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THE LEX FORI—BASIC RULE IN THE CONFLICT OF LAWS

Albert A. Ehrenzweig*

A. LEX FORI: EXCEPTION OR RULE?

Once a court has taken jurisdiction, it will usually apply its own law, unless the parties' own choice or an important foreign fact, such as a foreign domicile, a foreign situs, or a foreign conduct, appears to require application of another law. Most judges and lawyers will agree with this simple proposition—and yet text books, class notes, the Restatement, and even much language of the courts, would have it otherwise: foreign domicile, foreign situs, foreign conduct and other foreign "contacts" are said a priori to require application of a foreign law, unless the court can be persuaded for special reasons to turn to its own law or to the law chosen by the parties. This blatant discrepancy between the actual doing of the courts and "official" theory in the law of conflict of laws has made an awesome mystery or an object of ridicule of this subject in the eyes of many. The time has come for a stock taking and re-evaluation of accepted techniques in the light of practical needs, history and comparison.

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Note. The following works (treatises and articles) will be referred to herein only by the names of their authors: Batiffol, Traité élémentaire de droit international privé, 2d ed. (1955); Beale, A Treatise on the Conflict of Laws or Private International Law (1916); Cheshire, Private International Law, 5th ed. (1957); Dicey, Conflict of Laws, 7th ed. (1958); Ehrenzweig, Conflict of Laws (1959); Falconbridge, Essays on the Conflict of Laws, 2d ed. (1954); Gamillscheg, Der Einfluss Dumoulins auf die Entwicklung des Kollisionsrechts (1955); Gutzwiller, "Le développement historique du droit international privé," 29 Recueil des Cours 289 at 298 (1929); Lainé, Introduction au droit international privé (1888); Meijers, "L'Histoire des principes fondamentaux au droit international privé à partir du moyen âge," 49 Recueil des Cours 547 (1934); Neumeyer, Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus (1901, 1916); Niederer, Einführung in die allgemeinen Lehren des internationalen Privatrechts (1954); Nussbaum, Principles of Private International Law (1943); Quadri, Lezioni di diritto internazionale privato, 2d ed. (1958); Story, Commentaries on the Conflict of Laws (1834); Wolff, Private International Law, 2d ed. (1950).

I am indebted to Professor Rodolfo de Nova for many valuable suggestions offered during the completion of my research at the University of Pavia.—A.A.E.
For several centuries courts have, in varying ways and degrees, recognized foreign contracts or testaments which were valid under the law of their execution, permitted an alleged wrongdoer to show that he acted lawfully under the law of his conduct, or treated the transfer of foreign land in accordance with the law of its situs. Refinements have resulted in longer lists of such exceptions from the basic rule of the law of the forum. But it should not have been forgotten that foreign laws originally assumed these functions only to fill vacua created by superior legal orders or the forum’s self-limitation. The Pope could and did prohibit the bishop from enforcing the law of his diocese against foreigners; the feudal creed could and did prevent the court of Paris from applying its own law to land in Lyon; the parties’ choice could and did exclude the rules of the forum; the United States Constitution and international treaties can, and do at times, prohibit states from applying their own laws “extraterritorially.” In all these cases foreign laws have supplemented, rather than displaced, a law of the forum limited by superior orders. Self-limitations of that law have had the same effect. Sister state customs were admitted in medieval Italy, where city ordinances would in terms limit themselves to citizens. Foreign customs were applied in feudal France, where seignorial courts would grant (and expect) localization of statuta realia. The laws of other sovereigns were extended courtesy in the Dutch provinces whose laws in turn had disclaimed ubiquitous validity. The “civil ley” of the world community of commerce was applied in English courts merchant where the common law had denied itself to foreigners and foreign facts. And foreign laws were permitted to operate by “analogy” where “unilateral” or “spatial” rules of modern codes provided for their application to nationals, domiciliaries or domestic transactions.

These situations in which foreign laws have thus been called upon to fill a vacuum could well have been collected and classified in a catalogue of exceptions from the basic rule of the law of the forum, governed by party autonomy on the one hand, Roman common law, feudal order, natural law, the law merchant and international law, on the other hand. Instead, in a gradual process of academic petrification, which reached its climax after, and perhaps because of, the disappearance or weakening of superior orders and ideologies, doctrine has traded the fertile inconsistencies and intricacies which would have characterized this scheme, for the sterile consistencies and simplicities of dogmatic formulas, which distinguish our current “official” law of conflict of laws.
These formulas have in turn relegated both party autonomy and the basic lex fori to the status of exceptions, and have, in spite or rather because of their consistency and simplicity, brought this branch of the law to the brink of defeat.

Beginning with D'Argentré’s nearly all-embracing “statuta realia,” through Story’s private “international” law, Savigny’s “seat” of legal relationships, and the English dogma of foreign-created “obligations,” to Holmes’ “first principles of legal thinking,” Beale’s “vested rights,” and the Restatement’s “legislative jurisdiction,” forum and foreign laws have been made to “govern” by virtue of postulates which have always required, and now lack, foundation and sanction in a superior order. For, all of these orders have long disappeared with the common law of Rome, the feudal order of the Franks, the natural law of Grotius and Pufendorf, and the “civil ley” of the English law merchant. And the internationalist “creed” of the last century is on the wane. Nevertheless, long obsolete ideologies have continued to serve as the bases of the “official” conceptions and language of conflicts law, and have thus caused much unnecessary difficulty and confusion in American decisions, even in those of our most courageous courts which have achieved justice in spite of the conceptions thus forced on them. In a series of articles I have given many examples for this judicial predicament in the conflicts law of torts and contracts conflicts. Mention of two will suffice at this point.

A California citizen was killed in an automobile accident in Arizona. In a California law suit the California defendant claimed that the plaintiff’s cause of action had died under “applicable” Arizona law, although California had long abolished what even a hundred years ago was felt to be a rule contrary to “justice,” and

1 Nuusbaum 26. This creed had resulted in “a transmutation of forceful liberal and cosmopolitan tendencies into dogmas through a psychological process also observable elsewhere.”


8 Beach v. The Bay State Co., 27 Barb. (N.Y.) 248 (1858).
permitted the survival of tort actions. Nevertheless it took the imaginativeness and scholarship of a progressive court to defeat the defendant's seemingly conclusive insistence on the law of the "place of the wrong" in order to do justice between two California citizens according to California law. And in order to be able to do so, the court had to resort to dogmatic language devised 700 years ago for totally different purposes.\(^4\)

An uncle and his niece, both citizens of the Commonwealth of Massachusetts, were traveling through Italy. Desirous of giving his companion a valuable gift, the uncle handed his niece a sealed envelope which contained shares in a Massachusetts corporation. On his death his administrator claimed the shares, because the validity of the transfer "is to be judged by the law of Italy, and ... certain formalities required by the law" had not been observed. To the Massachusetts court "plainly that which was done in Italy would have been sufficient, if it had been done in Massachusetts, to effect a transfer of legal title to the shares." But, feeling compelled to concede the plaintiff's argument with regard to the transfer of movables in general, the court, in order to do justice between two Massachusetts citizens according to Massachusetts law, had to develop a special rule for shares of stock\(^6\) that may well become a new source of confusion in future cases.\(^7\)

Decisions of this kind could be multiplied at will: from the Connecticut automobile renting agency which could be held liable in Connecticut under Connecticut strict liability law to a Connecticut citizen for a Massachusetts accident only because the court, while conceding the "place of wrong" adage, was able to transform a tort into a contract;\(^7\) to the contract valid under the law of Alaska, the state of the domicile of both parties, which, having accidentally been concluded in New York (where it was invalid) had to be validated in Alaska by resort to renvoi;\(^8\) to the numberless cases in

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\(^4\) Grant v. McAuliffe, 41 Cal. (2d) 859, 264 P. (2d) 944 (1953), per Traynor, J. To the contrary, although conceding that "equity" might require another answer, Allen v. Nessler, 247 Minn. 230 at 242, 76 N.W. (2d) 793 (1956), in unfortunate reliance on the Restatement, Beale and Wharton, and authors of annotations.

\(^5\) Morson v. Second Nat. Bank of Boston, 306 Mass. 588, 29 N.E. (2d) 19 (1940), per Qua, J.

\(^6\) As long as four centuries ago, Dumoulin, the great advocate of the principle of autonomy, asked the question whether it would be desirable to apply the purely accidental lex contractus to a sale between two foreigners traveling in Italy, of a house located in their home country. Mayzes 651.


\(^8\) Alaska Airlines v. Stephenson, (9th Cir. 1954) 217 F. (2d) 295.
which American courts, in order to be able to apply their own law to the American property of alien decedents, have had to apply artificial techniques of the most varied kinds to justify their preference for American law.  

Less frequent, though more disturbing, are those cases in which less courageous judges, or judges less familiar with the tools at their disposal, have more or less grudgingly acquiesced in what they thought to be compelling precedent, and have done injustice by refusing to apply their own laws. Few will be those to acclaim the Alabama court which denied the injury claim of the Alabama brakeman against the Alabama railroad under Alabama law for negligent conduct committed in Alabama because the injury was inflicted in Mississippi and the "Code of Alabama had no efficiency beyond the lines of Alabama," or the astounding ruling of an Illinois court which, in 1958, denied recovery to an Illinois citizen against Illinois tavern keepers for an injury sustained in an automobile accident caused by a driver to whom defendants had unlawfully sold liquor in violation of the Illinois Dram Shop Act—because the place of the tort or wrong was Missouri, and its laws determine "whether the act... gives rise to a cause of action," or those cases in which courts have refused to limit liability under their own guest statutes, or insisted on applying foreign statutes of this type notwithstanding the fact that both parties were citizens of the forum state and could not possibly have considered foreign standards for their conduct simply because of crossing into another state. In the field of contracts, cases are rare, but equally regrettable, where courts have seen fit to sacrifice the parties' unambiguous intention to the magic of words.

The dogma which has so often either misled the courts during the past few decades, or has forced them into artificial evasions or reluctant acceptance, is being slowly—too slowly—discredited and

10 Alabama Great Southern R. Co. v. Carroll, 97 Ala. 126, 11 S. 803 (1892).
destroyed. This task will be rendered easier if we realize that, by expressly treating traditional conflicts rules as exceptions from a basic law of the forum, we would not abandon valuable achievements of a more refined era, nor return to a regrettable "provincial" attitude, but, on the contrary, promote the actual application of foreign law by improving and refining the rules pertaining to specific typical situations. We would merely restore a highly cultured, world-minded law but recently threatened by a nearly world-wide sweep of a dogmatic conceptualism which has sacrificed reality and the painstakingly and slowly progressing idealistic rationalism of centuries to ideological rather than idealistic formulas, at the risk of losing everything and gaining nothing. We shall continue, through international treaties, constitutional control and determined scholarship, to strive for an ever-closer relation between both the world's and the Union's legal systems. But I believe we shall not be able to do so with any hope of success if we continue to speak the language of an unattainable fantasy. Great scholars everywhere, including the "local law" advocates in this country, have long attacked the various techniques of the false internationalism underlying our recent conflicts law. We shall have to find the courage to retrace our steps to that period of American law in which the imaginative searching of a young society for new answers to new problems was not yet obscured and emasculated by the all-too-easy acquiescence in common-place generalizations, a period in which courts still felt free to treat their own law as primarily entitled to application unless displaced by the parties' reliance on another law or similar compelling considerations.

By this return to earlier periods, the superstructure of the last century need not be entirely lost. An important, though yet little-explored achievement of "classic" conceptualism is the "adjustment" to the concepts of forum law of the concepts of the applicable foreign rule. Moreover, there is merit in the compilation of a catalogue of those principles which, though necessarily inconsistent with each other, like all principles of "justice," may, if

14 NUSSBAUM 26-32; and, in general, EHRENZWEIG 13.
applied consciously and without a priori priorities, assist the judge in his decision: the forum's "political" interest including its conception of its "public policy"; the substantive harmony between laws applicable to a unitary set of facts, such as a family, a decedent's estate or a contractual relationship; the reduction of possible conflicts between the decision reached by the forum and that likely to be reached by a foreign court as to the same facts; and perhaps the effectuating of as many party expectations as possible.

Finally, acceptance of the lex fori as a basic rule and relegation of traditional conflicts rules to the status of exceptions keyed to ever narrower fact situations will not substantially alter their scope and contents. Lex situs, lex loci and personal law will be called upon, as they are now, to give better "conflicts justice" than the lex fori. But the judge will not have to rely on qualifications, renvoi or public policy to justify his preference for his own or another proper law, and applicability of the foreign law will in each new situation have to be established to his satisfaction.

The following summary of this thesis will show its essential connection with the progressing reform of the law of jurisdiction.

The Thesis

1. American courts have in fact nearly always given preference to their own laws in the decision of conflicts cases, both interstate

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19 See, in general, Currie's articles cited in EHRENZWEIG 16.


23 Kegel, note 17 supra, at 279.


25 See text accompanying notes 243-339 infra.


27 See, in general, EHRENZWEIG 88, 120.
and international, and have usually applied foreign law only in situations where such preference was contrary to the intentions of the parties or would have caused hardship on other grounds. The first exception based on the parties' intention is so firmly established that it may be regarded as the second basic rule. Other propositions as to a priori “applicable” or “governing” law, such as the lex loci delicti or situs, and particularly rules serving the unity of status and estates, should be preserved, but only where, and insofar as, they have sufficiently crystallized in certain specific situations so as to be tenable as other exceptions from a basic lex fori.

2. The converse treatment of the lex fori as an exception from such a priori propositions, far from being based on “logical” postulates or practical exigencies, is the heritage of academic aberrations in the history of conflicts law. The latest of these aberrations, in this country as well as abroad, is an internationalist or universalist ideology which has established a fictitious allocation of “competencies” thought to entitle the several laws to ubiquitous application according to a small number of broad and vague formulas. This ideology has forced American courts to justify the actual application of their own law or the law intended by the parties, by various artificial devices such as arbitrary localizations of allegedly decisive contacts, procedural characterization, renvoi and resort to public policy. The current decline of this ideology will facilitate the abandonment of these academic exercises, which is suggested in the final part of this article, and the return to the lex fori as the basic principle, which alone can remove the prevailing uncertainty and confusion.

3. Conscious recognition of this basic principle would concentrate our effort on a search for a scheme of international and interstate jurisdiction which would secure a lex fori properly applicable in view of a substantial contact of the court with parties or facts. Such an effort would be assisted by the current extension of traditional jurisdictional concepts and their concomitant limitations under what may broadly be called a doctrine of forum conveniens.

4. Once the ascertainment of a convenient forum would thus have become the primary object of the law of conflict of laws,
conflicts rules, insofar as they are not established by constitutional limitations or international conventions, would, upon a comparative analysis of forum and foreign policies, come into play primarily in determining whether the defendant would be unfairly dealt with under the law of the forum, and where governmental interests otherwise require displacement of that law.

The third proposition has been extensively discussed in the first part of my book on the Conflict of Laws dealing with "Jurisdiction and Judgments." Full proof of the fourth proposition will have to await a detailed analysis of all typical situations, a contribution to which I hope to offer in a series of articles and in the second part of my book. In order to establish the first two propositions, a historical and comparative analysis will demonstrate that, besides party autonomy, application of the lex fori has always been the basic principle of conflicts law and was merely temporarily displaced from time to time. So clearly has the lex fori been prevalent all through history that our discipline even lacked a name until the internationalist period of the last century, when the conflicting claims of foreign laws produced both the "Conflict of Laws" and "Private International Law." Insofar as the following analysis is concerned with the doctrine of earlier centuries, it must partly be based on conjecture. This doctrine followed largely scholastic tradition and did not necessarily reflect living law. I believe, however, that the interpretations offered in these pages, have strong support in available authority, and that these interpretations, if found tenable, could go a long way toward destroying the dangerous idols of current dogma and restoring the lex fori to its rightful place. This historical analysis will follow the sequence in which the several countries originally entered upon the world scene of private international law.

33 Note 22 supra.
34 This term is usually ascribed to Huber. See Nussbaum 7. But see also note 148 infra.
35 Story is the creator of this phrase. Nussbaum 7.
36 Primary sources have been extensively used in this analysis. Since most of these sources are in foreign languages, references are, however, prevalingly to the classic studies by Lainé, Neumeyer, Meijers, and Gutzwiller. See Note, p. 637 supra.
B. HISTORY AND COMPARISON

1. Italy

The great fulfillment of Roman law as a jus gentium governed the Empire. As the law prevailing in all fora, it excluded conflict. Ambiguously, the beginning of conflicts law is often identified with the general regime of "personal laws" within the several territories of the conquering Germanic tribes. But conflict of laws in our sense can arise only from a competition between a lex fori and foreign laws, and there was no such lex fori to contest the free reign of each litigant's own law. Nor was there such competition when those great "personal" laws, the perfected and later declining "lex" of the Langobards, and the defeated and later rising laws of the Romans, had yielded, as had the King's powers, to the feudal laws, the Frankish capitularia, and the customs and statutes of the city states. All of these, though on different grounds, claimed general "territorial" application to both citizens and foreigners, to the exclusion of all foreign laws; and the lex fori ruled supreme confirmed in its rule by treaties among the city states. It would be wrong to treat this stage as one of primitive unawareness of inequities thus caused.

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38 See, in general, Meijers 549; Calisse, A History of Italian Law 39 (1928). But see Quadri 32-42.
39 1 Neumeyer 11; Batifol 11; Meijers 572. The translation of "Stamm" by "tribe" is misleading since we are dealing with highly organized and advanced communities rather than with primitive hordes. Concerning the fundamental difference between the "personal laws" of that period and that following the regime of an integrated lex fori in the 10th century, see 1 Neumeyer 14. As to the gradual decline of the old personal laws, through the return of Roman law, the parties' choice, and needs of commercial intercourse, see 1 Neumeyer 143, 147, 160.
40 At the time of the Frankish conquest in 774, Lombard law had reached the stage of its highest development as the "best law nearly generally known." 1 Neumeyer 23, referring to a statement by King Liutprand.
41 Roman law had persisted and was rejuvenated as both local and universal law. 1 Neumeyer 44-50. For its co-existence with Lombard law, see id. at 57, 134.
42 1 Neumeyer 29-38; Batifol 13; Wolff 21. See, in general, Boretius, Die Capitularen im Langobardenreich 14 (1864); Abignente, Storia del diritto in Italia 186 (1884).
43 1 Neumeyer 39, 59, 65, 70.
44 2 Neumeyer 1, 13; Gutzwiller 299.
45 The oldest treaty is that between Pisa and Amalfi assuring the merchants of each party of treatment under the lex fori. 2 Neumeyer 5. Apparently as a courtesy to the neighboring state, criminal jurisdiction was extended to crimes committed abroad. 2 Neumeyer 29.
The city judge applied the Roman rules of competency. Since the primary tenet of these rules was the parties' subjection to the court of the defendant's domicile as his "forum generale," application of this forum's law would neither aggrieve the defendant nor the foreign plaintiff. On the other hand, a foreign defendant could hardly complain if the added competencies of the place of contracting, of the delict, of the thing in issue, made applicable a forum law which had the most significant contacts with the case. Nor was injustice done where a Venetian's will executed abroad was subjected to Venetian law by a Venetian statute.

But the lex fori, after a regime of one hundred years, was rendered inadequate at the beginning of the thirteenth century, when, presumably in part because of the revived influence of Roman law, foreigners were deprived of both the burdens and the privileges of forum law. This development seems to have occurred rather abruptly, although around 1200 Aldricus had opened the first breach in the lex fori when he referred the judge to the "stronger and more useful law." Accursius, as late as 1228, had quite generally permitted the place of litigation to determine the applicable custom. But only a few years later, this great master...
of the Gloss made the now famous concession that in Modena the citizen of Bologna must not be adjudged under the laws of Modena. 5

What, then, was the foreigner's law in Modena? "At first there seemed to present itself an easy solution. Local laws were considered mere modifications of the common law which bound everybody everywhere. What was simpler than to apply this very common law to the foreigner?" But this easy solution could not, in the long run, satisfy new needs. It was at this point that the inventiveness of scholars devised the first casuistic rules of conflict of laws. Indeed, "the groping and uncertain experiments of those scholars constitute the starting points for all theoretical endeavors which our time continues to employ in private international law." 6

To fill a gap, then, a gap left by the self-limitation of the lex fori and the failure of the common law, the canonists, as well as, independently, secular scholars led by Jacobus Balduini and Ubertus de Bobio, having first found the law of the forum applicable to foreigners as to contracts made in the forum state, began, conversely, to apply foreign laws to foreign contracts. 62 And it was similarly to fill a gap that courts upheld testaments made by citizens abroad not only under the lex fori, but under the foreign law as well. 63 These conflicts rules, without displacing the lex fori, thus had come to its rescue. Wherever the lex fori was willing to operate, it retained its effect, far from conceding to the foreign law a right to "govern" a legal relation; and it is fundamental for the understanding of this origin of all private international law that probably all of its early rules were at least explained by

59 See, e.g., Yntema, "The Historic Bases of Private International Law," 2 AM. J. COMP. L. 297 at 302 (1953); 2 NEUMEYER 76.
60 2 NEUMEYER 82.
61 2 NEUMEYER 83. The same period also saw the creation of that differentiation between procedural and substantive law which has remained a principal tool of our theory. 2 NEUMEYER 85, 88.
62 2 NEUMEYER 84, 102.
63 2 NEUMEYER 45; 2 LAINE 338; PARRA, LA REGLA "LOCUS REGIT ACTUM" Y LA FORMA DE LOS TESTAMENTOS 30, 34, 52 (1955). As to the relevance of the situs, see PARRA 27, 48, 60. The famous "English question," debated by Bartolus and his contemporaries (Italian estate of Englishman), foreshadows the broadening of the conflicts rule. GUTZWILLER 315. See also MEIJERS 597, 608 on the influence of the school of Orleans.
64 Where jurisdiction was based on the place of contracting, a Modena court would adjudicate a Modena contract under Modena law even as to a Bologna citizen. 2 NEUMEYER 84. This seems to have been true also where jurisdiction was based on the defendant's domicile (2 NEUMEYER 94) or where the foreigner was not familiar with the lex contractus (2 NEUMEYER 187).
65 See notes 70, 72 infra.
the "principle of the parties' autonomy," which later conceptualist dogma was to betray to the lasting detriment of doctrine and practice.

To be sure, the Commentators, following their academic leaning toward generalization and faithful to the persisting idea of an all-embracing law of Rome, were ultimately inclined to grant to foreign law, at least in a few specific situations, the same claims to extraterritorial application which earlier they had granted to the lex fori. Their ever-recurring invocation of the clearly inapplicable imperial decree of Cunctos Populos in the very titles of their works makes this more than likely. But, contrary to later misinterpretations, most dramatically exemplified in Professor Beale's mis-translation of Bartolus, the earlier Italian Commentators had, in general, recognized the priority of the lex fori by organizing their analysis around the effectiveness of the lex fori as to either foreigners before the forum or forum citizens abroad. Balduini had merely asked the forum to "inspect" the customs of the place where the contract was located. The same language was still used by Bartolus (1314-1355) and Baldus (1327-1400). Only Salicet may be said to have foreshadowed later dogma which may well have been promoted by the universalist tendencies of a canon law coordinated by the Pope's sovereignty. It seems that in what was probably the most frequent conflicts situation, namely the case involving a foreigner's contract, the court would take jurisdiction over the foreigner as the court of the place of contracting, in the expectation that the judgment would be recognized by the

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66 Meijers 633 with primary reference to the writings of Salicet.
67 Meijers 630.
68 Niederer 38.
69 Codex Justinianus 1.1.1. This technique was used all through history from Accursius
to d'Argenten. Niederer 39.
70 Beale, Bartolus on the Conflict of Laws 18 (trans. 1914), consistently translates the word "inspicitur" by "govern." 1 Lainé 135 correctly translates: "il faut considérez," and "il faut egard." But see also Van de Kamps Bartolus de Saxoferrato 1313-1357 235 (1936) ("geldt het recht").
71 As to the international criminal law of Bartolus and his successors, see Meili,
Bartolus ALS HAUPT DER ERSTEN SCHULE DES INTERNATIONALEN STRAFRECHTS 30, 43 (1908).
72 2 Neumeyer 86 ("inspicitur," "spectatur").
73 See note 70 supra.
74 Baldus de Ubaldis (1327-1400), in his Commentaria in Primum, Secundum et Tertium Codicis Librum, De Summa Trinitate, L. I, no. 57 (ed. Augustae Taurinorum 1576). This work deals almost exclusively with the newly discovered "personal law." Note 40 supra.
75 Note 91 infra.
foreigner's home state. Although Salicet (died 1412) would insist that also a foreign lex contractus "shall" be applied, he, too, returned to the lex fori where the contract was to be performed in the forum state. Rochus Curtius (died 1495) was perhaps first generally to discuss the applicability of foreign "customs." But court practice even then seems to have largely ignored dogmatic developments, and further generalizations were left to the French statutists.

Passing over less significant writers, such as Chasseneuz (died 1541) and Tiraqueau (died 1558), Dumoulin (1500-1566) may perhaps be considered as the last exponent of the Italian school. He, too, refrains, with certain traditional exceptions, from ascertaining a "governing" law and is satisfied with examining the limits of a lex fori which he supplemented by the ubiquitous applicability of the common law and the test of natural justice. Indeed, to his contemporaries, Dumoulin seems to have been an advocate of the primary rule of the lex fori. It may not be a coincidence that this scholar, who kept himself free of later conceptualistic generalizations, is also often credited with having re-emphasized in the law of conflict of laws the great principle of the autonomy of the parties, and that it was in turn this great principle which has remained the object of contempt and attack by those preferring neat dogma to living law.

Perhaps it was fortunate for Italy's legal history that, for the next two centuries, political upheavals virtually excluded her

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76 See, for early French law, Neumeyer, "Zur Geschichte des internationalen Privatrechts in Frankreich und den Niederlanden," 11 ZEIT. FÜR VÖLKERRECHT 190 at 192, 195 (1920).
77 BARTHOLOMAEUS A SALICE, PARS PRIMA IN PRIMUM ET SECUNDUM CODICIS LIBROS, L. cunctos populos, no. 4 ff. (1574), L. 6, tit. 2, lib. XXI, Dig., uses the phrase "caveri oportet."
78 I LAINÉ 180.
79 ROCHUS CURTIUS, TRACTATUS UTRIUSQUE JURIS, tít. II, 376 (1854) uses in the heading of the second part the phrase "an judex debeat equi."
80 This observation has been based on such statements as that of Coquille (1523-1603), according to whom the French costumes are not to be treated as "local to the same extent as the Docteurs ultramontains have considered their Statutes" (trans). 2 COQUILLE, ŒUVRES, LES COSTUMES DU PAYS ET COMTÉ DE NIVERNAIS 1 (1703). Cf. GAMILLSCHEG 98. See also NIEDEWER 37; I LAINÉ 300. CALASSO, LEZIONI DI STORIA DEL Diritto ITALIANO, rev. ed., 317 (1948), refers to Cujas' criticism of the commentators for being "verbose as to easy matters, silent as to difficult ones, and diffuse in a narrow spot." (trans). Simply to ascribe Coquille's anti-statutism to his resentment of the Lutheran Dumoulin's attack against his uncle Bourgoin, a Catholic, is hardly justifiable. DUPIN, LA COSTUME DE NIVERNAIS 432 (1864).
81 Note 105 infra.
82 GAMILLSCHEG 73, 88, 93.
83 GAMILLSCHEG 33, 98.
84 See I LAINÉ 223; GAMILLSCHEG 110-124.
from the arena of conflicts scholarship which during that period was largely one of dogmatic deviation. Yet it was only two years after Sardinia's defeat in 1851 that Italian scholarship was to set the stage for another great victory when Mancini (1817-1888) in a now famous speech added the political ideas of his country's resorgimento to the European concert of internationalist doctrine.

Supported by the reforms of the French Code, he urged the nationality principle as the primary basis of a truly international conflicts law. Its force was spent in an unparalleled impact on legislation and literature at home and abroad. In Italy, too, the international dream has yielded to a new "territorial" realism, which may or may not coincide with the peculiarly Italian doctrine of "incorporation" authorizing the judge, in applying his own law, to incorporate foreign laws in that law by a creative act.

2. The Canon Law

As in the secular law of the Italian city states, the lex fori governed supreme in early canon law. And as in the secular law of the Italian city states, the lex fori of the canon law at one time met situations which seemed to require its withdrawal. But problem and solution differed substantially in the two laws. While the laws of the Italian cities had denied their own applicability

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85 It seems that the treatise by Rocco, TRATTATO DI DIRITTO CIVILE INTERNAZIONALE (originally published in 1837, ed. 1859), which adopts a natural law ideology, was unable to survive the impact of Mancini's work. See BAR, DAS INTERNATIONALE PRIVAT-UND STRAFRECHT 44 (1862).

86 Mancini, DELLA NAZIONALITA COME FONDAMENTO DEL DIRITTO DELLE GENTI (1851). See also Mancini, LA VITA DEI POPOLI NELL'UMANITA (1872). Among others, Mancini relied on the teachings of Savigny (note 155 infra) and Westlake (note 169 infra). See also 1 CLUNET 221 at 230 (1874).


88 The Codice Civile Italiano of 1865 (amended 1942) and the Spanish Civil Code of 1889 relied largely on Mancini. See, in general, NIEDERER 66; LEREBOURS-PIGEONNIERE, note 87 supra, at 331.

89 See, e.g., Ago, TEORIA DEL DIRITTO INTERNAZIONALE PRIVATO 59-94 (1934); BALLABORE-PALLIERI, DIRITTO INTERNAZIONALE PRIVATO, 2d ed., 9-11 (1950); De Nova, "Solution du conflit de lois et reglement satisfaisant du rapport international," 37 REV. CRIT. DE DR. INT. 178 (1948); Morelli, ELEMENTI DI DIRITTO INTERNAZIONALE PRIVATO ITALIANO, 6th ed., 20-23 (1959); Pacchioni, ELEMENTI DI DIRITTO INTERNAZIONALE PRIVATO 111-122 (1930); Quadri 169-239. For bibliographies, see, e.g., De Nova, "La jurisprudence italienne en matiere de conflits de lois de 1935-1949," 39 REV. CRIT. DE DR. INT. 159-162 (1950); NIEDERER 69; BATIFOL 258, 278.

90 This theory is often identified with the name of Anzilotti [STUDI CRITICI DI DIRITTO INTERNAZIONALE PRIVATO (1898)]. See, e.g., Ago, "Regles Generales des Conflicts de Lois," 58 RECUEIL DES COURS 249 at 303 (1958); Esperson, "Le Droit International Privé dans la législation italienne," 6 CLUNET 329 (1879); 7 id. at 245, 337 (1890). See also NIEDERER 371; RABEL, THE CONFLICT OF LAWS, A COMPARATIVE STUDY, 2d ed., 16, 62 (1958).

912 NEUMEYER 126. See also RIGAUD, ACTES DU CONGRES DE DROIT CANONIQUE (1950).
to foreigners and foreign facts, the clerical judge found himself unable to apply his law for other reasons. Delegation of judicial authority was the rule and neither the delegating nor the delegated judge seemed entitled to his own law.\(^9\) Moreover, the right to appeal to a judge in another territory raised the question as to the law applicable in the appellate court.\(^9\) Perhaps in part for these reasons the parties were given the right to choose their own judge and their own law long before similar rights were available in secular courts.\(^9\) That, in the absence of such choice, the defendant's law was given preference\(^9\) is additional support for the assumption that the law of the forum, i.e., typically the law of the defendant's domicile, had even then remained the law entitled to primary consideration.\(^9\)

As in the Italian city states more complex fact situations required greater refinement. Here, as there, other laws were permitted to aid the lex fori where it had become deficient. And here, as there, contracts and testaments led the way,\(^9\) with delicts following suit.\(^9\) But canon law, too, even earlier than its secular counterpart, prompted by its coherence under one sovereign, succumbed to dogma. Pope Boniface VIII (1294-1303), in his *Decretale Ut Anima rur* (1298), had decreed that the bishop's ordinance threatening excommunication for larceny, did not bind his subjects outside the diocese, because, in the words of the Roman jurist Paulus, "nobody may pronounce law (jus dicere) outside his own territory."\(^9\) Although Paulus' adage referred to judicial rather than to legislative jurisdiction,\(^9\) even a contemporaneous Gloss extended the *Decretale* to restrict the legislative power as such,\(^9\) precluding the forum from applying its own law to foreigners or foreign transactions, or a foreign law to citizens or domestic transactions. It may be regrettable that the final text of the *Codex Juris Canonici* preserved this theorem by presuming every law to be

\(^{92}\) Neumeyer 129.
\(^{93}\) Neumeyer 129. For analogies in early French feudal law, see Neumeyer, "Zur Geschichte des internationalen Privatrechts in Frankreich und den Niederlanden," 11 Zeit. für Völkerrecht 190 at 195 (1920).
\(^{94}\) Neumeyer 129.
\(^{95}\) Neumeyer 113.
\(^{96}\) Neumeyer 132. An exception existed where the plaintiff's law was more favorable to the defendant or was more likely to do justice. Neumeyer 131.
\(^{97}\) Neumeyer 131, 135.
\(^{98}\) Neumeyer 138.
\(^{99}\) Dig. 2, 1, 20.
\(^{100}\) Pacelli, *La Personnalité et La Territorialité des Lois Particulièrement dans le Droit Canon* 2 (1945).
\(^{101}\) Id. at 5.
To be sure, an earlier draft, conversely favoring a presumption of personality, would have similarly recognized a regime of rigid rules. But the reversal, thus proposed, of an age-old formula might have strengthened those other provisions of the Code which may mark a trend back to the pre-Bonifacian *lex fori*.  

3. France

The spouses De Ganey, domiciliaries of Paris, had made each other heirs of all their after-acquired property. In a dispute between the heirs of husband and wife the former claimed a piece of land in Lyon as not having been included in the mutual gift. That gift had been made under the community property law of the Paris Coutume, it was claimed, which lacked extraterritorial validity in Lyon, a city subject to the Roman *droit écrit*. The Bartolist and royalist Dumoulin rendered a famous opinion favoring application by the Paris judge of his own law which, through the contract, had been deprived of its local character. Lex fori, then, and party autonomy, even as to foreign land!

To d'Argentré this opinion was intolerable. In his all-pervasive desire to support Breton feudalism against the King by giving priority to the *lex situs* as to Breton land, he felt compelled to oblige the judge equally to apply the *lex situs* to foreign land. Whatever the rationale of this obligation—and there are almost as many interpretations as authors dealing with this question—the *lex fori* had found its limitation, one not self-imposed or suggested by the common law, like the limitation of the Italian city laws, nor decreed by the sovereign, like the limitations of the several jurisdictions of the canon law. Rather, the feudalist displacement of the law of the forum was demanded by a political ideology

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102 Codex Juris Canonici, Canon 12.
103 Draft 1914, Canon 7, quoted Pacelli, note 100 supra, at IV.
104 Codex Juris Canonici, Canon 14, §1, no. 1.
105See, e.g., D'ESPINAY, LA FÉODALITÉ ET LE DROIT CIVIL FRANÇAIS 343 (1862); GAMILSCHEG 42.
106 As to French antecedents, see MEIJERS 549. For a different view of the controversy, see NEUMEYER, "Zur Geschichte des internationalen Privatrechts in Frankreich und den Niederlanden, 11 ZEIT. FÜR VÖLKERRECHT 190 at 199 (1920).
108 GAMILSCHEG 103, 202. See also 1 CATELLANI, IL DIRITTO INTERNAZIONALE PRIVATO, 2d ed., 441 (1895), citing De la Lande de Calan's dissertation (1892); NIEDERER 46.
109 See GAMILSCHEG 104.
to which that law had to yield the power over land,\textsuperscript{110} and perhaps by that nascent internationalism\textsuperscript{111} which, too, endowed the foreign law with a right to recognition.\textsuperscript{112}

If d'Argentré had stopped at this point, he could have retained in his scheme the predominance of the lex fori with the one great exception of the lex situs.\textsuperscript{113} But the great scholar, judge and legislator did not stop there. His was the urge for a simplification of the administration of justice in his native Brittany, his a predominant concern for those feudal interests which were just then facing the first stage of their decline. If statuta realia, the laws governing land, were to gain the great standing he desired for them, he may well have wished to restore an at least apparent balance by giving imperative effect, also, to those ancient statuta personalia, which are carried about by everybody "wherever he may go."\textsuperscript{114}

The inevitable inconsistency between these two principles has often been pointed out.\textsuperscript{115} The all-importance of a "territorialism" purporting to embrace all legal relations as to forum land seems irreconcilable with the forum's duty, though secondary, to recognize as to such land personal laws "created" by another sovereign. D'Argentré, the feudalist, attempted to minimize this inconsistency by reducing, as far as possible, the scope and impact of the foreign personal laws intruding on the forum law of the situs.\textsuperscript{116} But neither later scholars nor the courts followed suit.\textsuperscript{117} The conflict remained unresolved, and the lex fori continued, openly or in disguise,\textsuperscript{118} to determine French law until the eve of the great

\textsuperscript{110} Gamillscheg 104.
\textsuperscript{111} 1 Lainé 270.
\textsuperscript{112} For antecedents, see Gamillscheg 105; Neumeyer, "Zur Geschichte des internationalen Privatrechts in Frankreich und den Niederlanden," Zeit. fü r Völkerrecht 190 at 198 (1920).
\textsuperscript{113} The regime of the lex situs has since been surrounded by something close to a psychological taboo. See in general, Ehrenweig 205. For early history, which can be traced back to 1270, see Batiffol 261.
\textsuperscript{114} D'Argentré, note 107 supra, at no. 4. See 2 Lainé 320.
\textsuperscript{115} 2 Lainé 322.
\textsuperscript{116} This D'Argentré sought to achieve by subjecting the statuta mixta to the regime of the statuta realia without regard to a possible preponderance of their personal character (which Dumoulin had conceded), and by limiting the effect of personal statutes to those which purport to affect the "general status," to the exclusion of those which "merely create a limited incapacity." D'Argentré, note 107 supra, at no. 14. See 2 Lainé 324. For criticism of the resulting predominance of the lex fori, see 2 Lainé 316; Batiffol 267.
\textsuperscript{117} 2 Lainé 338, 389, 394; Delaume, Les Conflits de lois à la veille du Code civil 338 (1947).
\textsuperscript{118} Concerning the continued impact of the lex fori through the process of qualification, the renvoi, and the ordre public, see Delaume, note 117 supra, at 49, 93, 114.
codification and beyond. In this form, strengthened by Dutch influence, French doctrine, in the writings of Boullenois (1680-1762), Boughier (1673-1746), Froland (+ 1746), and Merlin, came to play its important role, shared with that of Dutch and German scholars, in the formative process of American conflicts law. This American law was in turn partly responsible for that internationalist affliction which for a considerable period was to hem the natural development of French conflicts law. Foelix, the author of the first French treatise of the 19th century, announced flatly his “complete adoption” of Story’s teaching. But it was Savigny whose internationalist idealism probably gave the decisive impulse to that dogmatic deviation which culminated in the work of Pillet, Beale’s great French counterpart.

It would seem, however, that in France, too, the restoration of the lex fori is around the corner. Notwithstanding Niboyet’s somewhat ambivalent support of Pillet’s teaching, Bartin’s realism has prevailed—though veiled in a universalist aura of philosophy

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120 Apparently Boullenois himself had been strongly influenced by the Dutch doctrine.

121 See 2 Lainé 418; Gamillscheg 185; Batiffol 271. The main contribution of these authors has been seen in their revival of Dumoulin’s autonomy of the parties and their refinement of the law of succession. Batiffol 278.

122 Boullenois’ work [Traité de la Personnalité et de la Réalité de loix, coutumes, ou statuts (1765)] was one of the main sources of Story’s Commentaries. See also Gamillscheg 247; Beale 44.


124 Foelix, Traité de Droit International Privé 12 (1843). See Vareilles-Sommières, La Synthèse du Droit International Privé 165 (1897); Batiffol 284. On Masse, Le droit commercial dans ses rapports avec le droit des gens et le droit civil (1884), see Bar, Das internationale Straf- und Privatrecht 45 (1862).

125 See Batiffol 280; Louis-Lucas, note 123 supra, at 803.


and aesthetics in the great work of Batiffol.\textsuperscript{128} Thus, in the law of
torts no less an authority than Mazeaud\textsuperscript{129} has expressly advocated
the outright application of the lex fori.\textsuperscript{130}

4. \textit{Netherlands}

What d'Argentère's feudalistic theorem did not achieve in
France, it did apparently at first achieve in the Netherlands.\textsuperscript{131}
There, at the end of the 17th century, it not only gained full
acceptance but did so in displacing the last elements of Bartolistic
theory which had been part of Dutch scholarship for a long time.
Where the French resisted the single-minded application of a
lex fori et situs, the Dutch welcomed it wholeheartedly in their
new spirit of feudal independence. Thus, d'Argentère's teaching
was responsible for the famous Perpetual Edict of July 12, 1611
which provided for the application of the lex rei sitae even to
such questions as that of testamentary capacity and the form of
the execution of wills. Nicholas Burgundus\textsuperscript{132} (1586-1649) may
be considered the most distinguished and radical representative
of that trend. He exercised decisive influence not only on later
Dutch writers but in France as well. "Things do not follow the
person but attract the persons themselves."\textsuperscript{133} It is not surprising
that from such premises there could easily arise a conception of a
right "created" by the statute of the situs, a conception appearing
in the very title of the treatise of Rodenburgh (1618-1668) who,
directly and through the work of Boullenois (1680-1762),\textsuperscript{134}
greatly influenced the theory of Joseph Story.

\textsuperscript{128} \textit{Batiffol, Aspects philosophiques du droit international privé} (1956); also Louis-
Lucas, note 123, supra, at 805. For a purely philosophical universalist approach, see Gold-
schmidt, \textit{Sistema y filosofía del derecho internacional privado} (1948-1949); Gold-
schmidt, "Die philosophischen Grundlagen des internationalen Privatrechts," \textit{Festschrift
für Wolff} 203 (1952).

\textsuperscript{129} Mazeaud, "Conflits de lois et compétence internationale dans le domaine de la
responsabilité civile délictuelle et quasi-délictuelle," \textit{29 Rev. Crit. de Pr.} 377 at 382,
387, 398 (1934), establishing his thesis \textit{de lege lata} and \textit{de lege ferenda}; 3 Mazeaud, \textit{Traité
trine in general, see \textit{Batiffol} 50.

\textsuperscript{130} In the drafting of the new civil code, Niboyet's vested rights (supra note 126) seem
to have prevailed. See Commission de Réforme du Code Civil, \textit{Travaux} 1949-1950, at 618;
\textit{Avant-projet de Code Civil} 63, 220 (1955).

\textsuperscript{131} This analysis is based primarily on the sources discussed by I Lainé 396. See also
Kollewijn, \textit{Het beginsel der openbare orde in het interationaal Privaatrecht} (1917).

\textsuperscript{132} Burgundus, \textit{Ad Consuetudines Flandriae alienumque gentium controversiae}
(1646). See I Lainé 401.

\textsuperscript{133} I Lainé 403, quoting from Burgundus' original Latin.

\textsuperscript{134} Boullenois' work, discussed notes 120, 122 supra, includes a French translation of
Rodenburgh's work.
But the doctrine seems to have ignored much of the living law. Only twenty-three years after the Edict of 1611, its insistence upon the lex situs was “interpreted” out of its language where the situs was not in the forum state. In 1634 the Princes rendered the opinion that the Senate of Milan had not properly invoked this Edict when it had declared void a testament executed in Brussels in compliance with local requirements, on the ground that the testament had failed to satisfy the requirements of the law of Milan, the situs of the property. And Burgundus’ teaching was in part refuted by one of his contemporaries, Pierre Stockmans (1608-1671), who, in angry language, castigated the “pragmatists” with their “universal rules.” The soil was prepared for the Voets and for Ulricus Huberus who, being averse to both the academic strife of the Bartolists and the feudal preoccupation with the omnipotence of the lex situs, may be credited with having swept aside the dogmatic inroads in the basic character of the lex fori which in fact had probably never ceased to prevail.

Paul Voet (1619-1667) still follows accepted statutist dogma and merely anticipates new things to come by permitting both real and personal statutes to extend abroad if comity so requires. This comity became the basis of the theory of Ulricus Huberus (1647-1694): how may one legislator compel another legislator of equal rank to apply one law rather than the other? With the conclusion that one declared incompetent in Holland cannot rely in that province on a contract concluded by him in Friesland, though he would there be treated as competent, Johannes Voet abandoned the later statutist postulate that questions concerning the same set of facts must be uniformly decided wherever litigated. Although the foreign domiciliary law may be applicable to the transfer of domestic movables on grounds of comity, any sovereign state remains free to apply its own law if it so desires.

Notwithstanding this courageous emancipation from universalist doctrine, the Dutch school started from an unrealistic premise which was to facilitate its conversion into its seeming opposite, the doctrine of vested rights, the premise, namely, which apparently had been inherited from the statutists, that the law of conflict of

135 See 1 LAINÉ 400.
136 1 LAINÉ 406.
137 See GAMILLSCHEG 174, 180.
138 2 JOHANNES VOET, COMMENTARY ON THE PANDECTS (Paris ed. 1829), Gane trans. (1955), Bk. V, tit. 1, §51, p. 64. See GAMILLSCHEG 181, and, in general, see SCHOLTEN, COMITAS 11-78 (1949).
laws is concerned with relations between sovereigns. It is clearly of no concern to any sovereign whether his law is or is not applied in foreign litigation between private parties. But neither Asser’s anti-comity approach nor Jitta’s “ultranational” order based on a law of humanity have seriously affected the consistent realism of Dutch scholarship, whose only reproach to Huber and the Voets has been that they “did not further develop their fundamental idea.” This idea would have required abandonment of the statutist tradition and the search, in each case, for “solutions best suited to serve the real interests of human society and a good administration of justice.” As to torts, Netherlands courts have not hesitated to resort to the lex fori where justice so required, and a Dutch scholar has developed a brilliant scheme of dealing with conflicts problems in this field, which would favor a lex fori controlled by rational rules of jurisdiction.

5. Germany

Such early German codes as the Sachsenspiegel (1215-1235) and the Schwabenspiegel (1273-1276) were satisfied with the lex fori even where contemporary Italian doctrine would have conceded another solution. Thus, even the law of succession was apparently always that of the forum situs. What was perhaps a Bartolist interlude of nascent conflicts rules was dislodged in the 16th century, as it was in France, by feudal preference for the lex situs. Mynsinger (1514-1588) and Gaill (1526-1587) have been

139 Asser, Éléments de Droit International Privé, Rivier trans. 30 (1884).
141 For a bibliography, see Niederer 371. See also Ofterhaus, “L’Université d’Amsterdam et le Droit International Privé,” Festgabe Gutzwiller 283-302 (1959); Kollewijn, Geschiedenis van de Nederlandse Wetenschap van het Internationaal Privaatrecht tot 1880 (1937).
142 Meijers 668.
143 Ibid.
146 Beckmann, “Zum internationalen Privat-und Prozessrecht des Sachsenspiegels,” 1 Zeit. für Völkerrecht 394, 470, 476 (1907); Niederer 37.
considered as the most important representatives of this trend, and, among their successors, Hertius (1651-1710) became an outstanding follower of the extreme positions of d'Argentré and Burgundus.\textsuperscript{147} Significantly, apparently for the first time in Germany, Hertius refers to the conflict ("collisio") of laws—a terminology which presupposes recognition of a foreign law's claim to application; and Cocceji (1644-1719) was the first German author to base his related theory on an international order closely tied to prevailing natural law conceptions.\textsuperscript{148}

These and other "universalists" were strongly criticized by Carl Georg von Wächter,\textsuperscript{149} who thus has come to be known as the outstanding advocate of the lex fori. This much is true: Wächter, perhaps for the first time since the 13th century, consciously and expressly put the lex fori into the center of his system.\textsuperscript{150} But he, too, of course, recognized the need for cataloguing the situations where the lex fori, to avoid hardship, must yield to foreign laws by limiting its own scope. Wächter's catalogue includes the express or implied choice of law by the parties, certain phases of personal capacity, domestic relations, succession and formalities of legal transactions, always with proper regard for the priority of coercive rules of the forum.\textsuperscript{151}

Quite improperly, I believe, Wächter's courageous abandonment of earlier academic deviations is said to have been discredited by the work of Savigny, that other great German scholar,
whose writings have acquired considerable reputation in this country—perhaps in part due to the fact that he paid his repeated respects to the work of his contemporary, Joseph Story. But Savigny, like Wächter, rejected clearly and definitively the logical circle of "vested rights,"\(^{153}\) denied to any foreign law a right to application, and thus recognized the lex fori as the fountainhead of all conflicts law.\(^{154}\) His great contribution was that he enriched Wächter's catalogue of exceptions by his theory of the "seat of the legal relation," and sought specific solutions for specific problems on grounds of justice and expediency rather than dogma.\(^{155}\) On the other hand, Savigny is probably also responsible for the internationalist illusion of his successors.\(^{156}\) To him, the regime of the lex fori was modified by an "international common law of nations." While, in Savigny's work, this modification was still one in fact rather than by necessity, Bar\(^{158}\) assigned to conflicts law a supra-national power, and Zitelmann treated it outright as a branch of public international law.\(^{159}\) But universalist ideologies have succumbed in Germany as they have in Italy, France and the Netherlands.\(^{160}\) Kahn, like Barton,\(^{161}\) developed, for a new

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\(^{152}\) Cf. 8 Savigny, System des heutigen Römischen Rechts, Book 3, 28 (1840).

\(^{153}\) Savigny, Conflict of Laws 147 (1849, trans. Guthrie 1880). Credit for this argument should, however, go to Wächter, note 149 supra, at 25 Arch. Civ. Pr. 4 ("petitio principii"), or Kori, Erörterungen praktischer Rechtsfragen, III, 3 (1833). Notes 220-223 infra.

\(^{154}\) Savigny, note 153 supra, at 71, 78, 144. In the law of torts, Savigny even gave greater emphasis than Wächter to the lex fori by refusing to admit defenses under the lex loci. For criticism, see Bar, Das Internationale Privat- und Strafrecht 317 (1862).

\(^{155}\) On Savigny in general, see Gutzwiller, Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts (1923); Gutzwiller, "Le développement historique du droit international privé." 29 Recueil des Cours 289 at 353 (1929); Ehrenzweig 6, n. 2. See also Maridakis, "Die internationalprivatrechtliche Lehre Savignys im Lichte seiner Rechtsentstehungstheorie." Festschrift für Lewald 309 (1953); Gaudemet, "La théorie des conflits de lois dans l'oeuvre d'Antoine Pillet et la doctrine de Savigny," 1 Mélanges Fillet 89 (1929).

\(^{156}\) See Nussbaum 21; Batifol 285; Beale 88. But see also Schäffner, Entwicklung des Internationalen Privatrechts (1841).

\(^{157}\) Savigny, note 153 supra, at 70. See also id. at 145, where he points to the problems which would arise from a general use of the lex fori under our system of concurrent international jurisdiction.

\(^{158}\) Bar, Das Internationale Privat- und Strafrecht (1862). See Beale 89.

\(^{159}\) Zittelmann, Internationales Privatrecht (1897); Zittelmann Die Möglichkeit eines Weltrechts (1888). See, e.g., Beale 91; Niederer 156; Gutzwiller, "International-Privatrecht," in 1 Stammler, Das Gesamte Deutsches Recht 1515 at 1552, 1558, 1552 (1931). For a more recent internationalist system, see Frankenstein, Internationales Privatrecht (Grenzrecht) (1926-1935).

\(^{160}\) Notes 89-90, 127-130, 141-145 supra. Austria had withstood the internationalist interlude owing to its specific code provisions. Thus, Das allgemeine bürgerliche Gesetzbuch (A.B.G.B.) §35ff. make the lex fori almost always applicable to contracts, giving
"positivist" approach, a theory of conflict of laws based on the lex fori. Niemeyer, in his proposals for the codification of private international law, equally rejected universalist dogma. And the German civil code, contrary to earlier drafts, has mostly limited itself to circumscribing the scope of the lex fori. German courts, presumably influenced by the conceptualistic jurisprudence of the beginning of this century, have largely frustrated this conscious choice of the legislature by re-interpreting "unilateral norms" as "bilateral" ones; but contemporary writers like Kegel, Nussbaum, Raape and Wengler have reversed the trend.

6. England

In the 17th century England knew valiant attempts at introducing the Roman law, as the law of reason, to govern relations with foreigners. But in merchant courts and admiralty the law of the international community of merchants was available as the lex fori both to and against foreigners, upon both domestic and foreign transactions. Common law courts had no need and, indeed, no inclination to deal with matters foreign. Not until these courts, owing to the decline of first the law merchant and then the courts of admiralty, had begun to take cognizance of such matters under prevalence to the law of nationality and intention. See, in general, Walker, Internationales Privatrecht 407 (1934).

161 Bartin, Principes de droit International Privé (1930).

162 Kahn, "Gesetzkollisionen," 30 Iherings Jahrbücher 1, 141 (1890).

163 Niemeyer, Vorschläge und Materialien zur Kodifikation des internationalen Privatrechts (1895).

164 See text at notes 329-339 infra.


166 See, for a vigorous plea, Wiseman, The Law of Laws: or the Excellency of the Civil Law, above All Other Human Laws Whatsoever 146, 161 (1647).

167 "And this law of Merchants hitherto observed in all countries, ought in regard of commerce to be esteemed and held in reputation as the Law of the twelve Tables amongst the Romans. For herein you shall find everything built upon the foundations of Reason and Justice." Malynes, Consuetudo, vel, Lex Mercatoria (1686) 6. For an attack against "Bartolus, Baldus, Justinian . . . and divers other Doctors and learned of the civil Law," with their "many long discourses and Volumes and Books on the questionable matters . . . ," see id. at 3.
the common law of England did the problem of conflict of laws arise.\textsuperscript{168}

At the beginning of this new era, the lex fori was not threatened as the basic rule. Owing to jurisdictional limitations, it could (usually) be applied without hardship to either party.\textsuperscript{169} Where foreign contract law interposed itself, as it had in early continental law, it did so as the law presumably intended by the parties,\textsuperscript{170} while other exceptions from forum law were dominated by the Dutch theory of comity.\textsuperscript{171} But here, as elsewhere, conceptualist dogmatism gradually turned pragmatic exceptions into a scheme of purportedly self-evident conflicts rules precariously hidden in the obsolete statutist terminology.\textsuperscript{172}

Westlake’s text of 1858 (which saw its last edition as late as the second decade of this century) was as much influenced by continental models as was its precursor, Story’s \textit{Commentaries}. But Westlake remained fully conscious of the predominant role of a lex fori whose application seemed justified by the choice of jurisdiction.\textsuperscript{173} Westlake, like Phillimore,\textsuperscript{174} may thus be considered as Savigny’s counterpart. Indeed, both expressed their indebtedness to this great German scholar. Since the American Wharton limited himself to a comparative digest,\textsuperscript{175} and Foote to a largely uncritical re-examination of the case law,\textsuperscript{176} it was left to Dicey to introduce in Anglo-American law the product of continental conceptualism at its worst, the vested rights theory, although that theory by then had long been discredited in the country of its

\begin{enumerate}
\item See, in general, \textit{EHRENZWEIG} 5. On early Scottish conflicts law, see Gibb, “Le droit international privé en Écosse au XVIe et au XVIIe siècle,” \textit{25 Rev. de Dr. Int. Prive} 560 (1900), particularly at 571 on the natural law approach of Lord Stair.
\item See, e.g., \textit{WESTLAKE, PRIVATE INTERNATIONAL LAW} 53, 91, 102, 153, 156 (1859).
\item \textit{BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY} (1838); \textit{HENRY, THE JUDGMENT OF THE COURT OF DEMERARA} 1, 34 (1823).
\item Note 169 supra.
\item \textit{PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW}, 3d ed., Preface, p. XV (1889).
\item \textit{WHARTON, CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW INCLUDING A COMPARATIVE VIEW OF ANGLO-AMERICAN, ROMAN, GERMAN, AND FRENCH JURISPRUDENCE} (1872).
\item \textit{FOOTE, PRIVATE INTERNATIONAL LAW BASED ON THE DECISIONS OF THE ENGLISH COURTS} (1878).
\end{enumerate}
origin. Dicey's *First Principle* was that "any right which has been duly acquired under the law of any civilized country is recognized and . . . no right which has not been duly acquired is enforced . . . by English courts."*178*

Some English writers continue, at least in part, to approve this meaningless and therefore harmful displacement of the lex fori,*179* but Cheshire*180* and Falconbridge*181* have abandoned this approach. So have the editors of the 7th edition of Dicey who have made the *First Principle* contingent upon "the English rules of the conflict of laws."*182* Regrettably this complete abandonment of Dicey's fundamental assumption is explained in a mere note which may easily be overlooked.*183* Nothing short of an open break would have done justice to the entirely original work of the editors who have, in fact, joined those rejecting all universalist dogma and toiling for a proper delimitation of the lex fori as the basic principle of conflict of laws. The history of the conflicts laws of torts and contracts which I have more fully discussed elsewhere*184* seems best suited to illustrate the hesitant progress of English law.

Notwithstanding unsupported assumptions to the contrary,*185* torts did not become a subject of conflict of laws until the middle of the 19th century. To be sure, civil suits against British Crown officers with regard to their colonial administration raised the question earlier whether such officers could justify themselves by reference to the colonial law.*186* But these questions were raised and answered in close analogy to those of criminal responsibility which had been discussed ever since Bartolus' *Commentarii*.

177 Note 153 supra and note 221 infra. See also Cheshire 32. Holland's jurisprudence had prepared the ground. See Nadelmann, "Some Historical Notes on the Doctrinal Sources of American Conflicts Law," *Festgabe Gutzwiller* 263 at 276-278 (1959).


180 Cheshire 32.

181 Falconbridge 11.

182 Dicey 9.

183 Dicey 12.

184 See note 2 supra.


Wächter was probably the first author to deal with tort conflicts on a more general scale, and it was he who apparently inspired Willes, J., in his now famous opinion in the leading case of Phillips v. Eyre. This opinion announced those rules which are still treated as the basis of English tort conflicts law. To both Wächter and Justice Willes the foreign law was nothing but a defense, while the lex fori governed supreme as the sole basis of liability. In fact, even this function of foreign law seems to have been limited to its use "as an authority or ratification in the particular case, and on the peripheral question of vicarious liability."

More fortunate than the United States, England has seen those dogmatic attempts fail at their inception which would endow the foreign law with the power to "create" a tort liability. Indeed, we may wonder at the "metaphysical attractions of an obligation springing to birth out of the soil at the possibly unsuspecting actor's feet and hanging himself around his neck like an albatross." The feat of turning this nightmare into law was reserved to the American Law Institute's Restatement of the Law of Conflict of Laws. But even in England dogmatization of isolated legal rules has created new problems in both the tort and contracts law of conflicts.

To be sure, the English tort rule which requires actionability under both the lex fori and the lex loci is clearly justified as to moral wrongs for which it was devised. But dogmatic generalization is probably responsible for the application of this

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187 This persistent connection is well illustrated by Codex Maximilianeus Bavariae Civilis (1756) Part I, c. 2, §17, which deals with the problem of "different laws, statutes and customs prevailing in loco Judicii, Delicti, Rei sitae, Contractus and Domicilii," and clearly identifies "delict" in this phrase with a crime whose "punishment" is subjected to the "laws of the place where it was committed." On the other hand, Part IV, c. 16 which deals with "crimes and obligations arising therefrom," recognizes, in addition to "penal actions," "persecutory actions" which inter alia include tort actions such as those under the lex Aquilia (§6) or de effuso vel dejecto (§8).


189 Smith, note 185 supra, at 452. See also Dicey 941, 951. On this ground the much criticized decision in Machado v. Fontes, [1897] 2 Q.B. 231, seems entirely proper, in which liability for a Brazilian libel was found under English law. Falconbridge 820. Only a vested rights approach could doubt the "logical" accuracy of this decision. Pollock, note 13 L.Q. Rev. 233 (1897).

190 See concerning Westlake's theory to this effect, Smith, note 185 supra, at 454.

191 Id. at 457.

192 See text at notes 213-223 infra.
rule to "tort" liabilities which serve modern principles of enterprise risk allocation rather than the sanction of moral wrongs. In such cases the lex loci delicti as such has no claim to application, and other tests must be sought to supply such exceptions from the lex fori as may be required by the policies underlying each specific rule of enterprise liability.

To illustrate: Where an Ontario plaintiff brought a suit in Saskatchewan against his employer, a national railroad, for an injury sustained in Ontario through the negligence of a fellow servant, dismissal could well have been supported on the ground, advanced by the trial court, that the forum should not have taken jurisdiction. But it is unfortunate that the Privy Council preferred to rest its decision against plaintiff on the purely conceptualistic argument that the law of the place of accident had preserved the fellow servant rule which had been abolished by the lex fori. Should the decision have been the same if the plaintiff had been a Saskatchewan resident? Since it was not a "wrong" that had been sued upon, the defendant could not, in its calculations, have relied on an antiquated common-law rule widely abolished. The lex fori must prevail where the forum's selection does not impose hardship on the defendant.

In other fields, the allegory of a foreign law creating rights to be enforced or recognized in the forum has been even more harmful. To be sure, the lex contractus which has left its fatal marks in the American Restatement has long yielded in England to a flexible non-rule of "proper law," which is simply an admonition to the court to consider whether a foreign law in the particular case would be more appropriate than the lex fori— to "inspect" that foreign law in the true sense of Bartolus. But there are other problem situations in which the lex fori is being given its due only in the circuitous ways of renvoi, pro-
cedural characterization or public policy. England, like the United States, seems entitled to a new start, discounting the dubious achievements of this dogmatic century.

7. United States

In order to obtain a proper perspective in history and comparison, there must be excluded at the outset all those problems which, while phrased in terms of choice of law, concern the recognition of judgments or quasi-judgments, i.e., of individual foreign governmental acts directed against individual persons. Recognition of such acts is clearly governed by considerations quite different from those involved in the choice of foreign abstract rules which purportedly are better equipped to decide the case at bar than the lex fori. In the former category we find most of the earliest conflicts questions, such as the recognition of foreign discharges in bankruptcy, or of assessments by foreign administrative officers and the like.

Any attempt at classifying Story's general theory of choice of law would be futile. He was an eclectic, willing to accept the experience of England and Scotland in their mutual dealings with domestic relations, to combine elsewhere the inconsistent theorems of the Dutch supremacy of local law with the French feudalists' wholesale acceptance of the lex situs, and to sanction the internationalist ideology of his own time by endowing it with the new name of "private international law." This much seems certain, however, that Story was far from replacing the lex fori by a set of a priori rules calling for the application of foreign law. Professor Beale thought otherwise. But for his contention of an

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199 See text following note 243 infra.
200 See, e.g., Livermore, Dissertations on the Questions Which Arise From the Contrariety of the Positive Laws of Different States and Nations 140 (1829); 2 Kent, Commentaries 321 (1827); Henry, The Judgment of the Court of Demerara in the Case of Odwin v. Forbes on the Plea of the English Certificate of Bankruptcy in Bar, in a Foreign Jurisdiction (1823).
201 Ehrenzweig 31.
203 Story's chapter on Jurisdiction and Remedies kept the door wide open for applying the lex fori to both contracts and torts.
early vested rights tradition of Anglo-American law\textsuperscript{204} he relied on one English\textsuperscript{205} and one Massachusetts case,\textsuperscript{206} both of which concerned the effect of "quasi-judgments" in bankruptcy\textsuperscript{207} not here pertinent. And such dicta in the Massachusetts case as concerned choice of law refute Beale's thesis. The court did not suggest that "an act or obligation valid by the laws of the place where made was valid everywhere."\textsuperscript{208} What the court did say was that "as the laws of foreign countries are not admitted ex proprio vigore, but only ex comitate, the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction . . .," and that the lex contractus does not apply to contracts "entered into with a view to the laws of some other State."\textsuperscript{209}

When Field prepared his \textit{Outlines of an International Code} in 1872, he was understandably influenced by the internationalist ideology which was then approaching its climax. But, while treating conflicts law as an essential part of international law, he did not hesitate to state the "well settled rule founded on reason and authority . . . [that] the lex fori . . . furnishes in all cases, prima facie, the rule of decision; and if either party wishes the benefit of a different rule or law, as for instance the lex domicili, lex loci contractus, or lex rei sitae, he must aver and prove it."\textsuperscript{210} In 1875 the Supreme Court of Wisconsin felt able to call the principle that a personal injury action was governed by the lex fori, "almost too familiar . . . for discussion or authority."\textsuperscript{211} As late as 1879 Rorer's text on \textit{American Inter-State Law}, while conceding certain conflicts principles to be based on "natural rights," the "law of nations," or "universal law" (including personal law and the lex contractus), starts with the proposition that "the rule of comity will not be enforced as against domestic law or the legal rights and interests of \textit{citizens}, or to their injury."\textsuperscript{212}

\textsuperscript{204} \textit{Beale} 105.
\textsuperscript{206} Blanchard v. Russell, 13 Mass. 1 (1816).
\textsuperscript{207} Note 201 supra.
\textsuperscript{208} \textit{Beale} 105.
\textsuperscript{209} Blanchard v. Russell, 13 Mass. 1 at 4-5 (1816).
\textsuperscript{210} Field, \textit{Outlines of an International Code} 439 (1872), relying on Norris v. Harris, 15 Cal. 226 at 253 (1860), per Field, C.J., with earlier authority.
\textsuperscript{211} Anderson v. Milwaukee & St. Paul R.R., 37 Wis. 321 (1875).
\textsuperscript{212} \textit{Rorer, American Inter-State Law} 5 (1879). Emphasis added.
It was left to Joseph Beale to implant in American law the conceptualist thinking of his continental contemporaries. Dean Griswold has said that "it is very hard to think of any other field of the law which has been so much 'made' by one man." It will take many more to un-make his law, for Beale became the author of the *Restatement*, and the teacher of many judges and scholars who even today continue to speak his language. Un-made this "law" must be, as the frustrated attempt by a great man to make this a better world.

When Professor Beale began to teach conflict of laws in 1893 this subject was not taught at any American law school, and he found no textbook usable for his purpose. His first course was presented as one on "Conflict of Laws and International Law." Notwithstanding his later emphasis upon the distinction between the two subjects, his first casebook would seem to support the conclusion that his thinking which equated interstate and international conflicts was very definitely influenced by an international ideology. Only this ideology can explain his lack of interest in interstate problems for which, indeed, a text would have been available, and his all-pervading theory of "vested rights."

Professor Beale believed this theory, around which he built his *Restatement* and his treatise, to be an "indigenous" creation of the common law, whose earlier appreciation he credited—with "a conceit, strange and . . . inexpedient"—only to Dicey's text with its "crowning quality," its "ability to keep clear of the Continental writers." But Dicey himself had acknowledged his debt to "foreign jurists, such as Savigny, Bar, and Foe-lux," as well as to Westlake who, in turn, ever since his first

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214 Ibid.
215 1 Beale, A Selection of Cases on the Conflict of Laws, p. V (1900): "... questions of international law, which should properly be decided in every country in the same way."
216 Rorer, note 212 supra, discounted in 1 Beale, Conflict of Laws (1935), p. XXX, as of "no independent authority," "a summary statement of the doctrines of the Conflict of Laws merely as they apply between the states, together with a considerable body of constitutional law." Emphasis added.
edition, had stressed the overwhelming importance of continental writers for the development of English conflicts law.\textsuperscript{220} And those continental writers, well-known to Beale\textsuperscript{221} had discarded the theory of vested rights, erroneously praised by him as "indigenous" to the common law, as perhaps the most harmful loan from the internationalist doctrine of the last century.\textsuperscript{222} Fortunately, a new generation of judges and writers in this country, too, has begun to discount this aberration.\textsuperscript{223}

C. The Basic Rule in Disguise

As long as a quarter of a century ago, an outstanding French scholar urged "that the role attributed to the foreign law is too broad and that attributed to the lex fori is too narrow. We have reason to assume that the lex fori has a strong claim to be applied to everybody, even to foreigners, a claim which to promote we have applied considerable coquetry, and which is based on the fact that the lex fori is the law most adequate for the country where the litigation occurs, and perhaps even most adequate for the conflicting private interests."\textsuperscript{224} I have tried to show in this paper that this new stress on the predominance of the lex fori is but a return to its historical mission. In a series of articles, I have tried to show the need for a factual and policy analysis of those typical situations in which American conflicts law should continue to refer to foreign laws.\textsuperscript{225} This task might take decades to complete. In the meantime, traditional formulas will fill what we may hope will be an ever-diminishing gap. Personal law, lex situs and lex actus will continue to force us to choose between them. But, once relieved of dogmatic pretense, the choice can be narrowed and simplified. In the absence of a different autonomous choice by the parties, the lex fori will yield to foreign laws only for specific reasons which may be more readily analyzed and

\textsuperscript{220} See, e.g., \textsc{Westlake, Private International Law}, 5th ed., 23 (1912).

\textsuperscript{221} \textsc{Beale, Conflict of Laws} (1916) added to the author's Treatise as an Appendix.

\textsuperscript{222} See notes 155, 177 supra. See also, e.g., \textsc{Nussbaum 27; Wicasm, Der Begriff des wohlerworbenen Rechts im Internationalen Privatrecht} 7, 22 (1955). \textsc{Phillimore, Commentaries Upon International Law}, 3d ed., Preface, p. XI (1889), still refers to "acquired" rights entitled to recognition according to "reason and the interests of society."

\textsuperscript{224} See \textsc{Ehrenzweig 13}.

\textsuperscript{225} See note 2 supra.

\textsuperscript{223} See id. at 442.
classified than those now allegedly calling for their a priori application. Suggestions that the lex fori be thus restored as the basic rule of conflict of laws often meet dogmatic criticism as being "provincial," "nationalist," "defeatist," even among those willing to recognize the realities of everyday practice. But, as Justice Traynor has remarked, "The hazard is less of impassioned provincialism than of the lingering ills of a passive formalism."\(^{226}\)

The lex fori, in many different disguises, is about to regain that position in theory which it has always maintained in effect. In all countries whose legal histories have been retraced in this paper, and elsewhere, the dogmatic interlude is drawing to a close. In Italy, Mancini's postulates based on the law of nationality have yielded to a new emphasis on the internal character of conflicts rules, and, more generally, to a new "territorialism" which, in effect, favors the lex fori.\(^{227}\) In France, Bartin, Lerbours-Pigeonnière and Batiffol have long overcome Pillet's internationalist flight into fancy.\(^{228}\) Neither the Netherlands\(^{229}\) nor the Scandinavian countries since Ørsted's pioneering fight against statutist theory have ever abandoned their realistic preferences for the lex fori and the autonomy of the parties.\(^{230}\) In Germany, modern writers have long found the way back to a functional analysis of specific fact situations, in disregard of Zitelmann's international dream and the conceptual jurisprudence of the latter statutists.\(^{231}\) In England, Dicey's "vested rights" have been emasculated by his contemporary editors who have joined Cheshire in assisting the courts in the rebuilding of a modern doctrine.\(^{232}\) In the United States leading judges and virtually all writers on the subject, outside the American Law Institute, have begun to build again on the "wreckage"\(^{233}\) left by the destruction of the

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\(^{226}\) Traynor, "Is This Conflict Really Necessary?" 37 Tex. L. Rev. 657 at 675 (1959).

\(^{227}\) Note 88 supra.

\(^{228}\) Notes 126-130 supra.

\(^{229}\) Note 141 supra.


\(^{231}\) Notes 162-165 supra.

\(^{232}\) Note 180 supra.

Restatement’s house of cards. And everywhere courts seek to overcome antiquated “rules” and official theory by manipulating these rules or their connecting factors, or by creating “exceptions” such as procedural, “preliminary,” and other characterizations of questions or rules, renvoi, fraud on the law, “estoppel,” failure of proof, and above all, public policy. All these exceptions are designed to reach results indirectly which could be reached directly by recognizing the lex fori as the rule primarily to be applied. A brief analysis of some of these techniques will readily show their inadequacy.

1. “Public Policy” and “Ordre Public”

“The notion that the rules of Conflict of Laws can be derived from some general formula or theory is responsible for another doctrine—that of ‘public policy’—which in turn has caused the utmost confusion.” This statement of Professor Lorenzen disposes, for our present purposes, of the controversy between those who think that public policy is “peculiarly English and smacks of the particular genius of the common law,” and those who concede a much greater part to this concept in continental law. In both legal systems the appearance of public policy

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234 Note 223 supra.
235 Notes 279-296 infra.
236 Notes 321-328 infra.
237 Classic examples are the contracts characterizations of tort and land cases [see Ehrenzweig, “Contracts in the Conflict of Laws,” 59 Col. L. Rev. 978, 1171 (1959)]. See also notes 4 and 7 supra.
238 Notes 301-320 infra.
239 This term is not yet fully accepted in the common law. But see, e.g., Francescaris, La théorie du renvoi 43 (1958).
241 Notes 297-300 infra.
242 Notes 243-278 infra.
244 Paton, Jurisprudence, 2d ed., 98 (1951). See also Winfield, “Public Policy in the English Common Law,” 42 Harv. L. Rev. 76 at 98 (1928) (“part of the spirit of the common law”).
coincides with the climax of those universalist aspirations which undertook to displace the lex fori by a uniform conflicts law and thus required measures to make such a law as harmless as possible to the law of the forum. Wherever that law continued to need protection, reference to public policy, or the "ordre public" was given an ever-increasing play as an "exception." Traceable to the statuta odiosa of statutist eras\(^2\) (which, however, may originally have merely limited the laws of the forum themselves) and to the cautious and incidental reliance of Huber on the forum's interest\(^2\) (unnecessary under his rationale of mere comity), the ordre public was moved into the center of attention by Mancini\(^2\) and again by Bartin.\(^2\)

A historical study of the origin of the doctrine in Anglo-American conflicts law is lacking.\(^2\) English cases habitually adduced to prove early application are not in point.\(^2\) And it seems clear that there was neither need nor use of the doctrine in this field until the establishment of the vested rights doctrine at the end of the last century.\(^2\) For here, as elsewhere, "public policy" appears where the common law fails to keep "in touch with the needs of the day."\(^2\) The same observation applies to the history of American law.\(^2\) Not until the era of vested rights

\(^{246}\) Batiffol 263.

\(^{247}\) Batiffol 270.

\(^{248}\) Nussbaum 110.

\(^{249}\) Bartin, Études de Droit International Privé (1899).


\(^{252}\) For recent authority, see Cheshire 150.

\(^{253}\) 8 Holdsworth, A History of English Law 56 (1926).

\(^{254}\) See Lorenzen, "Territoriality, Public Policy and the Conflict of Laws," 33 Yale L. J. 736 (1924); Paulsen and Sovern, "'Public Policy' in the Conflict of Laws," 56 Col. L. Rev. 969 at 981 (1956).
which reached its climax in Beale's Restatement did public policy become an essential part of American conflicts law and an additional source of its confusion.\textsuperscript{255}

In 1827 the Louisiana court remarked "that in the conflict of laws, it must often be a matter of doubt, which should prevail; and that whenever a doubt does exist, the court, which decides, will prefer the law of its own country to that of the stranger."\textsuperscript{256} Story found "great truth" in this statement and returned to its message in virtually every chapter of his analysis without having to resort to an exception of public policy.\textsuperscript{257} Only where past centuries had produced a semblance of rules "by which nations are morally or politically bound,"\textsuperscript{258} was there room in his work for such an exception.\textsuperscript{259} Legislation at first failed to alter this situation as long as judicial distrust left undisturbed the regime of the common law of the lex fori where dealing with foreign facts. The history of wrongful death statutes offers an example for both this early lack of conflicts law and its later functioning by rule and exception. Such statutes\textsuperscript{260} began to spread through the United States after the enactment of Lord Campbell's Act in England in 1846.\textsuperscript{261} Presumably owing to judicial preference for the common law, forum statutes were treated as local and limited to domestic causes of action, notwithstanding early claims that these statutes should equally be applied to foreign accidents, having removed a procedural limitation\textsuperscript{262} or a defect in the common law.\textsuperscript{263} No wonder then that conversely the common law of the forum was preferred to

\begin{footnotes}
\footnote{255}{Conflict of Laws Restatement §612 (1934).}  
\footnote{256}{Saul v. His Creditors, (La. 1827) 5 Martin R. (n.s.) 569 at 595.}  
\footnote{257}{See, e.g., Story 29.}  
\footnote{258}{Story 71.}  
\footnote{259}{"Generally speaking, the validity of a contract is to be decided by the law of the place, where it is made." Story 201. But the lex fori re-enters as to contracts "against good morals, or religion, or public rights." Id. at 213. The same rule and exception apply to the "favored contract" (id. at 100) of marriage. Id. at 104. Limitations on the parties' autonomy were rare. Paulsen and Sovern, "'Public Policy' in the Conflict of Laws," 56 Col. L. Rev. 969 at 972 (1956).}  
\footnote{260}{Ehrenzweig 4.}  
\footnote{261}{For abortive colonial legislation, see, e.g., Charter and General Laws of the Colony and Province of Massachusetts Bay, c. 8, 43 (1759), Colonial Laws of Massachusetts, 1660-1672 (Whitmore's Reprint 1889) 126; Conn. Acts and Laws (1750) 17; Conn. Pub. Stat. (1806) 120. See, in general, Rose, "Foreign Enforcement of Actions for Wrongful Death," 33 Mich. L. Rev. 545 at 552 (1935): "... the body of the present law is blemished by early preconceptions."}  
\footnote{262}{Stat. 9 & 10 Vict., c. 93.}  
\footnote{263}{This argument was made in Whitford v. Panama R.R., 23 N.Y. 465 (1861) by the dissenting judge.}  
\end{footnotes}
foreign statutes. But the universalist illusion of "governing" conflicts rules had progressed far enough to compel, almost from the very beginning, dogmatic rationalizations of this practice. As early as 1857 we find the New York court refusing to apply its wrongful death statute to a Connecticut accident because "whether an act or omission affords a right of action depends on the law of the place where it is done or omitted." And this rationalization gained a life of its own when in 1880 the Supreme Court announced the ubiquitous applicability of the wrongful death statute of any state in which "a right of action has become fixed and a legal liability incurred."

It was then, and only then, that courts had to seek to control an over-generalized "rule." The first "exception," which permitted the foreign statute to be enforced only if substantially similar to that of the forum, promised preservation of the lex fori as the basic law. But this principle was not acceptable to Holmes and Cardozo, judges steeped in the universalist illusion of their time, who were about to lay the groundwork for the grand scheme adopted in the Restatement, according to which rights lawfully vested shall be everywhere maintained. All that seemed left of the lex fori in that scheme was the possible exception, recognized with apparent reluctance by both these judges and the Restatement, that the foreign law is to be ignored.

264 Campbell v. Rogers, 2 Handy 110, 12 Ohio Dec. 355 (1855).
265 Richardson v. New York Central R. Co., 98 Mass. 85 (1867). See also Anderson v. Milwaukee & St. Paul Ry. Co., 37 Wis. 321 at 322 (1875), refusing to apply an Iowa statute that had abolished the fellow servant rule: "The action here is a personal action, for personal injury, governed by the lex fori. This is almost too familiar a principle for discussion or authority." See also Vandeventer v. The New York and New Haven R.R., 27 Barb. (N.Y.) 244 (1857); Whitford v. Panama R.R., 23 N.Y. 465 (1861).
266 Dennick v. Railroad Co., 103 U.S. 11 at 18 (1880). This was new doctrine. Three of the cases relied on by the Court did not concern torts. In the fourth case, Great Western Ry. Co. v. Miller, 19 Mich. 305 (1869), a judgment based on a Canadian statute, was reversed on what amounted to a theory of forum non conveniens. And N. & C. R.R. v. Sprayberry, 8 Bax. (67 Tenn.) 341 (1874), upheld a foreign tort claim for the death of wife and children without facing the problem.
270 In contrast to the draftsman, Professor Beale [A TREATISE ON THE CONFLICT OF LAWS 105-107 (1916)] the Restatement has abandoned the language, though not the concept, of vested rights. See, in general, EHRENZWEIG 9-10.
where it "outrages the public policy" of the forum.271 But this would not do. Only a few years later Chief Judge Lehmann found it necessary to broaden the applicability of the lex fori by, inter alia, excluding a foreign law as being "contrary to the law of this state."272 This broad test would, of course, exclude generally the application of foreign laws. It is as unworkable as its counterpart, Justice Cardozo's vested right. But both Lehmann and Cardozo could have reached the desired result by abandoning both "rule" and "exception," in favor of an outright application of the lex fori.273

Similar difficulties in international conflicts cases have prompted international conferences to recommend to the several countries the classification and enumeration of those specific situations in which the public policy exception seems indispensable.274 But these recommendations remained unheeded and had to be abandoned.275 Even such more definite categories as have been developed both internationally and nationally as the alleged "unenforceability" of "penal" and "revenue" laws are in the process of disintegration.276 This fact "ought to have been a warning that there was something the matter with the reasoning upon which the rules to which it is the exception were supposed to be based,"277 and renewed analysis of these rules should have become the primary objective of scholarship. But "the principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful


272 Mertz v. Mertz, 271 N.Y. 466, 3 N.E. (2d) 597 (1936). Remedial characterization was used as another ground of the decisions. See also Paulsen and Sovern, "'Public Policy' in the Conflict of Laws," 56 COL. L. Rev. 969 at 995 (1956).


275 BATIFFOL 378. MAASSEN-MYGGDAL, OERE PUBLIC OG TERRITORIALITET (1946) has made a valuable attempt at saving both the rules and the concept by detailed classifications. See id. at 813, 818 (English summary).

276 See EHRENZWEIG 131, 201.

thought, of discriminating distinctions, and of true policy development in the conflict of laws."  

2. "Procedure"

American doctrine started with the assumption "universally admitted and established" that "the forms of remedies, and the modes of proceeding . . . are to be regulated solely and exclusively by the laws of the place where the action is instituted." This principle goes back to the time when certain foreign laws were first said to be entitled to "inspection." Thus, when Balduini formulated the "remedy" rule he merely confirmed the continuation of the regime of the lex fori as against these new exceptions. The rule was broadly interpreted, therefore, and presented few problems. Only when the internationalist dogmatization of conflicts law by the latter-day statutists began to require the application of foreign law did procedural characterization assume its modern function as the basis for exceptional applications of the lex fori. In the common-law orbit this function is traceable to Dutch doctrine. But it did not become significant until the victory of the doctrine of vested rights, against which the lex fori asserted itself as requiring its own procedures, "machinery," or "remedy."  

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280 Note 72 supra.
283 Slater v. Mexican National R. Co., 194 U.S. 120 (1904) is probably the outstanding case using this technique. In that case the Court, speaking through Justice Holmes, denied a tort claim for periodical payments under Mexican law because the Texas court had "no power to make a decree of this kind contemplated by the Mexican statutes." Id. at 128.
284 See, e.g., note 272 supra.
That the dichotomy is analytically meaningless has now been generally recognized. But it seems equally clear that solution of the resulting practical problems cannot now be sought in the abolition of a distinction so well established in the language of the courts. There remains the real need for a technique enabling the courts to restore to the lex fori some of the ground which it has lost through the dogmatic generalizations of the last decades. Thus, nothing would be gained by the discovery that statutes of limitations, whether part of the right or “remedial,” are really substantive because they affect the cause of action, that survival statutes must not be characterized as procedural as was recently done by a leading court, or that statutes of frauds, the standing to sue or be sued, or damages cannot in any proper sense be treated as procedural to assure application of the lex fori. But, like public policy, procedural characterization should be used only as a makeshift device until the law of the forum can again be recognized as the basic rule subject to displacement by foreign laws only under well-established exceptions grounded on reason and policy. Then, and only then, will it have become unnecessary to salvage the lex fori by such devices.

When Chief Judge Lehmann refused to apply Connecticut law over the forum’s prohibition of inter-spousal suits, he proved too much when he claimed that “no other state can, outside its own territorial limits, . . . provide by its law a remedy avail-

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287 Nussbaum 187; Cook, “‘Substance’ and ‘Procedure’ in the Conflict of Laws,” 42 Yale L. J. 333 (1933); Lorenzen, Selected Articles on the Conflict of Laws 336 (1947); Falconbridge 301.


289 See Ehrenzweig 128. Continental jurisprudence which favors substantive characterization has hardly progressed further. See id. at 129, n. 1.


292 Ehrenzweig 37.


294 Cook, “‘Substance’ and ‘Procedure’ in the Conflict of Laws,” 42 Yale L. J. 333 (1933) would have the court apply foreign law wherever it can do so “without unduly hindering or inconveniencing itself.” See also note, 47 Harv. L. Rev. 815 (1933); Comment, 10 La. L. Rev. 365 (1950) (contributory negligence).
able in our courts which our law denies to other suitors." Of course, Connecticut cannot, in the New York court, "provide" a new remedy. But New York may, under Connecticut law, grant a remedy for Connecticut accidents. That it may choose not to do so in order not to discriminate against those suing on New York accidents is a question to be settled by re-formulating the New York conflicts rule so as to extend the New York disability to foreign accidents. Only such unworkable "rules" as that of the Restatement which purports to require ubiquitous application of the lex loci have compelled such unworkable exceptions as that purporting to require general application of the lex fori to all "remedies." Nothing less will do but a rethinking of those conflicts rules as exceptions from the lex fori.

3. Failure to Prove the Foreign Law

Notwithstanding any foreign laws allegedly "governing" the case, American courts have, in literally hundreds and perhaps thousands of decisions, applied their own law, in reliance on the often obviously unrealistic principle that the foreign law not properly pleaded or proved may be presumed to be identical with the law of the forum. Only rarely have courts assumed an independent conflicts rule calling in such cases for the application of that law as such.

The indispensability of such a rule is demonstrated by those few but unluckily highly authoritative decisions in which suits have been dismissed on the ground that the "governing" law had not been established. When it is recognized, and only when it is recognized, that the law of the forum as the Basic Rule is entitled to application at the outset unless displaced by

296 For an attempt to reconcile the case law with a view to the parties' domicile, see Ford, "Interspousal Liability for Automobile Accidents in the Conflict of Laws," 15 Univ. Pitt. L. Rev. 397 (1954); Haumschild v. Continental Cas. Co., 7 Wis. (2d) 130, 95 N.W. (2d) 814 (1959).
a more appropriate law invoked by either party can the authority of such unfortunate decisions permanently be discounted.\(^3\)

4. **Renvoi**

   English and American law have long resisted that peculiar device by which a forum, having found itself obligated to apply a foreign law, returns to its own law by invoking that foreign law's own directives. And, indeed, until such an obligation to apply the foreign law began to displace confidence in a primary lex fori, there was no need for this technique.

   A significant illustration for this genesis of renvoi may be found in a 14th century proposal of Ubertus de Bobio who, having with apparent reluctance accepted Balduini's advocacy for the lex contractus,\(^3\) suggests that the lex fori may still remain applicable where the lex contractus itself does not wish to be applied to foreigners.\(^3\) Once the conflicts rule for contracts was firmly established on the basis of the presumed intention of the parties,\(^3\) this rationale excluded, of course, the idea of renvoi.\(^3\) It is clearly absurd to argue that where the parties intended a foreign law to be applied they also intended that part of that law to apply which denies its applicability by referring to another law. Such reasoning denies the very intention it invokes. Conversely, where the lex contractus is not, or should not be, referred to by the law of conflicts, in the absence of an intention to this effect, the lex fori should be applied without the need for legalistic subterfuge. Not until irrational dogma had displaced party autonomy and the lex fori as basic rules could renvoi gain entry in the law of conflict of laws.\(^3\)

   In 1882, the French court in the *Forgo* case applied the French law of succession to the French estate of a Bavarian domiciliary

\(^3\) Where the court invoked lacks a contact with the case justifying application of its own law, the suit might be dismissed as brought in a forum non conveniens. See Ehrenzweig 119.

\(^3\) Note 62 supra.

\(^3\) 2 Neumeyer 84. For other instances of early judicial decisions erroneously considered the "first manifestations of the renvoi doctrine," see Lewald, "La théorie du renvoi," 29 Recueil des Cours 519 at 533 (1929).

\(^3\) Note 84 supra.

\(^3\) But see, e.g., Mason v. Rose, (2d Cir. 1949) 176 F. (2d) 486.

\(^3\) For references to the enormous literature, see, e.g., 1 Rabel, The Conflict of Laws, 2d ed., 75-76 (1958); Batiffol 550; Francescakis, La théorie du renvoi 275-289 (1958).
who had, in fact, lived and died in France. If at that time the lex fori had not been replaced by an iron-clad internationalist doctrine, allegedly compelling the application of Bavarian law as the law of the decedent's legal domicile, the French court would have been free to apply its own law in the absence of any reason for another solution, and would not have felt impelled to introduce into conflicts law a concept which has been called "heretic," "puerile," "paradoxical," and "burlesque," and has been accused of "denaturing, falsifying and annihilating Private International Law."

There is little more to be said in favor of those well-known decisions which have, belatedly and yet too early, introduced renvoi in English and American law. Were it not for dogmatic "compulsion" to apply a foreign law by virtue of an allegedly self-evident international allocation of competencies, the English court would have had no difficulty in upholding under its own law the will of an Englishman domiciled in Malta who had made his will in England according to English law. To avoid the alleged "rule" that the law of domicile always "governed" the form of making a will, the court had to resort to renvoi, and probably incorrect renvoi at that. And when, on the other hand, the court in a leading case invalidated the French will of an Englishwoman domiciled in France (according to English, though not French, conceptions) as violating a French rule favoring her children, it could have done so by simply interpreting the English conflicts rule as referring to the law of the domicile determined by English law, instead of sitting as a French court which in that case would have accepted renvoi.

307 NUSSBAUM 92, n. 9, quoting from Lainé, "De l'application des Lois Etrangères en France," 23 CLUNIER 241 at 257, 260 (1895), and Pillet, "Contre la Doctrine due Renvoi," Rev. de Dr. Int. Pr. 5 at 9, 10, 13 (1913). See, in general, BAIEFFOL 253.
308 For a history of this concept in English law, see Griswold, "Renvoi Revisited," 51 HARV. L. REV. 1165 (1938). See also De Nova, "Considerazioni sul rinvio in diritto inglese," 30 RIV. DIR. INT. 308 (1938).
309 Frere v. Frere, 5 NOTES OF CASES IN THE ECCLESIASTICAL AND MARITIME COURTS 593 (1847). Cf. CHESIRE 76, also discussing other cases most of which are reconcilable as documenting a favor testamenti. For criticism, see MENDELSOHN-BARThOLDY, RENVOI IN MODERN ENGLISH LAW 67 (1937); Schreiber, "The Doctrine of the Renvoi in Anglo-American Law," 31 HARV. L. REV. 523 at 541 (1918); Dicey 80. For a defense, see Griswold, "Renvoi Revisited," 51 HARV. L. REV. 1165 at 1192 (1938).
In the now famous, or should we say, infamous, case of In re Schneider's Estate, the New York court applied the lex fori in denying forced heirship under Swiss law in favor of the estate of an American citizen against a New York will leaving the entire property to an English devisee. The court could have done so on the simple ground that the New York conflicts rule did not require displacement of the New York law by mere virtue of the fact that the New York funds were derived from Swiss real estate. But it chose to establish this conclusion by a process of multiple renvoi which was not only improper under New York law but required misinterpretation of Swiss law in several respects.

It cannot be a mere coincidence that the cases referred to by Dean Griswold in defense of the renvoi doctrine are all explainable by a reformulation of the conflicts rule allegedly applied; and those cases criticized by him as improperly rejecting the doctrine could have been satisfactorily decided by the same technique. Indeed, "the result is the same whether the

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312 See, e.g., Falconbridge 233, 246.

313 Griswold, "Renvoi Revisited," 51 Harv. L. Rev. 1165 at 1186 (1938). Cases involving transmission to a third law are not included in the present analysis. See id. at 1188. These cases are often explainable by formulating an exception from the primary conflicts rule. See id. at 1194, 1199, 1203 (lex situs rather than domiciliary law in succession cases).

314 If X, the presumable owner of an automobile devolving to him under English law from the French estate of an Englishman dying domiciled in France, takes the automobile to England, he should of course not be defeated in an English court by Y's claim that French internal law, referred to by the English conflicts rule, would allocate the automobile to him. Interpretation of the English conflicts rules as calling for the application of English internal law to the English estate of an Englishman dying in a country which does not apply its own law to foreign citizens, would suffice to justify this result without resort to an acceptance of French renvoi. But see Griswold, "Renvoi Revisited," 51 Harv. L. Rev. 1165 at 1186 (1938). See also University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936), id. at 1207; and the hypothetical case, id. at 1191. The same observation applies to the Restatement's renvoi as to title to land and validity of divorce. See id. at 1208. For similar criticism, see Cook, The Logical and Legal Bases of Conflict of Laws 246 (1949).


316 In Gray v. Gray, 87 N.H. 82, 174 A. 508 (1934), a New Hampshire court denied under the law of Maine a wife's claim against her husband for injuries sustained in a Maine automobile accident. In order to reach the lex fori, it would not have been necessary to resort to renvoi. Instead of weighing the policy of Maine as to the applicability of its law to foreign domiciliaries, which Dean Griswold (note 315 supra, at 1205) suggests, the New Hampshire court could and should have found its own law applicable because the
foreign rule applicable to extrastate elements is looked to because it is defined into the 'internal law' or because the reference is to the 'whole law' of the foreign country." But increasing recognition of the futility of accepted generalizations of "applicable" conflicts rules seems to require their progressive specification as exceptions from the lex fori rather than their correction by the artificial process of renvoi, which would thus lose its last justification as an "exception" from a non-existing international order, together with such tottering superstructures over a tottering structure as the theory of désistement which seeks to defeat renvoi by an unwilling law, instead of refusing to invoke that law in preference to the lex fori.

Two examples may explain this thesis and its possible exceptions. In a series of articles I have tried to show that the application of foreign enterprise liabilities is determined by a principle of reasonable insurability rather than by a reference to the fortuitous place of the wrong. Once a court has decided that the policy of its tort rule is primarily designed to serve the distribution of inevitable loss, and that liability under a foreign legal system, being foreseeable and insurable, is a burden properly distributable by the enterprise, a conflicts rule of that legal system is, ordinarily, irrelevant from the standpoint of the policies which have initially caused resort to the liability rule of that system.

Occasionally, however, particularly in the law of domestic relations, the application of a foreign rule may be required by deference to a foreign governmental interest, as, e.g., where the

lex loci delicti was not pertinent at the outset. Modern courts have so held. See Ehrenzweig, "Parental Immunity in the Conflict of Laws: Law and Reason Versus the Restatement," 23 UNIV. CHI. L. REV. 474 (1956). See also note 273 supra; Cook, note 314 supra, at 248. For a forthright rejection of the renvoi doctrine in a case involving interspousal immunity, see Haumschild v. Continental Cas. Co., 7 Wis. (2d) 130, 95 N.W. (2d) 814 (1959).

317 Griswold, note 315 supra, at 1198. Dean Griswold's analogy, id. at 1193, between the renvoi problem and that arising where the alleged conflicts rule refers to "no law," is perfect. But in both cases the lex fori remains applicable.


conflicts rule of the forum determines capacity to marry under the law of the parties' nationality or domicile. Assuming respect for that law to be the prevailing rationale of this conflicts rule, it would be senseless to apply that rule also in cases where the foreign law in turn is willing to defer to the law of the forum either as such or as the law of celebration. This simply means that the conflicts rule initially applied must be rephrased to read that capacity is determined by the law of nationality or domicile provided it purports to be thus applicable. Here, as always, the concept of renvoi is dispensable and must be discarded as "a classic example of violently prejudiced literature confronting naïvely consistent practice." 320

5. The "Preliminary Question"

Had the lex fori been restored to its proper function a few decades ago, we would have been spared another miscreant of a conceptualism gone rampant in private international law. The "preliminary question" would never have reached even that modest standing it now enjoys in the literature of the subject. To be sure not a single decision by a Commonwealth or American court has yet applied this new concept, but enough scholarly investigations continue to appear on this subject 321 to tempt a court to use it as a much needed tool for the evasion of obsolete conflicts law—unless we render this evasion unnecessary.

Succession to movables is generally said to be "governed" by the law of the decedent's domicile. 322 In a contest in California

320 1 RABEL, THE CONFLICT OF LAWS, 2d ed., 75-76 (1958). Where courts have been compelled to make renvoi an essential part of their practice as they have in Japan, such practice indicates a fundamental flaw in the primary rules. See Ehrenzweig, Ikehara and Jensen, "American-Japanese Private International Law" (forthcoming); Ehrenzweig, "Torts in the Horei," EGAWA FESTSCHRIFT (forthcoming).


between the widow and an alleged illegitimate child of a foreign domiciliary concerning movable property located in California, the decedent's domiciliary law will therefore be applied to determine the relative ranking of the two claimants. The widow asserts that an illegitimate child is not entitled to inherit under the decedent's domiciliary law which determines this question as "preliminary" to the principal question of succession. On the other hand, the son relies on the more favorable California law as the law of his own domicile governing his status.

There exists one good argument for the widow's contention, namely that application of a law other than that governing the principal question could distort the intended effect of that law since that law's provisions are interdependent. In other words, the decedent's law, the widow will argue, had it been faced with the possibility of inheritance claims of illegitimate children—which it was not since it has excluded such children from the legal definition of children in general—would have specifically excluded them from the right to inherit. On the other hand, the son's theory would treat his status alike for all purposes, so that a ruling on this status under one law for one purpose would preclude its redetermination under another law for another purpose. Usually, preliminary questions are discussed in relation to the even more complex problem whether, once it is conceded that foreign law applies to such questions, that law includes its conflicts rules or whether recourse is to be had to the conflicts rules of the forum.

No generally satisfactory solution has been suggested. Nevertheless one need not go so far as to see "as many problems as there are cases in which incidental questions may arise."323 Nor need we be satisfied with announcing a system of friendly "co-existence" of conflicts rules.324 The issue will lend itself to a more definite analysis once the lex fori is restored to its proper place as the basic rule. Where the lex fori has yielded to a foreign law chosen by the parties to a contract, it has done so in order to give effect to the parties' intention. Since this intention is quite generally directed to the application of foreign domestic

323 Dicey 62, quoting Gotlieb, note 321 supra.
law, the problem of renvoi cannot arise. Similarly, the applicability of foreign law to incidental questions is but a matter of intention. The same principle must apply where the lex fori has been displaced on other grounds. The policy calling for this displacement must equally determine its scope. Thus, if the forum refers to the decedent's domiciliary law to determine succession to forum property, it presumably does so to give effect to the decedent's likely intention. In the above example he may be assumed to have chosen not to make a will in reliance on the fact that only his legitimate children would take under the law of his domicile. Construction of the word "child" under the law of each situs or status would be contrary to this presumed motivation.

On the other hand—to take a situation raised in connection with a related though not dispositive Minnesota case—should the status of an Illinois widow for the purpose of her wrongful death claim brought in Minnesota against an Illinois defendant be determined under the conflicts rule of the forum (which would validate the marriage between first cousins under the Kentucky law of celebration), or under the law of Illinois as the place of wrong (which would invalidate the marriage of residents as violating her Uniform Marriage Evasion Act)? Suppose that the "place of wrong" rule is established in Minnesota in the determination of a widow's standing to sue. If the defunct vested rights rationale is properly ignored, Minnesota law has yielded in this case presumably on the ground that a potential accident victim has a right to rely on his own law in planning his financial protection by insurance and otherwise. Under this rationale he was certainly entitled to rely on the law of his domicile also concerning the status of his dependents. In other words, Minnesota should apply Illinois law as the law of the victim's domicile whether or not Illinois was the place of accident. The preliminary question of the widow's status remains in this sense subject to the conflicts rule of the forum.

325 Note 304 supra.
327 See Ehrenzweig 46.
328 See Kegel, Commentary to Articles 1-31 of the Introductory Law to the German Civil Code, Soergel, Buergertliches Gesetzebuch, vol. 4, 8th ed., 16 (1955). The problem has arisen with particular frequency concerning the right of a foreign-adopted child to
6. "Unilateral" and "Spatial" Self-Limitation

One of the most significant phases of last century's struggle between dogma and reality may be found in the controversy between the adherents of "unilateral" and universal conflicts rules. This controversy is clearly reflected in the history of the German Civil Code of 1896. At the time of its preparation the internationalist ideologies had probably reached their climax. Nevertheless, for reasons never fully ascertained, Parliament rejected almost all those universal rules of earlier drafts which, following these ideologies, had purported to distribute international legislative competencies. Instead, it enacted so-called "unilateral" rules which merely limited the applicability of German law in the presence of certain foreign contacts. Thus, in lieu of providing that marriage is "governed" by the law of the place of celebration, the Code provides that "the personal relations between German spouses are subject to German law." This change, while probably induced by political considerations, was in accord with the position taken by commentators, who considered universal rules as encroachments upon foreign sovereignties, as inconsistent with the essentially procedural character of conflicts law, or as potentially contrary to public international law.

If taken literally, "unilateral" statutory provisions leave a vacuum in many cases such as those concerning foreign nationals engaged in foreign transactions. Assuming a distribution of competencies by international agreement or uniform conflicts succeed to forum property. It is the forum law that must determine whether a foreign adoption is of the kind that would create succession rights under forum law. See De Nova, "Considerazioni comparative sull'adozione in diritto internazionale privato," FESTSCHRIFT FÜR MAKAROV 730 at 739-763 (1958).

329 See NIEMEYER, ZUR VORGESCHICHTE DES INTERNATIONALEN PRIVATRECHTS IM DEUTSCHEN BÜRGERLICHEN GESETZBUCH (1915). As to similar statutes, see NIEDERER 122; WOLFF 84. Cf. particularly French Civil Code, Art. 3.


331 Introductory Law to German Civil Code, art. 14. See also, e.g., id., art. 12 which dispenses of tort conflicts law with the provision that claims against Germans on foreign torts are limited to damages allowable under German law; and in general Schnell, Über die Zuständigkeit zum Erlass von gesetzlichen Vorschriften über die räumliche Herrschaft der Rechtsnormen," 5 ZEIT. FÜR INTERNATIONALES RECHT 337 (1895).

332 NIEDERER, DAS EINFÜHRUNGSGESetz VOM 18 AUGUST 1896 (Commentary), 2d ed. (1901).

333 Concerning Zitelmann's and Frankenstein's theories, see WIELHÖLTER, EINSITZIGE KOLLISIONSNORMEN ALS GRUNDELAGE DES INTERNATIONALEN PRIVATRECHTS 9 (1956).

334 See, in general, KEGEL, note 328 supra, at 8, 10.
laws, these cases could be simply excluded from domestic jurisdiction after ascertainment of an available foreign forum. In the absence of such agreements and uniformity, German courts, like English courts since Lord Mansfield, have had to find a solution in rules of choice of law. For this purpose they have by the use of analogy applied unilateral rules as general. But this analogy, far from being "almost self-evident," is improper. Considerations which lead to the application of the law of the forum to foreign transactions do not necessarily support application of a foreign law to corresponding domestic transactions. Article 7 (1) of the German Introductory Law, which makes German law applicable to German spouses abroad, cannot "by analogy" be said to imply that relations between foreign spouses in Germany must be treated under their national law. Only a pseudo-internationalist-conceptualistic attitude could justify this simple equation. This has been often recognized and whole new theoretical systems have been aimed at a more accurate interpretation of unilateral conflicts rules. Pilenko in France and Sohn in the United States may be taken as typical representatives of this "school." Both advise the judge inter alia to fill the vacuum by applying that foreign law, and only that foreign law, which claims applicability in the particular case. This approach seems objectionable on the ground that it concedes to foreign conflicts law a decisive role which may or may not coincide with the policy of the forum. The forum may prefer to apply foreign or forum law notwithstanding foreign conflicts rules to the contrary. Both Pilenko and Sohn, as well as all other "unilateralists," notwithstanding their antagonism to internationalism in conflicts law,

335 NIEDERER 122. See also WOLFF 94; LEWALD, RÈGLES GÉNÉRALES 17 (1941); RAAPPE INTERNATIONALES PRIVATRECHT, 4th ed., 33 (1955).


338 See also Vivier, "Le caractère bilatéral des règles de conflit de lois," 42 REV. CRIT. DE DR. INT. PR. 655 (1953), 43 id. 73 (1954); and, in general, WIETHÖLTER, EINSEITIGE KOLLISIONSNORMEN ALS GRUNDLAGE DES INTERNATIONALEN PRIVATRECHT (1956); QUADRI 271-275, 289; De Nova, "I conflitti di legge e le norme con apposita delimitazione della sfera di efficacia," 13 DIR. INT. 15 (1959). On the counterpart of this "introvert" doctrine, Ago's insistence on the purely foreign-directed function of conflicts law, see De Nova, supra, at 14.

339 Refinements vary, particularly as to the solution of two competing foreign laws. See WIETHÖLTER, note 338 supra, at 39.
are themselves internationalists in that they deny the forum law's predominant position by permitting the foreign law to "govern." But the lex fori is the rule rather than the exception.

The thesis of this paper endeavors to preserve the traditional precepts of conflicts law, now threatened by their failure as independent "rules," by reinterpreting them as exceptions from the lex fori. But this thesis can be fully established only through a study which would re-examine the entire case law bearing on each specific factual situation. In the second part of my treatise on the Conflict of Laws I hope to complete a series of studies which I have submitted as bearing on some of the more important conflicts problems of every-day legal life in the United States.