to be in force at the forum. The law of the place of wrong makes the defendant's liability turn upon the issue of negligence. If the court of the forum brings its domestic presumption into play, it will give the plaintiff a special advantage which he ought not to obtain. Neverthe­less, this has been done in several cases. The courts which followed their local presumption gave no explanation for doing so beyond the statement that the presumption "re­lates to the remedy."

One of the most important species of burden-of-proof rules consists of rules concerning the issue of contributory neg­ligence. It often happens that both the forum and the state of wrong concur in making the plaintiff's contributory neg­ligence an absolute bar to his recovery. Yet the law of the state of wrong assigns to the plaintiff the duty of clearing himself, whilst the law of the forum requires the defendant to prove the plaintiff's culpability. Which doctrine should the

6 See above, sections 23, 25.
7 Pennsylvania Co. v. McCann, (1896) 54 Ohio St. 10, 42 N. E. 768; Rastede v. Chicago, etc., R. Co. (1927) 203 Iowa 430, 212 N. W. 751; Richmond, etc., R. Co. v. Mitchell, (1893) 92 Ga. 77, 18 S. E. 290.
court adopt? It could scarcely be urged, as a reason for adopting the doctrine of the forum, that it was a trusted inference employed by the courts to eliminate the task of adducing more complete proof. Judicial experience never compelled a court to conclude either that plaintiffs are usually guilty of contributory negligence, or that they are usually innocent. Neither rule can be regarded as a rational inference crystallized for convenience into a rule of law.

To apply the rule of the forum and so require the defendant to bear a burden which the law of the place of wrong would not have put upon him would seem to be unfair to the defendant. Nevertheless, this has been done in a good many cases. The great weight of authority supports the view that the ordinary rule of the forum should allocate the burden of proof upon the issue of contributory fault.

In *Precourt v. Driscoll* the Supreme Court of New Hampshire took the contrary view which, if we may say so with respect, appears to be the more reasonable one. Vermont was the state of wrong. Under the New Hampshire practice, the defendant was required to prove the plaintiff's contributory negligence. In Vermont the plaintiff would have been expected to prove himself free from fault. In Vermont the plaintiff would have been expected to prove himself free from fault. The New Hampshire practice was to allocate the burden of proof for contributory fault to the defendant. This was supported by the great weight of authority. The New Hampshire practice was to allocate the burden of proof for contributory fault to the defendant. This was supported by the great weight of authority.

---

8 The same point is made in a different way by Allen J., in *Precourt v. Driscoll*, (1931) 85 N. H. 280, 157 Atl. 525.


shire court adopted the Vermont rule saying (in the course of a lengthy opinion):

"It appears that the procedural rule in Vermont as to the burden of proof of contributory negligence is indispensable to the enforcement of the substantive rule, and is established in conformity with it. The procedural rule is incidental to it, effectuates it, and in a real sense is part and parcel of it. The substantive rule in an exceptional way embraces the procedural rule as an inseparable corollary of it.

"The usual distinctions are so merged that, if they were made, the substantive rule would become invalid in the alteration of its character which the observance of the distinctions would impose. An element of the cause of action would be destroyed, and the allowance of the non-existence of the element as a defence would not restore it. Whatever technical comparisons may be made, the practical result of the enforcement of the local burden of proof rule would be to substitute a domestic cause of action for that sought to be enforced."

In this passage the court is obviously pouring new wine into old bottles. In the face of earlier authority, the court hesitates to say that the Vermont rule is not procedural. Yet it is strongly convinced that the Vermont rule ought to be enforced at the forum if the plaintiff's cause of action is to be defined in any real, practical sense by the law of Vermont.

Let us turn now to our second problem situation: the substitution of the forum's burden-of-proof rule for that of the state of wrong assists the defendant. Here there is not, perhaps, such a strong element of unfairness in applying the rule of the forum. If the plaintiff's chances of success are diminished, he has only himself to blame for choosing this forum. However, it is still desirable, from the point of view of choice-of-law policies, that the rule of the place of wrong should prevail.

We have already considered rules which create a presumption of negligence upon certain basic facts. A rule of
this kind forming part of the law of the place of wrong gives
the plaintiff a certain advantage. It is desirable that he should
retain that advantage in other jurisdictions. Some courts
have reached this result by giving rules of this type the same

treatment which they would receive in their home state. 11

Other courts have excluded such rules from consideration. 12

The law of the place of wrong may allocate the burden
of proving contributory negligence in such a way as to favour
the plaintiff. But if the forum's rule requires that the plaintiff
should affirmatively show his freedom from fault, the de­

fendant will try to have the local rule applied. There does
not appear to be any good reason for excluding the rule of the
state of wrong upon this point. But in a number of cases this
has been done. 13 There is also authority for the position that
if the law of the place of wrong would make the defendant
prove contributory fault, the court of the forum should do
likewise. 14

11 Rule of the law of the place of wrong applied:

Negligence of defendant railroad company presumed from fact of injury to

the plaintiff. Hiatt v. St. Louis, etc., R. Co., (1925) 308 Mo. 77, 271 S. W.
806; Ramey v. Missouri Pac. R. Co. (1929) 323 Mo. 662, 21 S. W. (2d) 873.

Negligence of defendant railway company presumed from failure to give re­

quired signals. Baltimore, etc., R. Co. v. Ryan, (1903) 31 Ind. App. 597,
68 N. E. 923.

Burden of proving absence of negligence placed upon employer in action

brought by employee. Lykes Bros. S. S. Co. v. Esteves, (C. C. A. 5th, 1937)
89 F. (2d) 528.

12 Rule of the law of the place of wrong excluded:

Negligence of defendant railroad company presumed from fact of injury to


Defendant's negligence presumed from rate of speed at which he was travel­

ling. Johnson v. Chicago, etc., R. Co., (1894) 91 Iowa 248, 59 N. W. 66;

Smith v. Wabash R. Co., (1895) 141 Ind. 92, 40 N. E. 270; Davis Cabs v.

222 Iowa 241, 268 N. W. 617; Collins v. McClure, (1939) 63 Ohio App.
312, 26 N. E. (2d) 780.

Defendant's negligence presumed from defective machinery. Jones v. Chi­

cago, etc., R. Co., (1900) 80 Minn. 488, 83 N. W. 446.


14 Reilly v. Pepe, (1928) 108 Conn. 436, 143 Atl. 568; Southern R. Co. v.

Robertson, (1909) 7 Ga. App. 154, 66 S. E. 535.
Something should be said at this point regarding a species of rules which, although not classically included in the category of presumptions, possess one of the most important attributes of presumptions in that they enable one of the parties to avoid a directed verdict. In common-law jurisdictions it is customary for trial and appellate courts to reverse any finding of fact, made by a jury, which they do not believe to be supported by a reasonable quantum of evidence. In the process of supervising and testing the work of juries, a court will sometimes build up, by the accumulation of decisions, a general theory that fact B is sufficient evidence from which a jury might properly infer fact A. Thus, if a proponent charged with the burden of adducing enough evidence of fact A to get before the jury, succeeds in producing the necessary minimum of evidence to prove fact B, he will be held to have fulfilled his original duty relative to fact A. Unlike a presumption, however, such a theory merely enables the proponent to obtain the jury’s opinion upon the existence of fact A; it casts no obligation upon the opponent to adduce some quantity of evidence in rebuttal.

What should be the status of such rules in conflict of laws litigation? No doubt they may materially assist the proponent of an issue upon which the evidence is scanty and ought, when they form part of the law of the place of wrong, to be taken into consideration. There is some authority for this view. By the same token, an habitual inference derived from the decisions of the forum ought to be ignored. It may be difficult, however, for a court to put out of mind a rational conclusion which it has already drawn from similar data in its previous opinions.

---


The attitude of the federal courts to the burden of proof on the contributory negligence issue requires separate consideration. Let us approach the question historically. When the doctrine of *Swift v. Tyson*\(^1\) was in flower there was no difficulty. The burden of proof upon an issue of contributory negligence was classified as part of the "general federal common law." The divergent opinions of state courts were ignored. All federal courts followed the uniform federal rule laid down by the Supreme court.\(^2\) And this rule assigned the burden of proving contributory negligence to the defendant. But since *Erie R. Co. v. Tompkins*\(^3\) (1938) the federal courts no longer administer a general common law. They must, in compliance with the Judiciary Act of 1789 (section 34), follow the common law as well as the statute law of "the several States." Hence the federal courts are no longer free to adopt a uniform federal rule governing the burden of proving contributory negligence on the ground that it is part of the federal common law.

The federal courts have, however, a uniform code of rules of procedure, authorized by an act of Congress and promulgated in 1938.\(^4\) The act which authorized the Supreme Court to prescribe these rules stipulates that they "shall neither

---

\(^1\) *Swift v. Tyson*, (1842) 16 Pet. (41 U. S.) 1.


\(^3\) *Erie R. Co. v. Tompkins*, (1938) 304 U. S. 64, 58 Sup. Ct. 817.

\(^4\) The rules are printed as a supplement to *U. S. C. A.* following title 28, section 723b.

SOME SPECIFIC PROBLEMS

abridge, enlarge, nor modify the substantive rights of any litigant." Rule 8(c) of the code might be thought to provide that the defendant to a suit in a federal court must assume the duty of pleading and proving the plaintiff's contributory negligence. But in several cases where the applicable state law required the plaintiff to prove his freedom from contributory fault, lower federal courts have refused to accept the view that rule 8 (c) affects the burden of proof, on the ground that the rule would then affect the substantive rights of the parties which must be determined by the state law. These federal courts take the view that a state rule which makes it necessary for the plaintiff to show his freedom from fault transcends the procedural category and affects substantive rights. Such a state rule therefore comes within the scope and policy of section 34 of the Judiciary Act and is obligatory upon federal courts.

If we adopt the position that the federal rules of court do not touch the burden of proof in relation to contributory negligence and that the federal courts must be guided by state laws, a further problem arises. To illustrate, suppose A is injured by B in state X. He brings suit against B in a federal court in state Y. Should the federal court, in dealing with the burden of proof on a contributory negligence issue, adopt the rule of state Y which is the forum, or the rule of state X where the injury was received? From the standpoint of choice-of-law policies it is desirable that the law of state X (the state of wrong) should prevail. But since the Supreme Court's decision in Klaxon Co. v. Stentor Electric Mfg. Co. 7

6 See section 35.
See section 10, above.
the federal court's choice-of-law would appear to be a choice in name only. This decision requires federal courts to adhere strictly to the conflict of laws rulings of their home states. Hence the treatment of the burden of proof by the federal court sitting in state Y will depend upon the views entertained by the state Y state courts. If the state courts would, in the instant case, apply their local burden-of-proof rule, the federal court will do likewise. If the state courts would, in the instant case, apply state X's burden-of-proof rule, the federal court will do likewise.