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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 ENTWICKELUNG DES INTERNATIONALEN PRIVAT-UND STRAFRECHTS BIS BARTOLUS* (1901, 1916); NIEDERER, *EINFÜHRUNG IN DIE ALLEGEMEINEN 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.¹ 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.² 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,"³ and

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

² Ehrenzweig: "The Real Estate Broker and the Conflict of Laws," 59 COL. L. REV. 303 (1959); "The Statute of Frauds in the Conflict of Laws," 59 COL. L. REV. 874 (1959); "Contracts in the Conflict of Laws," 50 COL. L. REV. 973, 1171 (1959); "Contractual Capacity of Married Women and Infants in the Conflict of Laws," 43 MINN. L. REV. 899 (1959); "Adhesion Contracts in the Conflict of Laws," 53 COL. L. REV. 1072 (1953); Book Review, 12 J. LEGAL ED. 137 (1959); "The Place of Acting in Intentional Multistate Torts," 36 MINN. L. REV. 1 (1951); "Alternative Actionability in the Conflict of Laws of Enterprise Liability," 63 JURIM. REV. 39 (1951); "Guest Statutes in the Conflict of Laws," 69 YALE L. J. 595 (1960); and my forthcoming articles, "Alienation of Affections in the Conflict of Laws," 45 CORN. L. Q. — (1960); "Products Liability in the Conflict of Laws," "Vicarious Liability in the Conflict of Laws," 69 YALE L. J. — (1960).

³ *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 stock⁵ that may well become a new source of confusion in future cases.⁶

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

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. MEIJERS 651.

⁷ *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928). See also *Graham v. Wilkins*, 145 Conn. 34, 138 A. (2d) 705 (1958); Ehrenzweig, "Vicarious Liability in the Conflict of Laws," 69 YALE L.J. — (1960).

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.⁹

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,"¹⁰ 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,"¹¹ 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.¹² 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.¹³

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

⁹ See Yiannopoulos, "Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary 'Rule,'" 46 CALIF. L. REV. 185 (1958).

¹⁰ Alabama Great Southern R. Co. v. Carroll, 97 Ala. 126, 11 S. 803 (1892).

¹¹ Butler v. Wittland, 18 Ill. App. (2d) 578, 153 N.E. (2d) 106 (1958). *Contra*, Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W. (2d) 365 (1957), distinguished on clearly inadequate grounds. See, in general, note, [1958] ILL. L. FORUM 287. Cf. Waynick v. Chicago's Last Dept. Store, (7th Cir. 1959) 269 F. (2d) 322.

¹² See, e.g., Loranger v. Nadeau, 215 Cal. 362, 10 P. (2d) 63 (1932). See, in general, Ehrenzweig, "Guest Statutes in the Conflict of Laws," 69 YALE L.J. 595 (1960).

¹³ For examples, see Ehrenzweig, "The Statute of Frauds in the Conflict of Laws," 59 COL. L. REV. 874 (1959); "Contracts in the Conflict of Laws," 59 COL. L. REV. 973, 1171 (1960); "Contractual Capacity of Married Women and Infants in the Conflict of Laws," 43 MINN. L. REV. 899 (1959); "Releases of Concurrent Tortfeasors in the Conflict of Laws," 46 VA. L. REV. — (1960).

destroyed.¹⁴ 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.¹⁵ Moreover, there is merit in the compilation of a catalogue of those principles which, though necessarily inconsistent with each other,¹⁶ like all principles of "justice,"¹⁷ may, if

¹⁴ NUSSBAUM 26-32; and, in general, EHRENZWEIG 13.

¹⁵ See, e.g., Kegel, "Begriffs- und Interessenjurisprudenz im Internationalen Privatrecht," *FESTSCHRIFT FÜR LEWALD* 259 at 282 (1953).

¹⁶ See Wengler, "Die Allgemeinen Rechtsgrundsätze des Internationalen Privatrechts und ihre Kollisionen," 23 *ÖFFENTL. RECHT* 473 (1943); Wengler, "Les principes généraux du droit international privé et leurs conflits," 41 *REV. CRIT. DE DR. INT.* 595 (1952); 42 *id.* 37 (1953). See also Wengler, "Skizzen sur Lehre vom Statutenwechsel," 23 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 535 (1958) (hereinafter cited *RABELS Z.*).

applied consciously and without a priori priorities,¹⁸ assist the judge in his decision: the forum's "political" interest including its conception of its "public policy";¹⁹ the substantive harmony between laws applicable to a unitary set of facts, such as a family,²⁰ 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;²¹ and perhaps the effectuating of as many party expectations as possible.²²

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 situations²³ 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"²⁴ 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,²⁵ and applicability of the foreign law will in each new situation have to be established to his satisfaction.²⁶ The following summary of this thesis will show its essential connection with the progressing reform of the law of jurisdiction.²⁷

The Thesis

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

17 BIENENFELD, REDISCOVERY OF JUSTICE (1947). Kegel, "Begriffs- und Interessenjurisprudenz im Internationalen Privatrecht," Festschrift für LEWALD 259 at 270 (1953), develops a specific concept of "conflicts" justice.

18 Kegel, note 17 *supra*, at 268, against Wengler, "Die Allgemeinen Rechtsgrundsätze des Internationalen Privatrechts und ihre Kollisionen," 23 Z. ÖFFENTL. RECHT 473 at 497 (1943).

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

20 As to "status," see, e.g., 1 RABEL, CONFLICT OF LAWS, 2d ed., 109 (1958). But cf. EHRENZWEIG 85.

21 Kegel, note 15 *supra*, at 269, simplifying a longer catalogue of Wengler, note 16 *supra*. See also Zweigert, "Die dritte Schule im Internationalen Privatrecht," Festschrift für RAAPE 35 (1948); Beitzke, "Betrachtungen zur Methodik im Internationalen Privatrecht," Festschrift für SMEND 1 (1952).

22 See Kegel, note 17 *supra*, at 271. On the *lex validitatis* in contracts law, see Ehrenzweig, "Contracts in the Conflict of Laws," 59 COL. L. REV. 973 (1959).

23 Kegel, note 17 *supra*, at 279.

24 See Cavers, "A Critique of the Choice-of-Law Problem," 47 HARV. L. REV. 173, 193 (1933); and, in general, EHRENZWEIG 13.

25 See text accompanying notes 243-339 *infra*.

26 See Traynor, "Law and Social Change in a Democratic Society," [1956] ILL. L. FORUM 230 at 234.

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.²⁸ 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*.²⁹

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.³⁰ 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,

²⁸ Note 22 *supra*.

²⁹ Note 2 *supra*.

³⁰ For a bibliography, see MEHL, *GESCHICHTE UND SYSTEM DES INTERNATIONALEN PRIVAT-RECHTS* 8 (1892).

conflicts rules, insofar as they are not established by constitutional limitations³¹ or international conventions,³² 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."^{32a} 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,³³ 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"³⁴ and "Private International Law."³⁵ 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.³⁶

³¹ See Currie, "The Constitution and the Choice of Law," 26 UNIV. CHI. L. REV. 9 (1958). But cf. EHRENZWEIG 29.

³² See, e.g., the Hague resolution of August 30, 1875, INSTITUT DE DROIT INTERNATIONAL, TABLEAU GÉNÉRAL DES RÉSOLUTIONS (1873-1956) 365 (1957). On the pertinent conventions on specific jurisdictional subjects, see EHRENZWEIG 23.

^{32a} EHRENZWEIG, *passim*. For an excellent foreign analysis, see Neuhaus, "Internationales Zivilprozessrecht und Internationales Privatrecht," 20 RABELS Z. 201 at 247-269 (1955).

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, prevailingly 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.³⁷ 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.³⁸ 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.³⁹ Nor was there such competition when those great "personal" laws, the perfected and later declining "lex" of the Langobards,⁴⁰ and the defeated and later rising laws of the Romans,⁴¹ had yielded, as had the King's powers, to the feudal laws, the Frankish capitularia,⁴² and the customs and statutes of the city states.⁴³ 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,⁴⁴ confirmed in its rule by treaties among the city states.⁴⁵ It would be wrong to treat this stage as one of primitive unawareness of inequities thus caused.

³⁷ See, e.g., Yntema, "The Historic Bases of Private International Law," 2 AM. J. COMP. L. 297 at 300 (1953); BATIFFOL 10; Niederer, "Ceterum quaero de legum Imperii Romani conflictu," FESTSCHRIFT FÜR FRITZSCHE 115 (1952); SCHWIND, GEISTIGE UND HISTORISCHE GRUNDLAGEN DES INTERNATIONALEN PRIVATRECHTS (1959).

³⁸ See, in general, MEIJERS 549; CALISSE, A HISTORY OF ITALIAN LAW 39 (1928). But see QUADRI 32-42.

³⁹ 1 NEUMEYER 11; BATIFFOL 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 29-33; BATIFFOL 13; WOLFF 21. See, in general, BORETIUS, DIE CAPITULARIEN 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 298.

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.⁴⁶ Since the primary tenet of these rules was the parties' subjection to the court of the defendant's domicile as his "forum generale,"⁴⁷ application of this forum's law would neither aggrieve the defendant nor the foreign plaintiff.⁴⁸ On the other hand, a foreign defendant could hardly complain if the added competencies of the place of contracting,⁴⁹ of the delict,⁵⁰ of the thing in issue,⁵¹ made applicable a forum law which had the most significant contacts with the case.⁵² Nor was injustice done where a Venetian's will executed abroad was subjected to Venetian law by a Venetian statute.⁵³

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,⁵⁴ foreigners were deprived of both the burdens⁵⁵ and the privileges of forum law.⁵⁶ 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."⁵⁷ Accursius, as late as 1228, had quite generally permitted the place of litigation to determine the applicable custom.⁵⁸ But only a few years later, this great master

⁴⁶ 2 NEUMEYER 23. On the early identity between problems of jurisdiction and choice of law, see MEIJERS 572.

⁴⁷ 2 NEUMEYER 94.

⁴⁸ 2 NEUMEYER 30, 80, 82.

⁴⁹ This competency found a counterpart in the cities' revenue interest in the "curatura," a levy on local contracts of foreigners. 2 NEUMEYER 31. On the impact of usury legislation, see *id.* at 32.

⁵⁰ 2 NEUMEYER 31.

⁵¹ On the financial background of this competency, see 2 NEUMEYER 33.

⁵² Paulus de Castro (died 1441) limits the Roman principle that the plaintiff must and may follow the defendant in his own forum (*actor debet sequi forum rei*), to the case of a foreign defendant sued in contract or quasi-contract and about to depart from the forum. 1 LAINÉ 189.

⁵³ See GUTZWILLER 299.

⁵⁴ 2 NEUMEYER 73. See also *id.* at 23 ("invention of the theoreticians"). On the influence of Byzantine law in Bologna, see Pringsheim, "Beryt and Bologna," *FESTSCHRIFT FÜR LENEL* 204 (1921).

⁵⁵ Thus, a citizen of Pisa defended himself successfully in Pistoja against the charge of having carried arms there unlawfully, by pleading his citizenship. 2 NEUMEYER 75, n. 4. And a statute of the Città de Castello which required an owner seeking to recover stolen goods from a bona fide purchaser to reimburse him for the purchase price, was held inapplicable in that city against a citizen of Arezzo. 2 NEUMEYER 79.

⁵⁶ Even against a counteraction the foreigner could not invoke forum law in his favor. Albericus de Rosate, *statutis* II 9, cited 2 NEUMEYER 78. See also MEIJERS 594.

⁵⁷ 2 NEUMEYER 66, 101. For a related canon law doctrine, see 2 NEUMEYER 131.

⁵⁸ 2 NEUMEYER 60, 66, 76, 101. See, in general, LANDSBERG, *DIE GLOSSE DES ACCURSIUS UND IHRE LEHRE VOM EIGENTUM* (1883). Concerning Azo's similar theory, see 2 NEUMEYER 59, n. 1; MEIJERS 594.

of the Gloss made the now famous concession that in Modena the citizen of Bologna must not be adjudged under the laws of Modena.⁵⁹

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?"⁶⁰ 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."⁶¹

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,⁶⁴ far from conceding to the foreign law a right to "govern" a legal relation;⁶⁵ 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 LAINÉ 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 137).

⁶⁵ See notes 70, 72 *infra*.

the "principle of the parties' autonomy,"⁶⁶ 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,⁶⁷ 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*.⁶⁸ 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.⁶⁹ But, contrary to later misinterpretations, most dramatically exemplified in Professor Beale's mis-translation of Bartolus,⁷⁰ 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.⁷¹ Balduini had merely asked the forum to "inspect" the customs of the place where the contract was located.⁷² The same language was still used by Bartolus⁷³ (1314-1355) and Baldus⁷⁴ (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.⁷⁵ 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

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'Argentré. NIEDERER 39.

⁷⁰ BEALE, BARTOLUS ON THE CONFLICT OF LAWS 18 (trans. 1914), consistently translates the word "inspicitur" by "govern." I LAINÉ 135 correctly translates: "il faut considérer," and "il faut avoir égard." But see also VAN DE KAMP, 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. 1, 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.⁷⁶ Although Salicet (died 1412) would insist that also a foreign *lex contractus* "shall" be applied,⁷⁷ he, too, returned to the *lex fori* where the contract was to be performed in the forum state.⁷⁸ Rochus Curtius (died 1495) was perhaps first generally to discuss the applicability of foreign "customs."⁷⁹ But court practice even then seems to have largely ignored dogmatic developments,⁸⁰ and further generalizations were left to the French statutists.⁸¹

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.⁸² Indeed, to his contemporaries, Dumoulin seems to have been an advocate of the primary rule of the *lex fori*.⁸³ 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.⁸⁴

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

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 SALICETO, 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 1 LAINÉ 180.

⁷⁹ ROCHUS CURTIUS, TRACTATUS UTRISQUE JURIS, tit. II, §76 (1584) uses in the heading of the second part the phrase "an iudex debeat equi."

⁸⁰ This observation has been based on such statements as that of Coquille (1523-1603), according to whom the French *coutumes* are not to be treated as "local to the same extent as the Docteurs ultramontains have considered their Statutes" (trans). 2 COQUILLE, OEUVRÉS, LES COUSTOMES DU PAYS ET COMTÉ DE NIVERNIS 1 (1703). Cf. GAMILLSCHEG 98. See also NIEDERER 37; 1 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 Bourgoïn, a Catholic, is hardly justifiable. DUPIN, LA COUTUME DE NIVERNAIS 432 (1864).

⁸¹ Note 105 *infra*.

⁸² GAMILLSCHEG 73, 88, 93.

⁸³ GAMILLSCHEG 33, 98.

⁸⁴ See 1 LAINÉ 223; GAMILLSCHEG 110-124.

from the arena of conflicts scholarship which during that period was largely one of dogmatic deviation.⁸⁵ 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.⁸⁶ Supported by the reforms of the French Code,⁸⁷ 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.⁸⁸ In Italy, too, the international dream has yielded to a new "territorial" realism,⁸⁹ 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.⁹⁰

2. *The Canon Law*

As in the secular law of the Italian city states, the *lex fori* governed supreme in early canon law.⁹¹ 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

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 I *CLUNET* 221 at 230 (1874).

⁸⁷ See LEREBOURS-PIGEONNIÈRE, *DRIT INTERNATIONAL PRIVÉ*, 7th ed., 83-88 (1959).

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-PIGEONNIÈRE, note 87 *supra*, at 331.

⁸⁹ See, e.g., AGO, *TEORIA DEL DIRITTO INTERNAZIONALE PRIVATO* 59-94 (1934); BALLADORE-PALLIERI, *DIRITTO INTERNAZIONALE PRIVATO*, 2d ed., 9-11 (1950); De Nova, "Solution du conflit de lois et règlement 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 168-289. For bibliographies, see, e.g., De Nova, "La jurisprudence italienne en matière de conflits de lois de 1935-1949," 39 *REV. CRIT. DE DR. INT.* 159-162 (1950); NIEDERER 69; BATIFFOL 258, 278.

⁹⁰ This theory is often identified with the name of Anzilotti [*STUDI CRITICI DI DIRITTO INTERNAZIONALE PRIVATO* (1898)]. See, e.g., AGO, "Règles Générales des Conflits de Lois," 58 *RECUEIL DES COURS* 243 at 303 (1936); Esperson, "Le Droit International Privé dans la législation italienne," 6 *CLUNET* 329 (1879); 7 *id.* at 245, 337 (1880). See also NIEDERER 371; I *RABEL, THE CONFLICT OF LAWS, A COMPARATIVE STUDY*, 2d ed., 16, 62 (1958).

⁹¹ 2 NEUMEYER 126. See also RIGAUD, *ACTES DU CONGRÈS 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.⁹² Moreover, the right to appeal to a judge in another territory raised the question as to the law applicable in the appellate court.⁹³ 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.⁹⁴ That, in the absence of such choice, the defendant's law was given preference⁹⁵ 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.⁹⁶

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,⁹⁷ with delicts following suit.⁹⁸ 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 Animarum* (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."⁹⁹ Although Paulus' adage referred to judicial rather than to legislative jurisdiction,¹⁰⁰ even a contemporaneous Gloss extended the *Decretale* to restrict the legislative power as such,¹⁰¹ 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 2 NEUMEYER 129.

⁹³ 2 NEUMEYER 129. For analogies in early French feudal law, see Neumeyer, "Zur Geschichte des internationalen Privatrechts in Frankreich und den Niederlanden," 11 ZERT. FÜR VÖLKERRECHT 190 at 195 (1920).

⁹⁴ 2 NEUMEYER 129.

⁹⁵ 2 NEUMEYER 113.

⁹⁶ 2 NEUMEYER 132. An exception existed where the plaintiff's law was more favorable to the defendant or was more likely to do justice. 2 NEUMEYER 131.

⁹⁷ 2 NEUMEYER 131, 135.

⁹⁸ 2 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.

territorial.¹⁰² To be sure, an earlier draft,¹⁰³ 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*.¹⁰⁴

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.¹⁰⁵ *Lex fori*, then, and party autonomy, even as to foreign land!¹⁰⁶

To d'Argentré¹⁰⁷ 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.¹⁰⁸ Whatever the rationale of this obligation—and there are almost as many interpretations as authors dealing with this question¹⁰⁹—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

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.

¹⁰⁵ See, e.g., D'ESPINAY, *LA FÉODALITÉ ET LE DROIT CIVIL FRANCAIS* 343 (1862); GAMILLSCHEG 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).

¹⁰⁷ D'ARGENTRÉ (1519-1590), COMMENTARII IN PATRIAS BRITONUM LEGES SEU CONSUETUDINES GENERALES ANTIQUISSIMI DUCATUS BRITANNIAE, Art. CCVIII, Gloss 6 (ed. Paris 1621).

¹⁰⁸ GAMILLSCHEG 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 GAMILLSCHEG 104.

to which that law had to yield the power over land,¹¹⁰ and perhaps by that nascent internationalism¹¹¹ which, too, endowed the foreign law with a right to recognition.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*.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."¹¹⁴

The inevitable inconsistency between these two principles has often been pointed out.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*.¹¹⁶ But neither later scholars nor the courts followed suit.¹¹⁷ The conflict remained unresolved, and the *lex fori* continued, openly or in disguise,¹¹⁸ to determine French law until the eve of the great

¹¹⁰ GAMILLSCHEG 104.

¹¹¹ 1 LAINÉ 270.

¹¹² For antecedents, see GAMILLSCHEG 105; Neumeyer, "Zur Geschichte des internationalen Privatrechts in Frankreich und den Niederlanden," ZEIT. FÜR VÖLKERRECHT 190 at 193 (1920).

¹¹³ The regime of the *lex situs* has since been surrounded by something close to a psychological taboo. See in general, EHRENZWEIG 206. For early history, which can be traced back to 1270, see BATIFFOL 261.

¹¹⁴ D'ARGENTRÉ, note 107 *supra*, at no. 4. See 2 LAINÉ 320.

¹¹⁵ 2 LAINÉ 322.

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.

¹¹⁷ 2 LAINÉ 338, 389, 394; DELAUME, LES CONFLITS DE LOIS À LA VEILLE DU CODE CIVIL 333 (1947).

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.¹¹⁹ In this form, strengthened by Dutch influence,¹²⁰ French doctrine, in the writings of Boullenois (1680-1762), Bouhier (1673-1746), Froland (+ 1746), and Merlin,¹²¹ came to play its important role, shared with that of Dutch and German scholars, in the formative process of American conflicts law.¹²² 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.¹²³ Foelix, the author of the first French treatise of the 19th century, announced flatly his "complete adoption" of Story's teaching.¹²⁴ 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.¹²⁵

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,¹²⁶ Bartin's realism has prevailed¹²⁷—though veiled in a universalist aura of philosophy

¹¹⁹ See, in general, *id.* at 86, 336; and Delaume, "The French Civil Code and Conflict of Laws: One Hundred and Fifty Years After," 24 GEO. WASH. L. REV. 499 (1956).

¹²⁰ Apparently Boullenois himself had been strongly influenced by the Dutch doctrine. 2 LAINÉ 426.

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 273.

¹²² Boullenois' work [TRAITÉ DE LA PERSONNALITÉ ET DE LA RÉALITÉ DE LOIX, COUTUMES, OU STATUTS (1766)] was one of the main sources of Story's *Commentaries*. See also GAMILLSCHEG 247; BEALE 44.

¹²³ See Louis-Lucas, "Conflits de méthodes en matière de conflits de lois," 83 CLUNET 774 at 780 (1956) (with English translation). For an earlier adherent of the *lex fori* (based on a rational system of jurisdiction), see GAND, CODE DES ÉTRANGERS OU ÉTAT CIVIL ET POLITIQUE EN FRANCE (1853).

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.

¹²⁶ See, e.g., Niboyet, "Territoriality and Universal Recognition of Rules of Conflict of Laws," 65 HARV. L. REV. 582 (1952). Recognition, at the outset, "that attempts to achieve a universal private international law have failed" is in peculiar contrast to Niboyet's advocacy of unilateral conflicts rules. See also Makarov, "Der allgemeine Teil des internationalen Privatrechts im Entwurfe des neuen französischen Kodifikationswerkes," FESTSCHRIFT FÜR WOLFF 247 at 261 (1952); LOUSSOUARN, "The French Draft on Private International Law and the French Conference on Codification of Private International Law," 5 INT. & COMP. L. Q. 378 (1956).

¹²⁷ BATIFFOL 289. See also, e.g., Louis-Lucas, "Existe-t-il une compétence générale du droit français pour le règlement des conflits de lois?" 48 REV. CRIT. DE DR. INT. PRIVÉ 405 (1959); Maury, "Règles générales des conflits de lois," 57 RECUEIL DES COURS 329-563 (1936).

and aesthetics in the great work of Batiffol.¹²⁸ Thus, in the law of torts no less an authority than Mazeaud¹²⁹ has expressly advocated the outright application of the *lex fori*.¹³⁰

4. *Netherlands*

What d'Argentré's feudalistic theorem did not achieve in France, it did apparently at first achieve in the Netherlands.¹³¹ There, at the end of the 17th century, it not only gained full acceptance but did so in displacing the last elements of Bartolist 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'Argentré'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 Burgundus¹³² (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."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),¹³⁴ greatly influenced the theory of Joseph Story.

128 BATIFFOL, *ASPECTS PHILOSOPHIQUES DU DROIT INTERNATIONAL PRIVÉ* (1956); also Louis-Lucas, note 123, *supra*, at 805. For a purely philosophical universalist approach, see GOLDSCHMIDT, *SISTEMA Y FILOSOFIA DEL DERECHO INTERNACIONAL PRIVADO* (1948-1949); Goldschmidt, "Die philosophischen Grundlagen des internationalen Privatrechts," *FESTSCHRIFT FÜR WOLFF* 203 (1952).

129 Mazeaud, "Conflits de lois et compétence internationale dans le domaine de la responsabilité civile délictuelle et quasi-délictuelle," 29 *REV. CRIT. DE DR. PR.* 377 at 382, 387, 398 (1934), establishing his thesis *de lege lata* and *de lege ferenda*; 3 MAZEAUD, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE*, 4th ed., 339 (1950). On French doctrine in general, see BATIFFOL 50.

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, *TRAVAUX 1949-1950*, at 618; *AVANT-PROJET DE CODE CIVIL* 63, 220 (1955).

131 This analysis is based primarily on the sources discussed by I LAINÉ 396. See also KOLLEWIJN, *HET BEGINSEL DER OPENBARE ORDE IN HET INTERNATIONAAL PRIVAATRECHT* (1917).

132 BURGUNDUS, *AD CONSUETUDINES FLANDRIAE ALIARUMQUE GENTIUM CONTROVERSIAE* (1646). See I LAINÉ 401.

133 I LAINÉ 403, quoting from Burgundus' original Latin.

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.¹³⁵ 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."¹³⁶ 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 statist 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,¹³⁷ Johannes Voet abandoned the later statist 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.¹³⁸

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 statist, 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 approach¹³⁹ nor Jitta's "ultranational" order based on a law of humanity¹⁴⁰ have seriously affected the consistent realism of Dutch scholarship,¹⁴¹ whose only reproach to Huber and the Voets has been that they "did not further develop their fundamental idea."¹⁴² 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."¹⁴³ As to torts, Netherlands courts have not hesitated to resort to the *lex fori* where justice so required,¹⁴⁴ 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.¹⁴⁵

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*.¹⁴⁶ 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).

¹⁴⁰ JITTA, *INTERNATIONAAL PRIVAATRECHT* (1916). Cf. BEALE 95.

¹⁴¹ For a bibliography, see NIEDERER 371. See also Osterhaus, "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.*

¹⁴⁴ *De Beer v. de Hondt*, Hague App. June 16, 1955, N.J. 1955, no. 615, 3 NED. TIJDSCHR. INT. R. 290 (1956), applying Dutch law to a French automobile accident between nationals. But see for Belgium, *Overstraeten v. Sainte*, Cour de Cass. Belg. Mai 17, 1957 (Dutch law applied to Dutch accident between Belgians).

¹⁴⁵ Drion, "De ratio voor toepassing van vreemd recht in zake de onrechtmatige daad in het buitenland," [1949] RECHTSGELEERD MAGAZIJN THEMIS 3, 64. Cf. De Nova, "Appunti sull'illecito civile in diritto internazionale comparato," 4 COMMUNIC. E STUDI 7 at 18 (1952).

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.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.¹⁴⁸

These and other "universalists" were strongly criticized by Carl Georg von Wächter,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.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.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,

¹⁴⁷ 1 LAINE 408; GAMILLISCH 163.

¹⁴⁸ Earlier treatises merely referred to the extraterritorial validity of laws. See, e.g., STRYCK, *DE JURE PRINCIPIS EXTRA TERRITORIUM* (1674). TITIVS, *JUR. PRIV. ROM. GERM.* lib. 1, ch. 10, "De conflictu statutorum eorumque in ceteros valore" (1709), introduced conflicts terminology.

¹⁴⁹ Wächter, "Ueber die Collision der Privatrechtsgesetze verschiedener Staaten," 24 *ARCH. CIV. PR.* 230 (1841); 25 *id.* 1 (1842).

¹⁵⁰ But, in doing so, Wächter can claim a long line of later statisticians who began their investigations with the *lex fori* as the basic law. 25 *ARCH. CIV. PR.* 1 at 15 (1842) (e.g., Mevius, Stryck, Bohmer). Moreover, Wächter's theory seems to have been preceded by a contemporary controversy. See SCHÄFFNER, *ENTWICKLUNG DES INTERNATIONALEN PRIVATRECHTS* 31-36 (1841), who had made short shrift of the "adventurous idea" of comity which he had found foreign to actual practice. *Id.* at 37-38. 1 ZACHARIÄ, *HANDBUCH DES FRANZÖSISCHEN CIVILRECHTS*, 2d ed., p. XLI (1811) had treated conflicts rules as mere exceptions from the *lex fori*.

¹⁵¹ For adherents of Wächter, see PFEIFFER, *DAS PRINCIP DES INTERNATIONALEN PRIVATRECHTS* (1851); MITTERMAIER, *GRUNDSATZE DES GEMEINEN DEUTSCHEN PRIVATRECHTS*, 7th ed., §30, p. 115 (1847); PUCHTA, *PANDEKTEN*, 9th ed., §113, p. 171 (1863); PÜTTER, *DAS PRAKTISCHE EUROPÄISCHE FREMDENRECHT* (1845). See also THÖL, *EINLEITUNG IN DAS DEUTSCHE PRIVATRECHT* 168 (1851); THÖL, 1 *HANDELSRECHT* §17 ("In the first place the judge shall apply his own laws").

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.¹⁵² 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.”¹⁵⁷ While, in Savigny’s work, this modification was still one in fact rather than by necessity, Bar¹⁵⁸ 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 Bartin,¹⁶¹ developed, for a new

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 PILLET* 89 (1929).

¹⁵⁶ See NUSSBAUM 21; BATIFFOL 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 ZITELMANN, *INTERNATIONALES PRIVATRECHT* (1897); ZITELMANN *DIE MÖGLICHKEIT EINES WELTRECHTS* (1888). See, e.g., BEALE 91; NIEDERER 136; Gutzwiller, “International-Privatrecht,” in 1 *STAMMLER, DAS GESAMTE DEUTSCHE RECHT* 1515 at 1532, 1538, 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*.¹⁶² Niemeyer, in his proposals for the codification of private international law,¹⁶³ 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;¹⁶⁴ but contemporary writers like Kegel, Nussbaum, Raape and Wengler have reversed the trend.¹⁶⁵

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.¹⁶⁶ But in merchant courts and admiralty the law of the international community of merchants¹⁶⁷ 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*.

¹⁶⁵ Kegel, "Begriffs- und Interessenjurisprudenz im Internationalen Privatrecht," *FESTSCHRIFT FÜR LEWALD* 259 (1953); NUSSBAUM, *DEUTSCHES INTERNATIONALES PRIVATRECHT* (1932); RAAPE, *INTERNATIONALES PRIVATRECHT*, 4th ed. (1955); WENGLER, note 16 *supra*. But cf. GUTZWILLER, "Fünfzig Jahre Internationalprivatrecht," 23 *RABELS Z.* 403 (1958) who expresses new internationalist hopes in his survey of recent history. See, generally, BALLARINO, *PROBLEMI GENERALI DEL DIRITTO INTERNAZIONALE PRIVATO NELLA RECENTE LITERATURA TEDESCA* (1958).

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.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.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,¹⁷⁰ while other exceptions from forum law were dominated by the Dutch theory of comity.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 statist terminology.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 *Commentaries*. But Westlake remained fully conscious of the predominant role of a *lex fori* whose application seemed justified by the choice of jurisdiction.¹⁷³ Westlake, like Phillimore,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,¹⁷⁵ and Foote to a largely uncritical re-examination of the case law,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

¹⁶⁸ See, in general, EHRENZWEIG 5. On early Scottish conflicts law, see Gibb, "Le droit international privé en Écosse au XVI^e et au XVII^e siècle," 25 REV. DE. DR. INT. PRIVÉ 560 (1930), particularly at 571 on the natural law approach of Lord Stair.

¹⁶⁹ See, e.g., WESTLAKE, PRIVATE INTERNATIONAL LAW 53, 91, 102, 153, 156 (1859).

¹⁷⁰ See *Dungannon v. Hackett*, 1 Eq. Ca. Abr. 289, 21 Eng. Rep. 1051 (1702) (rate of interest); *Foubert v. Trust*, 1 Brown Parl. Cas. 129, 1 Eng. Rep. 464 (1703) (marital agreement). See NUSSBAUM 15.

¹⁷¹ Cf. *Robinson v. Bland*, 2 Burr. 1077, 97 Eng. Rep. 717 (1760); *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120 (1775), per Lord Mansfield.

¹⁷² BURGE, COMMENTARIES ON COLONIAL AND FOREIGN LAWS GENERALLY (1838); HENRY, THE JUDGMENT OF THE COURT OF DEMERARA 1, 34 (1823).

¹⁷³ Note 169 *supra*.

¹⁷⁴ 4 PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW, 3d ed., Preface, p. XV (1889).

¹⁷⁵ WHARTON, CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW INCLUDING A COMPARATIVE VIEW OF ANGLO-AMERICAN, ROMAN, GERMAN, AND FRENCH JURISPRUDENCE (1872).

¹⁷⁶ FOOTE, PRIVATE INTERNATIONAL LAW BASED ON THE DECISIONS OF THE ENGLISH COURTS (1878).

origin.¹⁷⁷ 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 Cheshire¹⁸⁰ and Falconbridge¹⁸¹ 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 elsewhere¹⁸⁴ 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' *Commen-*

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).

¹⁷⁸ DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS, p. xlii (1896).

¹⁷⁹ SCHMITTHOFF, ENGLISH CONFLICT OF LAWS, 3d ed. (1954). GRAVESON, CONFLICT OF LAWS, 3d ed., 30 (1955) seems to take an intermediate position.

¹⁸⁰ CHESHIRE 32.

¹⁸¹ FALCONBRIDGE 11.

¹⁸² DICEY 9.

¹⁸³ DICEY 12.

¹⁸⁴ See note 2 *supra*.

¹⁸⁵ See Smith, "Torts and the Conflict of Laws," 20 MOD. L. REV. 447 at 450 (1957). Cf. BATIFFOL 260, stressing the analogy to crimes.

¹⁸⁶ See *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (1774).

taries.¹⁸⁷ Wächter¹⁸⁸ 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*.¹⁸⁹ 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."¹⁹⁰

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.¹⁹¹ 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."¹⁹² The feat of turning this nightmare into law was reserved to the American Law Institute's *Restatement of the Law of Conflict of Laws*.¹⁹³ 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

¹⁸⁷ This persistent connection is well illustrated by *Codex Maximilianeus Bavaricus 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).

¹⁸⁸ Note 149 *supra*.

¹⁸⁹ *Phillips v. Eyre*, [1870] L.R. 6 Q.B. 1 at 29. See FALCONBRIDGE 809; Yntema, *Book Review*, 27 CAN. B. REV. 116 (1949).

¹⁹⁰ 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).

¹⁹¹ See concerning Westlake's theory to this effect, Smith, note 185 *supra*, at 454.

¹⁹² *Id.* at 457.

¹⁹³ 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*¹⁹⁴ as may be required by the policies underlying each specific rule of enterprise liability.¹⁹⁵

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*.¹⁹⁶ 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*¹⁹⁷ 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.¹⁹⁸ But there are other problem situations in which the *lex fori* is being given its due only in the circuitous ways of *renvoi*, pro-

¹⁹⁴ Wortley, "The General Principles of Private International Law from the English Standpoint," 71 *RECUEIL DES COURS* 5 at 59 (1947), advocates outright application of the *lex fori* in tort cases.

¹⁹⁵ See my papers, note 2 *supra*.

¹⁹⁶ *McMillan v. Canadian Northern Ry. Co.*, [1923] A.C. 120. See also Ehrenzweig, "Alternative Actionability in the Conflict of Laws of Enterprise Liability: An American Comment on M'Elroy's Case," 63 *JURID. REV.* 39 (1951) and, in general, Ehrenzweig, "Vicarious Liability in the Conflict of Laws," 69 *YALE L.J.*—(1960).

¹⁹⁷ See, in general, Ehrenzweig, "Contracts in the Conflict of Laws," 59 *COL. L. REV.* 973, 1171 (1959).

¹⁹⁸ Notes 70-72 *supra*. See also CHESHIRE 205.

cedural characterization or public policy.¹⁹⁹ 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,²⁰⁰ or of assessments by foreign administrative officers and the like.²⁰¹

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."²⁰² 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.²⁰³ Professor Beale thought otherwise. But for his contention of an

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.

²⁰² STORY 100-192, 7-38, 358-390. See Yntema, "Contract and Conflict of Laws: 'Autonomy' in Choice of Law in the United States," 1 N.Y. L. FORUM 47 at 51 (1955) ("derived from a variety of conflicting views"). Cf. Nadelmann, "Some Historical Notes on the Doctrinal Sources of American Conflicts Law," FESTGABE GUTZWILLER 263 at 272-276 (1959). See also IRMER, "COMITY," NEDERLANDSE INVLOED OP HET RECHT DER VERENIGDE STAATEN 28-41 (1948).

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 law²⁰⁴ he relied on one English²⁰⁵ and one Massachusetts case,²⁰⁶ both of which concerned the effect of "quasi-judgments" in bankruptcy²⁰⁷ 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."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."²⁰⁹

When Field prepared his *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 domicilii*, *lex loci contractus*, or *lex rei sitae*, he must aver and prove it."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."²¹¹ As late as 1879 Rorer's text on *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 *citizens*, or to their injury."²¹²

204 BEALE 105.

205 *Potter v. Brown*, 5 East 124, 102 Eng. Rep. 1016 (1804).

206 *Blanchard v. Russell*, 13 Mass. 1 (1816).

207 Note 201 *supra*.

208 BEALE 105.

209 *Blanchard v. Russell*, 13 Mass. 1 at 4-5 (1816).

210 FIELD, *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.

211 *Anderson v. Milwaukee & St. Paul R.R.*, 37 Wis. 321 (1875).

212 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."²¹³ 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.²¹⁴ 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.²¹⁵ Only this ideology can explain his lack of interest in interstate problems for which, indeed, a text would have been available,²¹⁶ 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"²¹⁷—only to Dicey's text with its "crowning quality," its "ability to keep clear of the Continental writers."²¹⁸ But Dicey himself had acknowledged his debt to "foreign jurists, such as Savigny, Bar, and Foelix," as well as to Westlake²¹⁹ who, in turn, ever since his first

²¹³ Griswold, "Mr. Beale and the Conflict of Laws," 56 HARV. L. REV. 690 (1943).

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.

²¹⁷ Yntema, Foreword to RABEL, THE CONFLICT OF LAWS, A COMPARATIVE STUDY, at XVI (1945).

²¹⁸ Beale, "Dicey's 'Conflict of Laws,'" 10 HARV. L. REV. 168 at 169 (1896).

²¹⁹ DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS, pp. vi, vii (1896).

edition, had stressed the overwhelming importance of continental writers for the development of English conflicts law.²²⁰ And those continental writers, well-known to Beale,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.²²² Fortunately, a new generation of judges and writers in this country, too, has begun to discount this aberration.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."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.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

²²⁰ See, e.g., WESTLAKE, *PRIVATE INTERNATIONAL LAW*, 5th ed., 23 (1912).

²²¹ BEALE, *CONFLICT OF LAWS* (1916) added to the author's Treatise as an Appendix.
³ BEALE, *CONFLICT OF LAWS* 1879 (1935).

²²² See notes 153, 177 *supra*. See also, e.g., NUSSBAUM 27; WICHSER, *DER BEGRIFF DES WOHLERWORBENEN RECHTS IM INTERNATIONALEN PRIVATRECHT* 7, 22 (1955). 4 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."

²²³ See EHRENZWEIG 13.

²²⁴ Louis-Lucas, "Remarques sur l'ordre public," 28 *REV. DE DR. INT. PR.* 393 (1933).
See also *id.* at 442.

²²⁵ See note 2 *supra*.

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, Lerebours-Pigeonnière and Batiffol have long overcome Pillet's internationalist flight into fancy.²²⁸ Neither the Netherlands²²⁹ nor the Scandinavian countries since Ørsted's pioneering fight against statist 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 statistists.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

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*.

²³⁰ See e.g., MALMSTRÖM, SOME ASPECTS OF CHARACTERIZATION IN PRIVATE INTERNATIONAL LAW: LIBER AMICORUM BAGGE 130, 131 (1956); Hambro, "Autonomy in the International Contract Law of the Nordic States," 6 INT. AND COMP. L.Q. 589 (1957). See also, in general, Korkisch, "Der Anteil der nordischen Länder an den Fragen des internationalen Privatrechts," 23 RABEL Z. 599 at 604 (1958); GJELSVIK, DAS INTERNATIONALE PRIVATRECHT IN NORWEGEN 37 (1935); MICHAELI, INTERNATIONALES PRIVATRECHT 39-45 (1947).

²³¹ Notes 162-165 *supra*.

²³² Note 180 *supra*.

²³³ Traynor, "Law and Social Change in a Democratic Society," [1956] UNIV. ILL. L. FORUM 230 at 234. See also Traynor, "Is this Conflict Really Necessary?" 37 TEX. L. REV. 657 (1959).

Restatement's house of cards.²³⁴ 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,²³⁵ "preliminary,"²³⁶ and other²³⁷ characterizations of questions or rules, *renvoi*,²³⁸ fraud on the law,²³⁹ "estoppel,"²⁴⁰ failure of proof,²⁴¹ and above all, public policy.²⁴² 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."²⁴³ 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,"²⁴⁴ and those who concede a much greater part to this concept in continental law.²⁴⁵ In both legal systems the appearance of public policy

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.* 973, 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., FRANCESCAKIS, *LA THÉORIE DU RENVOI* 43 (1958).

²⁴⁰ See 2 MADSEN-MYGDAL, *ORDRE PUBLIC OG TERRITORIALITET* 822 (1946) (English summary).

²⁴¹ Notes 297-300 *infra*.

²⁴² Notes 243-278 *infra*.

²⁴³ Lorenzen, "Territoriality, Public Policy and the Conflict of Laws," 33 *YALE L.J.* 736 at 746 (1924).

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").

²⁴⁵ GUTTERIDGE, *COMPARATIVE LAW*, 2d ed., 98 (1949). See, in general, LLOYD, *PUBLIC POLICY* 73 (1953); LEREBOURS-PIGEONNIÈRE, *PRÉCIS DE DROIT INTERNATIONAL PRIVÉ*, 6th ed., 288 (1954); MAURY, *L'ÉVICTION DE LA LOI NORMALEMENT COMPÉTENTE* 33-36 (1952); KOLLEWIJN, *HET BEGINSSEL DER OPENBARE ORDE IN HET INTERNATIONAAL PRIVAATRECHT* (1917); and particularly Nussbaum, "Public Policy and the Political Crisis in the Conflict of Laws," 49 *YALE L. J.* 1027 (1940); Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws," 39 *GROT. SOC.* 39 (1954); Sperduti, "Ordine pubblico inter-

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 statist eras²⁴⁶ (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 interest²⁴⁷ (unnecessary under his rationale of mere comity), the *ordre public* was moved into the center of attention by Mancini²⁴⁸ and again by Bartin.²⁴⁹

A historical study of the origin of the doctrine in Anglo-American conflicts law is lacking.²⁵⁰ English cases habitually adduced to prove early application are not in point.²⁵¹ 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.²⁵² For here, as elsewhere, "public policy" appears where the common law fails to keep "in touch with the needs of the day."²⁵³ The same observation applies to the history of American law.²⁵⁴ Not until the era of vested rights

nazionale e ordine pubblico interno," 37 *Riv. Dir. Int.* 82 (1954); LAGARDE, *RECHERCHES SUR L'ORDRE PUBLIC EN DROIT INTERNATIONAL PRIVÉ* (1959); SCHLESINGER, *COMPARATIVE LAW*, 2d ed., 465 (1959).

²⁴⁶ BATIFFOL 263.

²⁴⁷ BATIFFOL 270.

²⁴⁸ NUSSBAUM 110.

²⁴⁹ BARTIN, *ÉTUDES DE DROIT INTERNATIONAL PRIVÉ* (1899).

²⁵⁰ Both English and American texts rely indiscriminately on cases decided prior to and after the invasion of vested rights. See, e.g., CHESHIRE 150; 3 BEALE, *CONFLICT OF LAWS* 1647 (1935). See also Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law," 65 *YALE L. J.* 1087 (1956); note, 33 *COL. L. REV.* 508 (1933). Paulsen and Sovern, "'Public Policy' in the Conflict of Laws," 56 *COL. L. REV.* 969 at 972, 980 (1956) helpfully distinguish the "classical concept" from the "choice of law function" of public policy. On the history of public policy in general, see 8 *HOLDSWORTH, A HISTORY OF ENGLISH LAW* 56 (restraint of trade), 383 (contract) (1926).

²⁵¹ *Robinson v. Bland*, 2 Burr. 1077, 97 Eng. Rep. 717 (1760) (unenforceable contract under law of forum invoked by plaintiff); *De Wutz v. Hendricks*, 2 Bing. 314, 130 Eng. Rep. 326 (1824) (English contract unenforceable as directed against friendly government); *Hope v. Hope*, 8 DeG., M. & G. 731, 44 Eng. Rep. 572 (1857) (unenforceable contract bearing on family relations); *Santos v. Illidge*, 8 C.B. (n.s.) 861, 141 Eng. Rep. 1404 (1860) (interpretation of statute in terms applicable to foreign transaction); *Grell v. Levy*, 16 C.B. (n.s.) 73, 143 Eng. Rep. 1052 (1864) (contracts to be performed in England).

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.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."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.²⁵⁷ Only where past centuries had produced a semblance of rules "by which nations are morally or politically bound,"²⁵⁸ was there room in his work for such an exception.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 statutes²⁶⁰ began to spread through the United States after the enactment of Lord Campbell's Act in England in 1846.²⁶¹ 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 limitation²⁶² or a defect in the common law.²⁶³ No wonder then that conversely the common law of the forum was preferred to

255 CONFLICT OF LAWS RESTATEMENT §612 (1934).

256 *Saul v. His Creditors*, (La. 1827) 5 Martin R. (n.s.) 569 at 595.

257 See, e.g., STORY 29.

258 STORY 71.

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 Sovorn, "Public Policy' in the Conflict of Laws," 56 COL. L. REV. 969 at 972 (1956).

260 EHRENZWEIG 4.

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. (1808) 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."

262 Stat. 9 & 10 Vict., c. 93.

263 This argument was made in *Whitford v. Panama R.R.*, 23 N.Y. 465 (1861) by the dissenting judge.

foreign statutes.²⁶⁴ 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."²⁶⁵ 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."²⁶⁶

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,²⁶⁷ promised preservation of the *lex fori* as the basic law. But this principle was not acceptable to Holmes²⁶⁸ and Cardozo,²⁶⁹ 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.²⁷⁰ 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.

²⁶⁷ *Wooden v. Western N.Y. & P. R.R. Co.*, 126 N.Y. 10, 26 N.E. 1050 (1891). The oldest case seems to be *Leonard v. Columbia Steam Navigation Co.*, 84 N.Y. 48 (1881). Texas and Maryland seem still to adhere to this test. See Paulsen, "Foreign Law in Texas Courts," 33 TEX. L. REV. 437 (1955); Paulsen and Sovern, "'Public Policy' in the Conflict of Laws," 56 COL. L. REV. 969 at 975 (1956).

²⁶⁸ *Walsh v. New York and New England R.R.*, 160 Mass. 571, 36 N.E. 584 (1894).

²⁶⁹ *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918).

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

²⁷¹ *Loucks v. Standard Oil Co.*, 224 N.Y. 99 at 111, 120 N.E. 198 (1918). See also Goodrich, "Foreign Facts and Local Fancies," 25 VA. L. REV. 26 at 33 (1938).

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).

²⁷³ For a pragmatic analysis of the problem involved in both *Loucks v. Standard Oil Co.*, note 269 *supra* and *Mertz v. Mertz*, note 272 *supra*, see Ford, "Interspousal Liability for Automobile Accidents in the Conflict of Laws," 15 UNIV. PITT. L. REV. 397 (1954). See also Ehrenzweig, "Parental Immunity in the Conflict of Laws," 23 UNIV. CHI. L. REV. 474 (1956). For the role of public policy in the contracts field, see Ehrenzweig, "Contracts in the Conflict of Laws," 59 COL. L. REV. 973, 1171 (1959). See also Ehrenzweig, "Guest Statutes in the Conflict of Laws," 69 YALE L.J. 595 (1960).

²⁷⁴ Institut de Droit International, *Tableau Général des Résolutions* (1873-1956), Resolution of March 30, 1910, p. 277.

²⁷⁵ BATIFFOL 378. MADSEN-MYGDAL, *ORDRE 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.

²⁷⁷ Lorenzen, "Territoriality, Public Policy and the Conflict of Laws," 33 YALE L. J. 736 at 747 (1924).

thought, of discriminating distinctions, and of true policy development in the conflict of laws."²⁷⁸

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."²⁷⁹ This principle goes back to the time when certain foreign laws were first said to be entitled to "inspection."²⁸⁰ Thus, when Balduini formulated the "remedy" rule he merely confirmed the continuation of the regime of the *lex fori* as against these new exceptions.²⁸¹ The rule was broadly interpreted, therefore, and presented few problems.²⁸² 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.²⁸³ 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,²⁸⁴ "machinery,"²⁸⁵ or "remedy."²⁸⁶

²⁷⁸ Paulsen and Sovern, "Public Policy' in the Conflict of Laws," 56 COL. L. REV. 969 at 1016 (1956).

²⁷⁹ STORY 468. For a history of the distinction, see Ailes, "Substance and Procedure in the Conflict of Laws," 39 MICH. L. REV. 392 at 396 (1941).

²⁸⁰ Note 72 *supra*.

²⁸¹ MEIJERS 595, with additional sources. See also Ailes, "Substance and Procedure in the Conflict of Laws," 39 MICH. L. REV. 392 at 396 (1941).

²⁸² The laws of evidence, execution, default, statutes of limitations, and arbitration were included. MEIJERS 615, 616.

²⁸³ Cf. STORY 472, quoting Johannes Voet.

²⁸⁴ Concerning the logical inconsistency between this doctrine and its "procedural" exceptions, see, e.g., Yntema, "The Hornbook Method and the Conflict of Laws," 37 YALE L. J. 468 at 478 (1928). In contract cases the forum's remedies had always been withdrawn from the parties' autonomy. *Melan v. Duke de Fitzjames*, 1 Bos. & Pul. 138, 126 Eng. Rep. 822 (1797). See, in general, Ailes, "Substance and Procedure in the Conflict of Laws," 39 MICH. L. REV. 392 at 393 (1941).

²⁸⁵ *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.

²⁸⁶ See, e.g., note 272 *supra*.

That the dichotomy is analytically meaningless has now been generally recognized.²⁸⁷ 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.²⁸⁸ 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,²⁸⁹ that survival statutes must not be characterized as procedural as was recently done by a leading court,²⁹⁰ or that statutes of frauds,²⁹¹ the standing to sue or be sued,²⁹² or damages²⁹³ 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.²⁹⁴

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-

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.

288 Ailes, "Substance, and Procedure in the Conflict of Laws," 39 MICH. L. REV. 392 at 413 (1941).

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

290 Grant v. McAuliffe, 41 Cal. (2d) 859, 264 P. (2d) 944 (1953). Compare Currie, "Survival of Actions: Adjudication Versus Automation in the Conflict of Laws," 10 STAN. L. REV. 205 (1958); Traynor, "Is This Conflict Really Necessary?" 37 TEX. L. REV. 657 at 670, n. 34 (1959).

291 See Ehrenzweig, "The Statute of Frauds in the Conflict of Laws," 59 COL. L. REV. 874 (1959).

292 EHRENZWEIG 37.

293 See Ehrenzweig, "Contracts in the Conflict of Laws," 59 COL. L. REV. 973, 1171 (1959); and, in general, WOLFF 233, 238, 242.

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. 315 (1933); Comment, 10 LA. L. REV. 365 (1950) (contributory negligence).

able in our courts which our law denies to other suitors.”²⁹⁵ 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.²⁹⁶ 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.²⁹⁷ Only rarely have courts assumed an independent conflicts rule calling in such cases for the application of that law as such.²⁹⁸

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.²⁹⁹ 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

²⁹⁵ *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E. (2d) 597 (1936).

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. PRIT. L. REV. 397 (1954); *Haumschild v. Continental Cas. Co.*, 7 Wis. (2d) 130, 95 N.W. (2d) 814 (1959).

²⁹⁷ Currie, “On the Displacement of the Law of the Forum,” 58 COL. L. REV. 964 (1958); Nussbaum, “The Problem of Proving Foreign Law,” 50 YALE L. J. 1018 (1941). On judicial notice of foreign laws, see also, e.g., Stern, “Foreign Law in the Courts: Judicial Notice and Proof,” 45 CALIF. L. REV. 23 (1957); 23 A.L.R. (2d) 1437 (1952).

²⁹⁸ See, e.g., *Leary v. Gledhill*, 8 N.J. 260, 84 A. (2d) 725 (1951).

²⁹⁹ *Walton v. Arabian American Oil Co.*, (2d Cir. 1956) 233 F. (2d) 541, cert. den. 352 U.S. 872 (1956), relying on *Cuba Railroad v. Crosby*, 222 U.S. 473 (1912). As to the English doctrine to the contrary, see Currie, “On the Displacement of the Law of the Forum,” 58 COL. L. REV. 964 at 967 (1958).

a more appropriate law invoked by either party can the authority of such unfortunate decisions permanently be discounted.³⁰⁰

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*,³⁰¹ suggests that the *lex fori* may still remain applicable where the *lex contractus* itself does not wish to be applied to foreigners.³⁰² Once the conflicts rule for contracts was firmly established on the basis of the presumed intention of the parties,³⁰³ this rationale excluded, of course, the idea of *renvoi*.³⁰⁴ 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.³⁰⁵

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

³⁰⁰ 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.

³⁰¹ Note 62 *supra*.

³⁰² 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).

³⁰³ Note 84 *supra*.

³⁰⁴ NUSSBAUM 95. But see, e.g., *Mason v. Rose*, (2d Cir. 1949) 176 F. (2d) 486.

³⁰⁵ For references to the enormous literature, see, e.g., 1 RABEL, THE CONFLICT OF LAWS, 2d ed., 75-76 (1958); BATIFFOL 350; FRANCESCakis, LA THÉORIE DU RENVOI 275-289 (1958).

who had, in fact, lived and died in France.³⁰⁶ 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."³⁰⁷

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.³⁰⁸ 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.³⁰⁹ 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*.³¹⁰

³⁰⁶ Cour de Cassation, Civ. June 24, 1878, D.P. 79.1.156, S. 78.1.429.

³⁰⁷ NUSSEBAUM 92, n. 9, quoting from Lainé, "De l'application des Lois Etrangères en France," 23 CLUNET 241 at 257, 260 (1896), and Pillet, "Contre la Doctrine due Renvoi," REV. DE DR. INT. PR. 5 at 9, 10, 13 (1913). See, in general, BATIFFOL 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. CHESHIRE 76, also discussing other cases most of which are reconcilable as documenting a favor testamenti. For criticism, see MENDELSSOHN-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).

³¹⁰ In re Annesley, [1926] Ch. 692. For a criticism of that case as well as of the most recent announcement of the Privy Council in Kotia v. Nahas, [1941] A.C. 403, see CHESHIRE 76, 81. But see, for a defense of *renvoi*, Inglis, "The Judicial Process in the Conflict of Laws," 74 L. Q. REV. 493 (1958).

In the now famous, or should we say, infamous, case of *In re Schneider's Estate*,³¹¹ 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.³¹²

It cannot be a mere coincidence that the cases referred to by Dean Griswold in defense of the renvoi doctrine³¹³ are all explainable by a reformulation of the conflicts rule allegedly applied,³¹⁴ and those cases criticized by him as improperly rejecting the doctrine³¹⁵ could have been satisfactorily decided by the same technique.³¹⁶ Indeed, "the result is the same whether the

311 *In re Schneider's Estate*, 96 N.Y.S. (2d) 652 (1950), 100 N.Y.S. (2d) 371 (1950). The facts appear from *In re Schneider's Will*, 298 N.Y. 532, 80 N.E. (2d) 667 (1948). See also *In re Duke of Wellington*, [1947] Ch. 506, affd. [1948] Ch. 118 (situation of real property for legitime). For other American cases, see FALCONBRIDGE 246. Cf. De Nova, note, 11 *GIUR. COMP. DIR. INT. PR.* 120-121 (1954).

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 rule 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 1203. For similar criticism, see COOK, *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* 246 (1949).

315 Griswold, "Renvoi Revisited," 51 *HARV. L. REV.* 1165 at 1204 (1938).

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."³¹⁷ 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,³¹⁸ 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*.³¹⁹

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.

³¹⁸ See Lewald, "La théorie du *renvoi*," 29 *RECUEIL DES COURS* 519 at 615 (1929); WOLFF 186; and, in general, FRANCESCAKIS, *LA THEORIE DU RENVOI* (1958). For the last author's own views which reject the doctrine almost completely, see particularly *id.* at 150, 189, 260. Cf. Ehrenzweig, Book Review, 8 *AM. J. COMP. L.* 233 (1959). But see also Maury, Book Review, 48 *REV. CRIT. DE DR. INT. PR.* 602 (1959).

³¹⁹ WOLFF 198. Concerning the general rejection of *renvoi* by Scandinavian courts and writers, see Korkisch, "Der Anteil der nordischen Länder an den Fragen des Internationalen Privatrechts," 23 *RABELS Z.* 599 at 614 (1958). For a similar attitude of Italian law, see Migliazza, note, "Critiche sul problema del *rinvio*," 4 *STUDI MESSINEO* 209-264 (1959). On Westlake's early use of the doctrine, see FALCONBRIDGE 21.

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 subject³²¹ 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).

³²¹ See NUSSBAUM 104; Gottlieb, "The Incidental Question in Anglo-American Conflict of Laws," 33 CAN. B. REV. 523 at 535 (1955); ROBERTSON, *CHARACTERIZATION IN THE CONFLICT OF LAWS* 137 (1940); Maury, "Règles générales des conflits de lois," 57 RECUEIL DES COURS 329, 558 (1936); Cormack, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 SO. CAL. L. REV. 221 (1941); DICEY 57; RAAPE, *INTERNATIONALES PRIVATRECHT*, 4th ed., 113 (1955); WOLFF 206; MELCHIOR, *DIE GRUNDLAGEN DES DEUTSCHEN INTERNATIONALEN PRIVATRECHTS* 245 (1932); Wengler, "Die Vorfrage im Kollisionsrecht," 8 RABELS Z. 148 (1934); RIGAUX, *LA THÉORIE DES QUALIFICATIONS EN DROIT INTERNATIONAL PRIVÉ* 444 (1956); Venturini, "Le questioni pregiudiziali nel diritto internazionale privato," 11 GIUR. COMP. DIR. INT. PR. 184 (1954); Migliazza, "Le questioni pregiudiziali in diritto internazionale privato," 26 TEMI 477 (1950); Bentivoglio, note, 12 GIUR. COMP. DIR. INT. PR. 104 (1956); Lopez, "La cuestión incidental en derecho internacional privado" 9 REV. ESP. DIR. INT. 125 (1956).

³²² But see Yiannopoulos, "Wills of Movables in American International Conflicts Law: A Critique of the Domiciliary 'Rule,'" 46 CALIF. L. REV. 185 (1958).

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*.

³²⁴ RAAPE, *INTERNATIONALES PRIVATRECHT*, 4th ed., 116 (1955).

law, the problem of renvoi cannot arise.³²⁵ 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 case³²⁶—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.³²⁷ 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.³²⁸

³²⁵ Note 304 *supra*.

³²⁶ A hypothetical case, discussed by Harper, "Torts, Contracts, Property, Status, Characterization, and the Conflict of Laws," 59 *COL. L. REV.* 440 at 455 (1959), with reference to *Meisenhelder v. Chicago & N. W. Ry.*, 170 *Minn.* 317, 213, *N.W.* 32 (1927), involving the Federal Employers Liability Act.

³²⁷ See EHRENZWEIG 46.

³²⁸ See Kegel, Commentary to Articles 1-31 of the Introductory Law to the German Civil Code, SOERGEL, *BÜRGERLICHES GESETZBUCH*, 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 1896.³²⁹ 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.³³⁰ 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."³³¹ 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,³³² as inconsistent with the essentially procedural character of conflicts law,³³³ or as potentially contrary to public international law.³³⁴

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," *FESTGABE 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.

³³⁰ See, e.g., NIEDERER 116; RAAPE, *INTERNATIONALES PRIVATRECHT*, 4th ed., 19 (1955).

³³¹ Introductory Law to German Civil Code, art. 14. See also, e.g., id., art. 12 which disposes 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 NIEDNER, *DAS EINFÜHRUNGSGESETZ VOM 18 August 1896* (Commentary), 2d ed. (1901).

³³³ Concerning Zitelmann's and Frankenstein's theories, see WIETHÖLTER, *EINSEITIGE KOLLISIONSNORMEN ALS GRUNDLAGE 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,"³³⁵ 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 France³³⁶ and Sohn in the United States³³⁷ may be taken as typical representatives of this "school."³³⁸ 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.³³⁹ 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); RAAPE *INTERNATIONALES PRIVATRECHT*, 4th ed., 33 (1955).

³³⁶ Pilenko, "Le droit spatial et le droit international privé dans le projet du nouveau Code Civil français," 6 *REV. HÉLLÉNIQUE DR. INT.* 319 (1953); Pilenko, "Droit spatial et le droit international privé," 6 *IUS GENTIUM* 34 (1954); See De Nova-Pilenko, "Uno Corrispondenza," 13 *DIR. INT.* 198 (1959).

³³⁷ Sohn, "New Bases for Solution of Conflict of Laws Problems," 55 *HARV. L. REV.* 978 (1942).

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.* 13 (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 33.

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.