PART SEVEN

TORTS

In this part, the following books and articles will be cited in abbreviated form:

Common law: Hancock, Torts in the Conflict of Laws (1942); Lorenzen, "Tort Liability and the Conflict of Laws," 47 Law Q. Rev. (1931) 483, with comparative research; Goodrich, "Tort Obligations and the Conflicts of Laws," 73 U. of Pa. L. Rev. (1924) 19 (a chapter of his handbook); Stumberg, "Conflict of Laws-Torts-Texas Decisions," 9 Texas L. Rev. (1932) 21; Cook, "Tort Liability and the Conflict of Laws," 35 Col. L. Rev. (1935) 202 and Logical and Legal Bases of the Conflict of Laws (1942) 311, mainly concerned with polemics.

Henri Mazeau, "Conflits de lois et compétence internationale dans le domaine de la responsabilité civile délictuelle et quasi-délictuelle," Revue Crit. 1934, 377; von Schelling, "Unerlaubte Handlungen," 3 Z.ausl.PR. (1929) 854.

For comparative substantive law, see Rabel, "Die Grundzüge des Rechts der unerlaubten Handlungen," in Sonderheft, 6 Z.ausl.PR. (1932) 10; ten articles on "Haftung" in 4 Rechtsvergl. Handwörterbuch 43-113; Titze, "Unerlaubte Handlungen," in 6 Rechtsvergl. Handwörterbuch 676.

CHAPTER 24

The Principle

I. THE MEANING OF TORT

1. Delict and Quasi Delict

THE conflicts rules applicable to torts have been developed mostly with respect to *delicts,* viz., torts committed *by fault,* that is, intentionally or negligently.[1] The expression *lex loci delicti commissi* is still used to denote the principle that refers to the law of the place where the alleged tort occurs. However, in modern legislation, the separate position of liability *quasi ex delicto*—of "*quasi delicts*" —is practically abolished,[2] and accordingly by universal understanding, this conflicts rule at present covers any unlawful conduct *without fault* generating liability.[3]

1 See, for instance, Código Bustamante, art. 168.

2 TITZE, 6 Rechtsvergl. Handwörterbuch 678ff.

In a part of the French literature, *quasi-délit* is understood to mean liability for negligence, but such terms are ordinarily used to denote liability without fault, as by POLLOCK, Torts (ed. 13) 17.

3 Restatement § 379 (c) comment f; Le Forest v. Tolman (1875) 117 Mass. 109; Young v. Masci (1933) 289 U. S. 253, 53 S. Ct. 599.

England: Walpole v. Can. Northern R. Co., Privy C. [1923] A. C. 113, 120.

Austria: GlU. NF. 7252 (automobile); 3469, 5219, *cf.* 3439 (railroad); 6511 (fraud).

Belgium: POULLET § 317; Trib. Arlon (July 13, 1904) Revue 1905, 539 and (July 20, 1904) *id.* 543; Cass. (Feb. 21, 1907) and (Nov. 26, 1908) Revue 1909, 952, the latter decision also in Clunet 1909, 1178.

Czechoslovakia: Law of 1948 on private international law, § 48.

Egypt: C. C. (1948) art. 21 par. 1.

France: PILLET, 2 Traité § 549; WEISS, 4 Traité 415; NIBOYET 616 § 490; ARMINJON, 2 Précis 278.

Germany: RG. (June 14, 1915) Leipz.Z. 1915, 1443 No. 16; RG. (Feb. 25, 1904) 57 RGZ. 145; OLG. Karlsruhe (Oct. 28, 1931) IPRspr. 1932 No. 41.

Italy: Disp. Prel. (1942) art. 25 par. 2, and previously 3 FIORE § 1262ff.; DIENA, 2 Princ. 266; CERETI, Obblig. 195; Cass. Torino (Dec. 19, 1911) Riv. Dir. Com. 1912 II 177.

Siam: Law of 1939 on private international law, § 15 par. 1.

Spain: LASALA LLANAS 365.

Sweden: S. Ct. (Sept. 20, 1933) NJA. 1933, 364, see 7 Z.ausl.PR. (1933) 931.

This liability is based on the idea that a person who conducts for his own benefit a business subjecting other persons to possible loss, should bear the risk of the damage as a part of his business costs. In the terms of the civil law doctrine,[4] it is a liability *for risk (Gefährdungshaftung, responsabilité pour risque)*. Among the classes of persons frequently subject to such liability, we find the owners or keepers of animals, vessels, railroads, motor vehicles, aircraft, houses, inns, laboratories, et cetera. Thus assimilated to delictual obligations, obligations to pay damages irrespective of fault, when imposed by the state of the place where the act is done, are enforced outside this state. In fact, the liability for risk, whether based on the mere fact that the defendant has caused the damage or on a presumption of his fault, cannot be reasonably subjected to a conflicts rule entirely different from that selected for liability based on the proved fault of the defendant. The policies pursued in the national laws by all these various tort rules are too closely related to permit divergent determination of the applicable law.

The scope of the conflicts rule ought even to include in addition certain liabilities without fault attending acts that, although damaging to the interests of other persons, are permitted on account of the superior interests of the actor, acts, which, therefore, are termed lawful only in a formal or restricted sense.[5] For instance, it is formally lawful to effect an arrest or seizure on the mere probability of a claim, but the claimant will be liable, if in a subsequent suit he is shown to

Switzerland: BG. (Sept. 10, 1925) 51 BGE. II 327.
Syria: C.C. (1949) art. 22 par. 1.
Benelux-Draft, art. 18.

[4] Basic: JOSEPH UNGER, Handeln auf eigene Gefahr (ed. 2, 1893); *id.*, Handeln auf fremde Gefahr (1894); MATAJA, Das Recht des Schadenersatzes vom Standpunkt der Nationalökonomie (1888); for the modern literature see A. EHRENZWEIG, Negligence without Fault (1951) and MÜLLER-ERZBACH, "Ersatz durch Gefährdungshaftung und Gefahrtragung," 106 Arch. Civ. Prax. (1910) 309.

For common law, see *infra* p. 274 n. 87.

[5] TITZE, 6 Rechtsvergl. Handwörterbuch 680; ENNECCERUS-KIPP-WOLFF, Allg. Teil § 199.

have known or negligently failed to ascertain that his claim did not exist or, as frequently enacted, even merely because he had no actual claim. Here again liability is based on the idea of acting at the actor's own peril, although the damaging act is permitted by the law. Arrest and seizure have been subjected, therefore, to the law of the court that grants them provisionally.[6]

It is true that the differences between the laws of the various countries are greater with respect to liability for risk than with respect to liability for intentional or negligent harm. For a while in the past, radical tendencies swung to extreme elimination of the principle of fault. A few recent drafts and codes, including the Soviet Code, have conferred on the victim of fortuitous damage a claim for indemnification to an equitable extent,[7] and the Mexican Civil Code imposes a presumption of fault on any person who:

> Makes use of mechanisms, instruments, apparatus or substances dangerous in themselves, or in the velocity they deploy, in their explosive or inflammable nature, in the energy of the electric current conducted or for any other analogous causes. . . .[8]

At times, judges of more conservative jurisdictions may hesitate to apply such a foreign extracontractual liability based upon the mere fact of keeping a dog or carrying on an industrial enterprise, owning a house, or granting a third person the use of a car.[9] The way to overcome such doubts has been shown in the following classical reasoning of Judge Learned Hand:

[6] Germany: RG. (Sept. 20, 1882) 7 RGZ. 378; 2 BAR 396.
Switzerland: App. Zürich, 11 HE. 197, cited by 2 MEILI 96.

[7] Soviet Russian Civil Code, art. 406; Hungarian Draft, C. C. (1914) § 1486; *id.* (1928) § 1737; also the second draft of the German BGB. § 752 contained such rule.

[8] Mexico: C. C. (1928) art. 1913.

[9] Characteristically, BARTIN, 2 Principes 410ff., 433, as late as 1932, tries to explain the liabilities for risk as diverted liabilities for fault, and confesses embarrassment where his effort fails.

"There is nothing inherent or antecedently necessary in the conventional limitation of liability to such consequences as may be anticipated by ordinary foresight, within which limits the law of the state where the damage occurs concededly controls. No such limitation existed in ancient times, and the law is abandoning it in field after field; fault is by no means an inevitable condition of liability. Provided that the result be not too distasteful to the *mores* of the forum, we think that the state where the damage occurs may impute liability to one outside, if he be in fact the voluntary author of it. . . ."[10]

Some statutory provisions, apparently or really, go even farther, by subjecting all "extracontractual" claims to the law of the place where the act in question has been done.[11] This would include all causes of action claimed to arise out of formally and substantially *lawful* acts, such as, on the one hand, the so-called quasi contracts—e.g., *negotiorum gestio*, unjust enrichment, constructive trust—and on the other hand, destruction of private property for public use, if connected with the duty of compensation, and the like. All these cases must be reserved for discussion separate from torts and contracts.

2. Characterization of Tort

How do we determine the meaning of the term "tort" in the conflicts rule referring "tort" to the law of the place where the act alleged to be tortious has been done?

If the usual doctrine of characterization according to the law of the forum is taken literally, an act done abroad cannot support a claim for liability, except where it is an actionable

[10] Scheer v. Rockne Motors Corp. (1934) 68 F. (2d) 942 at 944.

[11] Belgian Congo: C. C. art. 11 par. 3.
Egypt: C. C. (1948) art. 21 par. 1.
Italy: Disp. Prel. (1942) art. 25 par. 2.
Poland: Int. Priv. Law, art. 11 No. 1.
Syria: C. C. (1949) art. 22 par. 2.
Treaty of Montevideo on International Civil Law of 1889, art. 38: place where the licit or illicit act has been done.
Similarly, French writers: NIBOYET, 5 Traité Nos. 1444-1447; BATIFFOL, Traité Nos. 561, 564; LEREBOURS-PIGEONNIÈRE No. 253.

tort also by the internal private law of the forum. This, in fact, is the British, Japanese, and Chinese approach (soon to be discussed), but it has been very decidedly rejected in all other countries. Moreover, the extension of the conflicts rule on tort so as to include foreign liabilities for risk is not compatible with this view.

To escape these obvious inconsistencies, the advocates of the *lex fori* are prepared to recognize any foreign type of liability that would be classified as tort if it were ordained by the domestic statutes of the forum.[12] This idea has some significance but in reality points to systematic problems beyond the domain of the internal law.

In consideration of the impossible consequences of the *lex fori* theory, the opposite theory of characterization according to the law referred to, has had more followers in this special field than generally.[13] In this view, the commonly used conflicts rule refers to the law of the place where an act is done to decide whether it is a tort, and no limitation is added. The result would seem acceptable in most cases. But no easy solution is afforded by this method where the positive laws disagree in characterizing certain obligations, as the duty to support illegitimate children or the liability for breach of promise to marry, which are based on tort in one country and on entirely different theories in others. In these cases, it does not help to say that "the predominance of the territorial law is justified only insofar as one is in the presence of an obligation of tortious character."[14]

Once more resorting to comparative law, we have to form a category of tort broad enough to embrace all definitions that may be given to the term on the basis of a conscientious general system of law. Actually or virtually, this concept underlies the thinking of lawyers, not only in civil law

[12] RAAPE 208 and IPR. 535.
[13] POULLET 364; WALKER 523.
[14] PILLET, 2 Traité 313.

countries but also in England and the United States.

We do not touch hereby, of course, the great controversy, pending for a long time in the English literature, which concerns the existence of a general liability that would overshadow the historical separate categories of tort,[15] such as assault, trespass, conversion, nuisance, defamation, etc. However this problem may be solved, it has become common ground that, by inductive generalization from the recognized separate types of peculiar tort liabilities, principles of tort can be formulated.[16] This is quite enough to reach the doctrinal state of German private law. Neither system imposes by a general rule liability for all negligent conduct. Nevertheless, the provisions given in the Civil Code for a number of important types of tort serve as a subsidiary regulation for tort actions established in special laws, including liabilities without fault.[17] The general rules of tort thus achieved, though more compact, are comparable to what may be called principles of tort in England, and still more so to the American doctrine.

On the other hand, the French Civil Code has formulated its famous principle of responsibility for fault—the product of the European pandectistic practice and itself the model of innumerable codes—in the broadest terms, too broad in fact for the purpose of municipal law. Article 1382 of the French Civil Code reads as follows:

> Any act whatever done by a man, which causes damage to another, obliges him by whose fault the damage was caused to repair it.

This definition has been narrowed by common opinion as well as in more modern reproductions in other countries such as article 41 of the Swiss Code of Obligations. The conduct

[15] See G. W. WILLIAMS, "The Foundation of Tortious Liability," in 7 Cambr. L. J. (1941) 111.

[16] SEAVEY, "Principles of Tort," 56 Harv. L. Rev. (1943) 72.

[17] 67 RGZ. 144, *cf.* 122 RGZ. 326.

must not only be tainted by fault but unlawful. In the prevailing conception of modern continental lawyers, behavior is unlawful if it is prohibited by the rules establishing general duties for the protection of individual interests or the interests of the community. In this view, breach of contract, at least by the debtor himself, is not "unlawful" in itself, since it is the violation of a relation between two persons rather than of a duty incumbent on every one. With this supplement, the concept holds true as a basic definition of tort in comparative consideration of any municipal system, special types as established in the various laws being defined by additional requirements.

The only concept of delict, useful on an international scale to the prevailing conflicts rule, is identical. It is equally easy to extend this concept of responsibility for risk. "Tort," thus, in the meaning of the conflicts rule, is any unlawful invasion of the interests of another person, causing damage or harm to a person. The conflicts rule, of course, will predicate what system of law shall determine these elements.

It is immaterial on what basis the law of the forum establishes the protected sphere, whether as property, status, or bodily integrity, and which unlawful invasions it recognizes as ground for actions or injunctions.

It is submitted that in practice the courts apply this very concept.[18]

II. The Principle

1. The Dominant Principle

The principle unanimously established by the canonists and later the statutists since the 13th century[19] and generally adopted today is that the *lex loci delicti commissi* governs.[20]

[18] See RG. (March 12, 1906) JW. 1906, 297; 23 ROLG. 14 and Rabel, 3 Z.ausl. PR. (1929) 755; Neuner, Der Sinn 105.

[19] See Neumeyer, Gemeinrechtliche Entwicklung 138ff; 2 Bar 115; 2 Melii 90.

[20] Mr. Justice Holmes in Cuba R. Co. v. Crosby (1912) 222 U. S. 473, 477, and

This predicates that the law of the place where an alleged tortious act in the broad meaning described above has been

in Western Union Telegraph Co. v. Brown (1914) 234 U. S. 542, 34 S. Ct. 955; Walsh v. New York & New England R. Co. (1894) 160 Mass. 571, 36 N. E. 584; 2 BEALE 1289; GOODRICH § 92; LORENZEN, 6 Répert. 325; Restatement §§ 378, 379, 381, 383, 384, 385, 386, 390.

Austria: OGH. (Nov. 2, 1910) 13 GlU. NF. 5219; (July 2, 1913) 16 GlU. NF. No. 6511.

Belgium: Cass. (Feb. 21, 1907) Pasicrisie 1907.1.135; (Nov. 26, 1908) *id.* 1909.1.25.

Belgian Congo: C. C. art. 11 par. 3.

Brazil: C. C., Introductory Law of 1942, art. 9. See ESPINOLA, 8 Tratado 478; TENORIO 339.

Czechoslovakia: Law of 1948 on private international law, § 48.

Denmark: Trib. Marit. Copenhague (May 31, 1905) Clunet 1909, 1184; Vestre Landsret (May 8, 1952) U.f. R. 1952, 854, Clunet 1954, 488, aff'd by S. Ct. (June 30, 1954) U.f. R. 1954, 772, 20 Z.ausl.PR. (1955) 509. BORUM and MEYER, 6 Répert. 224 No. 85.

Egypt: C. C. (1948) art. 21.

France: Cass. (req.) (Feb. 24, 1936) S.1936.1.161, Revue 1936, 782; Cass. (civ.) (May 25, 1948) Revue Crit. 1949, 89, first formal confirmations of the rule (see BATIFFOL, Revue Crit. 1949, 9) which was certain; however, see Cass. (req.) (Feb. 15, 1905) S.1905.1.209; Cass. (civ.) (May 16, 1888) S.1891.1.509.

French Morocco: Dahir of 11-13 August 1913, art. 16.

Germany: EG. BGB. art. 12 (implicitly); formerly common practice, starting from OLG. München (Dec. 1, 1829), 1 Seuff. Arch. No. 153; see in particular ROHG. (Jan. 19, 1878) 23 ROHGE. 174; RG. (Sept. 23, 1887) 19 RGZ. 382; and constant practice.

Greece: C. C. (1940) art. 26.

Hungary: Curia, Nos. 7674 (of 1905), 9016 (of 1926); see SCHWARTZ, 40 Z.int.R. 206; SZASZY, 11 Z.ausl.PR. (1937) 172; Curia, (Oct. 27, 1937) 5 Z. Osteurop. R. (1939) 396.

Italy: Disp. Prel. (1942) art. 25 par. 2; the rule was recognized before, although it was controversial whether it was included in art. 9 par. 2, Disp. Prel. of 1865, see FEDOZZI 759; Cass. (July 19, 1938) Foro Ital. 1938 I 1216.

The Netherlands: Rb. Utrecht (Feb. 4, 1927) W. 11675, N.J. (1927) 991; Rb. Amsterdam (June 22, 1931) N. J. (1932) 325; VAN HASSELT 305.

Norway: S. Ct. Christiania (Dec. 15, 1905) Clunet 1907, 852.

Poland: Int. Priv. Law, art. 11.

Portugal: C. Com. art. 674 (as to collisions); CUNHA GONÇALVES, 1 Direito Civil 670.

Scotland: The rule seems certain, although the courts still have difficulties in ascertaining their own jurisdiction. See Dalziel v. Coulthourst, Executors (1934) S. C. 566.

Siam: Law on private international law of 1939, § 15.

Sweden: S. Ct. (Sept. 20, 1933) 7 Z.ausl.PR. (1933) 931; (Dec. 2, 1935) 10 *id.* (1936) 624.

Switzerland: 22 BGE. 486 and 1170; 35 *id.* II 480; 43 *id.* II 315; 51 *id.* II 328; 66 *id.* II 167; 76 *id.* II 110.

Syria: C. C. (1949) art. 22.

Montenegro: C. C. art. 793.

Treaty of Montevideo on International Civil Law (1889) art. 38; (1940) art. 43.

Código Bustamante, arts. 167, 168.

Benelux-Draft, art. 18.

done, determines whether, under what conditions, to what extent, and with what consequences, this act constitutes a cause of action.

2. *Lex Fori*

Against the dominant rule, in the early half of the nineteenth century, Waechter and Savigny advanced the opinion that tort problems should always be governed by the law of the forum.[21] They both believed that the tort rules of the various municipal laws were of such an ethical and imperative nature that no country would ever apply the tort rule of another country, especially when it does not consider the act unlawful. This thesis, formed in too close relationship with ideas current in penal law, has sometimes influenced courts in England,[22] Spain,[23] and elsewhere.[24] In Greece, it was repealed only by the Civil Code of 1940,[25] and a recent French writer has attempted to revive it.[26] Soviet Russia has no fixed rule, but most writers seem to agree that application of Soviet Russian law even to acts done abroad suits the spirit of Soviet law.[27]

Some East Asian statutes limit the tort liability arisen under the law of the place of wrong to the standard of the *lex fori*.[27a]

[21] WAECHTER, 25 Arch. Civ. Prax. (1842) 392; SAVIGNY (tr. Guthrie) 217 § 371, *cf.* 253 § 374; their opinion was followed by some now obsolete German decisions: 9 Seuff. Arch. No. 1, 11 Seuff. Arch. No. 3; 25 Seuff. Arch. No. 115; in partial sympathy with the *lex fori* theory, ROLIN, 1 Principes §§ 363-365.

[22] See CHESHIRE'S (269) résumé of the case of The Halley.

[23] See the case history by LASALA LLANAS 365, where he has difficulty in reaching the dominant opinion.

[24] France: Cass. (req.) (May 29, 1894) S.1894.1.481.
Italy: App. Milano (July 8, 1925) Rivista 1926, 125. *Contra*: DE SANCTIS, *id.* 127; FEDOZZI 758.

[25] Greece: C. C. (1856) art. 6; *cf.* 2 STREIT-VALLINDAS 260; C. C. (1940) art. 26.

[26] HENRY MAZEAUD, Revue Crit. 1934, 377; PRUDHOMME, Clunet 1936, 626.

[27] MAKAROV, Précis 305 and authors cited. In interterritorial law, the law of the place of wrong governs if one of the parties invokes it, Instruction of Plenum No. XXXII of the Supreme Court of the USSR of Feb. 10, 1931, § 3 par. 2 (d), English translation in GSOVSKI, 2 Soviet Civil Law (1949) 13.

[27a] China: Decree of Aug. 5, 1918, art. 25 par. 2.
Japan: Law of 1898 on private international law, § 11 par. 3.
Siam: Law of 1939 on private international law, § 15 par. 3.

3. Rule of Similarity

The idea that a "foreign tort" could be sued on without regard to the internal law of the forum has encountered opposition in the conception that in every case the foreign municipal law should be substantially similar to the law of the forum.

American cases. This view has been held in a number of American cases involving foreign death statutes. Such statutes have been introduced in practically all jurisdictions in the United States to abolish the common law rule that "*actio personalis moritur cum persona*," that is, that an action for injury to a person cannot be maintained after his death by the deceased man's heirs. As the statutes vary in many details, extraterritorial application is important. But originally they were considered to create a new right on the ground of wrongful death rather than on that of a precedent tortious invasion of the body, and were construed as penal statutes, inapplicable in other states. It was a progressive step to apply them where there were similar domestic statutes.[28] The entire peculiar conception was forcefully refuted by the Court of Appeals of New York in *Loucks* v. *Standard Oil Co. of New York*.[29] Although the rule was followed as late as in 1931 and 1936 in Maryland,[30] and has not yet been expressly overruled in Texas,[31] American law as a whole may be claimed, at present,

[28] GOODRICH, 73 U. of Pa. L. Rev. (1924) 19, 28; HANCOCK, Torts 21-29; Texas & P. R. Co. v. Richards (1887) 68 Texas 375, 4 S. W. 627 and other Texas cases. See also STUMBERG, 9 Tex. L. Rev. (1931) at 29; furthermore, Wooden v. Western New York and Pennsylvania R. Co. (1891) 126 N. Y. 10, 26 N. E. 1050, *cf.* STUMBERG, *id.* 163.

[29] (1918) 224 N. Y. 99, 120 N. E. 198; see also Powell v. Great Northern R. Co. (1907) 102 Minn. 448, 113 N. W. 1017.

[30] London Guarantee & Accident Co. v. Balgowan S. S. Co. (1931) 161 Md. 145, 155 Atl. 334, 77 A. L. R. 1302; Davis v. Ruzicka (1936) 170 Md. 112. *Cf.* 155 F. (2d) 67 n. 3.

[31] El Paso & Juarez Traction Co. v. Carruth (Tex. 1923) 255 S. W. 159, declaring Mexican law substantially dissimilar. No recent case has treated the law of a state of the United States likewise. The theory has been confirmed despite art. 4678, Rev. Civ. Stat. (1925) in Wells v. Irwin (1942) 43 F. Supp. 212, 214. See STUMBERG, 9 Tex. L. Rev. (1931) 21, Texas Annotations to the Restatement (1936) § 384.

Conversely, a cause of action for tort after the death of the tortfeasor was recognized by the California Supreme Court between California residents in spite of the

to agree with civil law in submitting injuries ending in death, like all others, exclusively to the statute of the place of wrong.[32]

British rules. A famous double rule is generally regarded as governing tort problems in England, in a formula reproducing a passage of the opinion of Willes, J., in *Phillips* v. *Eyre:*

> "As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."[33]

Independently of the meaning Willes, J., himself clothed in these words,[34] they have become a rigid rule of secure, though very unhappy, standing.

The second part of this rule has an old history. In its oldest phase, this rule was intended to excuse a defendant who would be liable to damages under English law — for seizure[35] or

absence of a "survival" statute in the law at the place of wrong, Grant v. McAuliffe (1953) 41 Cal. (2d) 859, 264 P. (2d) 944. On another California case decided under public policy, see *infra* pp. 249 f.

[32] Restatement §§ 381-392. The contrary statement in 11 Am. Jur. 496 § 184 seems to be founded on antiquated cases.

[33] (1870) Q. B. 1 at 27; Lord Macnaghten in Carr v. Fracis Times & Co. [1902] A. C. 176, 182.

[34] Hessel E. Yntema suggests the possibility that "The celebrated two rules are an effort to formulate—as the event has shown, an unhappy one—the theory that 'a right of action', as well as the obligation, is 'the creature of the law of the place and subordinate thereto.' The first rule might thus be regarded as an expression of the truism that the case must be one of which the court of suit will take jurisdiction, a construction to which the immediately preceding observation, in the opinion, instancing the local nature of actions for trespass to land, that English courts do not undertake 'universal jurisdiction' over foreign transactions, lends countenance. This supposes that Willes, J., did not intend to suggest that the *lex fori* is the primary measure of the existence of either the 'obligation' or the 'right of action.' In subsequent cases, the two rules have come to exercise an autonomous and unwarranted fascination, eclipsing the more detailed analysis that formed their context. Which, if so, would serve to remind us of the great dangers inherent in formulae as a means of transmitting doctrine." *Cf.* Yntema, Book Review, 27 Can. Bar Rev. (1949) 116 ff., 121.

[35] Blad's Case (1673) 3 Swan. 603, Blad v. Bamfield (1674) 3 Swan. 604.

capture of a ship,[36] detention,[37] or arrest[38] of a man — in view of the lawfulness of such act in the instant case as done under a foreign sovereign. Thus far, the English rule aims at the same result as the prevailing rule that makes the local law of the place of wrong alone decisive. However, by strange complications the English judges arrived at the idea that the law of the place of wrong controls only the "justifiability" of the act. They did not ask whether it was a tort entailing damages at the place. The case definitively causing this deviation from the world-rule was *Machado* v. *Fontes*.[39] A libel published in Brazil injured the plaintiff. The defendant seemed to raise in objection the absence of a civil action for damages in the case of a libel under Brazilian law and requested inquiry into that law by a commission to be sent to Brazil. The Court of Appeal reasoned in the following way: A libel certainly was a criminal offense also in Brazil, hence not "justifiable." Even if no action for damages ensued there, it had to be granted according to English law. It should be conceded that the judges felt strongly the inequity of dismissing the action, under such extraordinary circumstances.[40] It has been suggested, therefore, that the court should have contented itself with an exceptional ruling on the basis of stringent public policy;[41] this, in fact, would have prevented the crystallization of a rule that generally substitutes the law of the forum for that of the place of wrong. However, the court and its numerous critics would have done still better by examining the assumption of the "unusual,"[42] nay fantastic, legal situation ascribed to Brazilian law. There was a double ground for not denying a civil action for damages on the ground of a

[36] Dobree v. Napier (1836) 2 Bing. N. C. 781.
[37] Regina v. Lesley (1860) Bell C. C. 220, 233.
[38] Carr v. Fracis Times & Co. [1902] A. C. 176.
[39] [1897] 2 Q.B. 231.
[40] GUTTERIDGE, review of CHESHIRE, 55 Law Q. Rev. (1939) 131.
[41] ROBERTSON, "The Choice of Law for Tort Liability in the Conflict of Laws", 4 Modern L. Rev. (1940) 27.
[42] HANCOCK, Torts 17, 121.

punishable act in Brazil. On the one hand, the general liability for fault, embodied in the French Civil Code, article 1382, adopted in the Portuguese Civil Code of 1867, articles 2361 and 2362, which now appears in the Brazilian Civil Code of 1916,[43] was recognized in all drafts[44] and no doubt was a living rule. On the other hand, the Penal Code of 1890, conforming to another French rule,[45] stated a duty of indemnification, as an effect of every final criminal condemnation.[46] Thus, the feeling of the English courts would have been shared by Brazilian lawyers. In this case, the helplessness of the court in regard to foreign law was to be blamed on the pleading, but it became consequential. In a later case in the Privy Council, the difficulties of workmen's compensation in Canadian provinces caused incidental argument to the effect that an accidental injury to a worker was "justifiable" as it was "neither actionable nor punishable," a manifest *lapsus linguae* in a case where the Privy Council in fact dismissed a claim that was not actionable by the *lex loci actus*.[47] Cheshire, in demonstrating this, has concluded that the second part of the rule in *Phillips* v. *Eyre* has been overruled and that the act must be *actionable* (also) under the law of the place of wrong.[48] The Scotch courts, in fact, have adopted the same view when they refuse to award "*solatium*" (satisfaction) for mental anguish in cases of wrongful accidents on English territory or vessels, despite the Scottish law.[49] The Canadian

[43] Brazil: C. C. art. 159 and for defamation, the special provision in art. 1547.

[44] See CARLOS AUGUSTO DE CARVALHO, Direito Civil Brasileiro Recompilado ou Nova Consolidação das Leis Civis (Rio de Janeiro 1899) 302 art. 1014.

[45] See M. S. AMOS and F. P. WALTON, Introduction to French Law (1935) 215.

[46] Penal Code, Decree No. 847, of Oct. 11, 1890, art. 69 (b), *cf.* BENTO DE FARIA, Anotações ao Código Penal do Brasil (ed. 4, 1929) 160; *cf.* art. 315 *et seq.* on "Calumnia e Injuria."

[47] Walpole v. Canadian National R. Co. [1921] 66 D. L. R. 127; [1923] A. C. 113, 70 D. L. R. 201.

[48] CHESHIRE (ed. 2) 301ff.; SCHMITTHOFF 161.

[49] Ld. Pres. Robertson in Kendrick v. Burnett (1897) 25 R. 82; law of the flag applied, as interpreted by Lord Dundeen in Convery v. Lanarkshire Tramways (1905) 8 F. 117; Naftalin v. London, Midland & Scottish R. Co. (1933) S. C. 259; M'Elroy v. M'Allister [1949] S. C. 110; See O'RIORDAN, "Choice of Law in Actions

courts, however, follow the English rule and in constant practice, before granting damages for a foreign act, state that it is not justifiable where committed.[50]

The "first rule" of Willes, J., has been developed in the converse case of a defendant liable under the foreign law who would not be liable under English law if the facts had occurred in England. This doctrine also rests mainly on one decision, *The Halley*, 1868,[51] concerning the liability of a shipowner for negligence of a compulsory pilot in Belgian waters, a liability existing under Belgian but not under English maritime law. A perfectly analogous case of compulsory pilotage was decided by the German Reichsgericht in 1891 to the same effect,[52] both decisions being equally overridden by later events.[53] Yet while the latter court referred to public policy as the basis of an exceptional objection to the suit on the foreign tort, the Privy Council went to the length of asserting the principle that an English court of justice will not:

"Give a remedy in the shape of damages in respect of an act which according to its own principles, imposes no liability on the person from whom the damages are claimed."[54]

Since then, the formula demands that the tort be "actionable in England."[55]

The double rule with its twofold implication approaches unconditional application of the law of the forum, with a

ex Delicto under Scots Law," in 4 Modern L. Rev. (1941) 214.

Remarkably, a claim for damages barred by the statute of limitation at the place of wrong (but not at the lex fori) and, therefore, justified, but not actionable there, was rejected, M'Elroy v. M'Allister [1949] S. C. 110 and comment by SCHMITTHOFF, 27 Can. Bar Rev. (1949) 816-826.

[50] S. Ct. of Canada: O'Connor v. Wray [1930] S. C. R. 231, [1930] 2 D. L. R. 899; Howells v. Wilson (C. A. 1936) 69 Que. K. B. 32.

[51] (1868) 2 L. R. P. C. 193.

[52] RG. (July 9, 1892) 29 RGZ. 93. The analogy was first pointed out by LORENZEN, 47 Law Q. Rev. (1931) 498 ns. 57, 62.

[53] *Infra* p. 276.

[54] L. J. Selwyn's dictum in The Halley at 204; repeated in Machado v. Fontes [1897] 2 Q. B. 231 by L. J. Lopes and L. J. Rigby.

[55] 2 WHARTON 1096; GOODRICH 272.

tempering proviso for the protection of a defendant whose act was "justifiable" at the place where done.[56] This rule is applied in Canada, far beyond the peculiar cases in which it originated, so as to prevent enforcement of claims arising not only in the United States but even in other Canadian provinces, when the laws involved "differ slightly from their own."[57] The Supreme Court of Canada has extended this unfortunate practice to Quebec, because in the Court's opinion no sufficient authority was cited for a prevailing more generous rule.[58] A recent application has afforded a true counterpart to *Machado* v. *Fontes*, even better substantiated in its facts. The Ontario Highway Traffic Act, 1937 (s. 27) makes careless driving punishable but (s. 47) denies civil relief to a gratuitous passenger of the car causing the accident. On this premise, the Canadian Supreme Court awarded damages to the victim on the ground of the tort law of Quebec *qua lex fori*, because the act was punishable, though not actionable at the place of wrong.[59] A remedy against the rule has been shown by the Supreme Court of Ontario. A gratuitous passenger injured in New York was granted relief according to New York law, on the thesis that the Ontario statute of 1930

[56] FALCONBRIDGE, 17 Can Bar Rev. (1939) 546, 549; 18 Can. Bar Rev. (1940) 308, 310. Even more definitely, M. WOLFF, Priv. Int. Law 493, explains the double rule as restricting the *lex loci delicti* "to the question: is the act that caused the damage justifiable? All other questions must be answered by the (English) *lex fori*."

[57] HANCOCK, Torts 89 n. 10.

[58] O'Connor v. Wray [1930] S. C. R. 231, [1930] 2 D. L. R. 899, as stated by Duff, C. J., in Canadian National S. S. Co. v. Watson [1939] S. C. R. 11, 13, [1939] 1 D. L. R. 273, 274, 11 Giur. Comp. DIP. (1954) 339, *cf.* FALCONBRIDGE, 18 Can. Bar Rev. (1940) 308. Howells v. Wilson (C. A. 1936) 69 Que. K. B. 32; *cf.* 3 JOHNSON 357. *Adde* Lieff v. Palmer (1937) 63 Que K. B. 278, and next note.

[59] McLean v. Pettigrew (1944) [1945] S. C. R. 62, [1945] 2 D. L. R. 65, 11 Giur. Comp. DIP. (1954) 342, affirming Pettigrew v. McLean (1942) 48 R. L. (N. S.) 400. See comment by FALCONBRIDGE [1945] 2 D. L. R. 82, 23 Can. Bar Rev. (1945) 309. It is a curious case also inasmuch as the Court, through Tascherian, J., in a learned exposition adopts the doctrine of French writers that there is no such thing as a *contrat de bienfaisance*, which in this case would have given relief under the law of Quebec, *qua lex loci contractus*. The French, in fact, do recognize a liability for fault which could have been correctly used as quasi-contractual but not as quasi-delictual ground for damages.

which excludes such claim was devoid of extraterritorial application.[60]

A somewhat analogous conflicts rule has been adopted in the conflicts laws of Asian countries,[61] with the difference that both laws are clearly based on the foreign tort law and, by exception, exclude its application, if the act is "not unlawful" under the domestic law of the court.

4. Harm Done in a Territory Not Belonging to Any Country

Apart from injuries occurring on board a vessel or aircraft, a topic to be discussed later, doubts have been expressed whether harm done in a territory without organized government, would be more appropriately subjected to the personal law of the alleged tortfeasor,[62] or to the law of the forum.[63] In those places of the Orient where the personal law determines jurisdiction, liability of the subjects of these powers is usually determined by their respective national laws.

III. Limitations on the Principle

Not so far-reaching as the emphasis laid on the law of the forum in the British, Japanese, and Chinese rules, the following exceptional rules have modified the main principle to the benefit of the law of the forum.

1. Law Common to the Parties

In Latin countries, there is a tendency with respect to

[60] Curley v. Clifford [1941] 2 D. L. R. 729, [1941] O. W. N. 154.

[61] China: Decree of August 5, 1918, art. 25 par. 1.
Egypt: C. C. (1948) art. 21 par. 2.
Japan: Law of 1898 on private international law, art. 11 par. 2.
Siam: Law of 1939 on private international law, § 15 par. 2.
Syria: C. C. (1949) art. 22 par. 2.
In accord: 1 Zitelmann 186, 187.

[62] 2 Frankenstein 371; Raape 217, III; M. Wolfe, IPR, (ed. 1) 103. *Contra*: Giese, 29 Archiv des öffentlichen Rechts (N. F.) (1937) 310, 341; and for Norway, Christiansen, 6 Répert. 579 No. 155.

[63] England: Foote 520.
France: 2 Arminjon (ed. 2) 342, 348 §§ 120, 122.
Contra: 2 Bar 121: "a precarious way out of embarrassment."

contracts to apply to two parties having the same nationality the law of their common country; it has sometimes found expression in the field of torts. According to this opinion, an act which is lawful under the *lex loci*, but unlawful under the national law of the parties, is held to constitute a tort by a court of the common country of the parties.[64] Some authors have even gone so far as to advocate that the personal law common to the parties should be applied also by the courts of any other country where the case might come up for decision.[65] Others have limited the national law to quasi delicts.[66]

The proposition has been defeated in France where it originated and is rejected in most countries.[67] It is certainly unreasonable in all those cases where private liability is closely

[64] Belgium: Cass. (Nov. 26, 1908) Pasicrisie 1909.1.25, Clunet 1909, 1178, Revue 1909, 951; *cf.* Ministère Public in Pasicrisie 1909.1.27; ROLIN §§ 363ff.
France: Trib. civ. Strasbourg (Jan. 28, 1929) Clunet 1929, 1131.
Greece: App. Athens (1899) No. 885, Clunet 1904, 450.
Italy: Cass. Torino (Dec. 19, 1912) Revue 1913, 586; App. Milano (July 8, 1925) Rivista 1926, 125; 3 FIORE § 1266.
Netherlands: BRAKEL 223; *contra* DUBBINK, De onrechtmatige Daad in het Nederlandse Internationaal Privaatrecht (1947) 29.
Switzerland: BG. (June 15, 1917) 43 BGE. II 309, at 317, "as an ancillary argument"!

[65] WEISS, 4 Traité 417 n. 1.

[66] 3 FIORE § 1266.

[67] E.g., Austria: OGH., GlU. NF. 47 No. 5219 (accident on an Austrian train having passed the border into Bavaria, German law).
Belgium: Cass. (May 17, 1957) Pasicrisie 1957. I. 1111, Clunet 1958, 1158, Revue Crit. 1958, 339; 8 LAURENT 25.
France: CRÉMIEU, 5 Répert. 491 No. 2: "out of question."
Germany: RG. (June 14, 1915) Leipz. Z. 1915, 1443 (automobile accident in Austria, of parties domiciled in Germany, Austrian law); RAAPE, IPR. 535. (A contrary view in 2 FRANKENSTEIN 375 is isolated.) Nevertheless, the National Socialist Decree of December 7, 1942, RGBl., Part I, 706 provided that all extra-contractual damages between German citizens should be governed by German law, wherever the act may be done. Recently advocated again by NEUHAUS, Book Review, 16 Z.ausl.PR. (1951) 651, 654; BINDER, "Zur Auflockerung des Deliktsstatuts," 20 Z.ausl.PR. (1955) 401-499, 480, 485, 498.
Italy: Cass. Torino (Dec. 19, 1911) Riv. Dir. Com. 1912 II 177; 3 FIORE § 1264 and in Clunet 1900, 719; DE SANCTIS, Rivista 1926, 128; FEDOZZI 758.
Sweden: S. Ct. (Sept. 20, 1933) NJA. 1933, 364, see 7 Z.ausl.Pr. (1933) 931; (Dec. 2, 1935) NJA. 1935, 585, 10 Z.ausl.PR. (1936) 624.
Switzerland: BG. (Oct. 30, 1940) 66 BGE. II 165 (implicit); Cour Genève (Sept. 20, 1957) Sem. Jud. 1958, 555; SCHNITZER vol. 1 p. 133, vol. 2 p. 676, prefers the law with which the case was most closely connected.

connected with the local administrative and insurance policies. These bind everyone in the territory, as expressed for instance in the International Convention on Motor Traffic providing that the driver is bound to observe the laws and regulations of the country where he travels.[68]

This seems also to be the general attitude of common law lawyers. It is true that once, in 1862, an English judge, Wightman, in a dictum stated that in an action brought by a British subject against a British subject the common law should be applied if it was more favorable to the plaintiff than the law of the place of wrong.[69] This proposition seems never to have been followed in England[70] and there are numerous cases in the United States where it was not even taken into consideration, although the facts of the case might have invited its application.[71]

However, in a group of cases involving foreign-committed unfair competition, the German courts and writers have considered that common German nationality of both parties or rather their common German domicil, should determine the application of the more severe German law.[72] This specific problem is to be discussed in connection with the complex of violations of commercial property.[73]

2. Local Actions

In the common law jurisdictions of both the British Empire

[68] Paris Convention on Motor Traffic of April 24, 1926, art. 8, HUDSON, 3 Int. Legislation at 1865; Pan-American Convention, Washington, Oct. 6, 1930, art. 10, HUDSON, 5 Int. Legislation at 790.

[69] Scott v. Seymour (1862) 1 H. & C. 219, Ex. Ch.

[70] However, Machado v. Fontes [1897] 2 Q.B. 231, is regarded as a practical application by CHESHIRE 274 and FALCONBRIDGE, Essays 820. Also MORRIS, "The Proper Law of a Tort," 64 Harv. L. Rev. (1950-51) 881ff., 885, advocates the common personal law in certain situations.

[71] American Banana Co. v. United Fruit Co. (1909) 213 U. S. 347, 29 S. Ct. 511; Cuba R. Co. v. Crosby (1912) 222 U. S. 473, 32 S. Ct. 132; Fitzpatrick v. International R. Co. (1929) 252 N. Y. 127, 169 N. E. 112; Alabama, Great Southern R. Co. v. Carroll (1892) 97 Ala. 126, 11 So. 803. An indication to the contrary in Grant v. McAuliffe (1953) 41 Cal. (2d) 859, 867, 264 P. (2d) 944, 949.

[72] 18 RGZ. 29; 55 *id.* 199, and others, see *infra* p. 297 n. 178.

[73] *Infra* pp. 295 ff.

and the United States, actions involving determination of title to real estate are still regarded as "local actions," i.e., as actions which can only be pursued in the forum where the land is situated and which are always to be decided in accordance with the law of that place.[74] Prevailing English and American opinion has extended this rule to actions for trespass to land.[75] This historical residue of the English jurisdictional doctrine has shocking results amounting to outright denial of justice[76] and has no counterpart anywhere outside the common law countries.

3. Protection of Defendant Nationals of the Forum

While the English and Japanese rules that a claim for tort must be actionable under the law of the forum result in protection for every defendant, in Germany a special limitation upon the application of the law of the place of wrong has been established in favor of defendants of German nationality alone. Article 12 of the Introductory Law to the German Civil Code provides expressly as follows:

> "By reason of an unlawful act committed in a foreign country, no greater claims can be enforced against a German than those constituted by German law."

[74] See KUHN, "Local and Transitory Actions in Private International Law (1918)," 66 U. of Pa. L. Rev. (1918) 301; WHEATON ,"Nature of Actions—Local and Transitory (1922)," 16 Ill. L. Rev. (1922) 456; WICKER, "The Development of the Distinction Between Local and Transitory Actions (1926)," 4 Tenn. L. Rev. (1926) 55.

[75] Restatement §§ 614, 615; British South Africa Co. v. Companhia de Moçambique [1893] A. C. 602; Livingston v. Jefferson (1811) 15 Fed. Cas. 660; Ellenwood v. Marietta Chair Co. (1895) 158 U. S. 105, 15 S. Ct. 771, recently joined by Arkansas: Reasor Hill Corp. v. Harrison (1952) 220 Ark. 521, 249 S. W. (2d) 994. Arizona Commercial Mining Co. v. Iron Cap Copper Co. (1920) 236 Mass. 185, 128 N. E. 4. *Contra*: The Minnesota courts, Little v. Chicago etc. R. Co. (1896) 65 Minn. 48, 67 N. W. 846; Peyton v. Desmond (1904) 129 Fed. 1; and New York Real Property Law, § 536.

In England, the principle is not applied if the tort claim is secured by a maritime lien, The Tolten [1946] P. 135, 11 Giur. Comp. DIP. (1954) 149.

[76] GOODRICH states that "the more reasonable view seems opposed to the self-imposed limitation of jurisdiction, which seems an archaic survival of outworn rules of venue." (73 U. of Pa. L. Rev. (1924) 24-25; Handb. 271); KUHN, *supra* n. 74, 301. LEFLAR, Arkansas Conflict of Laws 56 adduces a very impressive example.

The interference of the local law is understood to involve the existence of liability as well as the measure of damages. Thus a defendant of German nationality is not condemned, if under German private law he lacks capacity to commit tort, or his act is deemed lawful, or the negligence of the plaintiff was overwhelmingly superior, or the period of prescription has elapsed.[77] It suffices, however, that the award is agreeable to German law under some other theory, such as undue enrichment.[78] The application of article 12 to the cases has been proved very difficult.[79] For its nationalistic narrowness, the rule was widely criticized,[80] until in the recent dark period it has found praise in Germany.[81]

4. Public Policy as a General Limitation

The various rules discussed above protecting the law of the forum in certain cases against the law of the place of wrong, are specially formed expressions of the general principle that reserves the public policy of the forum. This safety valve for an "outraged feeling of justice"[82] remains available in addition. For example, in case a man was wrongfully killed, a European court that regarded him a subject of the forum would certainly disregard the common law ex-

[77] RAAPE 211, VII, 1; 118 RGZ. 141; 129 RGZ. 385, 388.

[78] RG. (Sept. 29, 1927) 118 RGZ. 141.

[79] See the laborious discussion by RAAPE 209, 213 (a); WALKER 530.

[80] 2 ZITELMANN 505; KAHN, 1 Abhandl. 446; WALKER 534; NEUMEYER, IPR. (ed. 1) 32; LEWALD No. 326 *in fine*; RAAPE 209, I, and IPR. 534, "the entire doctrine repudiates the provision."

[81] RUDOLPH SCHMIDT, Ort der unerlaubten Handlung 193 enjoys "the protecting effect of article 12 for Germans by helping the German (defendant) even though he may hurt a foreigner, "and looks to EG. BGB. art. 30 (public policy) for further tight protection.

The provision has been copied in China, Int. Priv. Law, art. 25 par. 2, and in the Brazilian Draft, art. 86, which contained more such nationalistic clauses (arts. 85-88), but does not appear in the Introductory Law of 1942. The Swiss Federal Tribunal (Sept. 10, 1925) 51 BGE. II 327, 329, does not exclude application of the law of the forum if it were more advantageous to the defendant!

[82] NIBOYET 616; 2 WHARTON 1095 required a fundamental difference of policy.

isting at an American place of wrong and not providing a satisfactory remedy.[83]

A former opinion which has been reflected in recent Italian writings, has argued that an obligation to pay damages resting upon a penal statute of the forum possesses extraterritorial effect at the forum as a unilateral special norm, applicable despite a foreign *locus delicti*.[84] By far the prevailing doctrine rejects this thesis sharply. But the *Código Bustamante* has turned a seemingly related consideration even into a general exception to the application of the *lex loci delicti*, punishable deeds or omissions being subjected to the law containing the penal statute; it is very difficult to understand the working of this rule.[85]

Fortunately, the known cases where courts in this country and elsewhere have refused the application of foreign tort law on the ground of an offended policy of the forum are very few.[86] There are ethically grounded divergences, such as those regarding the right of a spouse to damages from a person who has alienated the other spouse's affection. An Italian[87] and possibly a German[88] court would dismiss such an action based on English or American law. The Swiss Federal Court,

[83] App. Aix (Jan. 23, 1899) 15 Revue Int. Dr. Marit. 42 (collision on the high seas); Germany: RAAPE 223. Similar isolated suggestions have been made for acts deemed immoral at the forum (RUDOLF SCHMIDT, *op. cit. supra* n. 81 at 193) and fraud or gross negligence (POULLET § 319).

[84] The Italian writings by MANZINI, CHIRON, and SERENI are discussed by MIELE, 5 Giur. Comp. DIP. 84 n. 3.

[85] Código Bustamante, art. 167: Those (obligations) arising from crimes or offenses are subject to the same law as the crime or offense from which they arise; art. 168: Those arising from actions or omissions involving guilt or negligence not punishable by law shall be governed by the law of the place where the negligence or guilt giving rise to them was incurred.

[86] For the United States see HANCOCK, Torts 86: "quite unusual;" STUMBERG 198 collects only a few cases.

[87] 3 FIORE § 1267.

[88] RAAPE 198 advocates even in this case the enforcement of the foreign law. H. and L. MAZEAUD, 3 Responsabilité civile (ed. 2, 1934) § 2240, and ESMEIN in 6 Planiol et Ripert § 558, discard foreign rules that would not recognize legitimate defenses; and adopting this suggestion for Belgium, PIRSON et DE VILLÉ, 2 Traité de la responsabilité civile extra-contractuelle (1935) 320 § 407 propose to eliminate foreign laws not making a person liable for fraud and grave fault. Where do such laws exist?

on the other hand, has upheld an action for disruption of marriage, despite the contrary Danish domiciliary law of the spouses, though basing the decision on an additional Swiss place of wrong rather than on public policy.[89] Most applications of public policy have been examples of the well-known feeling of superiority. Thus, when a governess, who had been gravely injured by the child of her employer in Hawaii, sued for damages on the ground of parental liability, adopted in the Hawaiian Islands as in all French-influenced legislations, the Supreme Court of California in dismissing the claim, revived the similarity doctrine and applied—in 1927—the harsh common law rule of the state, as if it were a model.[90] The Court seems to have felt as the Supreme Court of the United States did considerably earlier in applying what it then regarded as the "true" common law rule, namely, the antiquated fellow-servant doctrine under the theory that it embodied the "general law"; for this reason, the claim of a fireman against a railway under Ohio law was defeated, in a case where the plaintiff had suffered injury in an accident in Ohio due to the locomotive engineer's negligence.[91] The French Supreme Court once declined to give effect to a bank monopoly in the territory of Monaco because of the freedom of commerce in France.[92] The courts, including American and French, seem to have endeavored more recently to avoid such "provincialism," as Cardozo has termed it in a famous tort case.[93] We shall encounter,

[89] BG. (June 15, 1917) 43 BGE. II 309, 317, cited with approval in Gordon v. Parker (1949) 83 F. Supp. 40, 43, Clunet 1950, 258, aff'd 178 F. (2d) 888.

[90] Hudson v. Von Hamm (1927) 85 Cal. App. 323, 259 Pac. 374; see the just criticism in the Notes, 13 Cornell L. Q. (1928) 266, 26 Mich. L. Rev. (1928) 439.

[91] Baltimore and Ohio R. Co. v. Baugh (1893) 149 U. S. 368. Chief Justice Fuller, in his dissenting vote, said that the decision unreasonably enlarged the fellow servant exemption of the employer.

[92] App. Aix (Dec. 19, 1892) S.1893.2.201, *aff'd*, Cass. (req.) (May 29, 1894) S.1894.1.481. *Contra*: NIBOYET 616 n. 3; BARTIN, 2 Principes 404.

[93] LOUCKS v. Standard Oil Co. of New York (1918) 224 N. Y. 99, 120 N. E. 198. See, for instance, the express denial of an objection drawn from public policy in

however, a few borderline cases.[94] And occasionally courts contrive the application of their own law by such devices as finding at all costs a place of wrong within the forum.[95]

5. Rationale

In some countries, the doctrine referring to the law of the forum derived support from analogies with penal law, under the continuing influence of Savigny. This lasted longer in Latin America than elsewhere, but it has ended also there.[96] Neither jurisdiction nor choice of law can be organized on the same lines for criminal offenses and private tort obligations. Even where a court of criminal procedure is authorized to award equitable damages in ancillary proceedings—the so-called procedure by adhesion—it has to follow its own internal law.

Application of the law of the place of wrong has often been based on the idea that a right to damages is vested in the injured person by that law,[97] or in the famous variant of Mr. Justice Holmes, that the law of the place of the act is the only source of the obligation on which the case depends.[98] These attempted justifications merit the same reproach as the vested rights theory in general.[99]

Loranger v. Nadeau (1932) 215 Cal. 362, 10 Pac. (2d) 63 (liability to a guest passenger).

French Trib. Valenciennes (Dec. 19, 1935) Revue Crit. 1936, 468 (fraudulent seduction, as opposed to status questions).

[94] *Infra* Chapter 25, pp. 274-276.

[95] E.g., Germany: 150 RGZ. 265, 271 on which see *infra* pp. 297 n. 179, 298, 313 n. 39.

Italy: Cass. (April 2, 1927) Foro Ital. Mass, 1927 II 472, cited by MIELE, 5 Giur. Comp. DIP. 84 n. 1.

[96] See, for instance, 2 BAR 118; ALCORTA, 2 Der. Int. Priv. 346; 3 VICO 137 § 159.

[97] United States: BEALE, 3 Summary §§ 1-5, reproduced 3 BEALE 1968; Cardozo, J., in Loucks v. Standard Oil Co. of New York (1918), *supra* n. 93, 224 N. Y. at 120; more cautious, GOODRICH 261.

[98] Mr. Justice Holmes in Slater v. Mexican Nat'l R. Co. (1904) 194 U. S. 120, 126; in Western Union Telegraph Co. v. Brown (1914) 234 U. S. 542, 547. Similarly, it is said in France that the law of the country is competent where the accident as generating factor occurs; see CRÉMIEU, 5 Répert. 491 No. 6.

[99] COOK, 35 Col. L. Rev. (1935) 202, Legal Bases 311.

European authors, continental and English, have been more inclined to explain the rule upon grounds of policy. A person owes obedience to the law of the country in which he is actually present. It is that law under which he is living at the time of the conduct complained of, and it is that law alone which can claim to determine the legality or illegality of his actions,[100] the law to whose standards he must elevate his behavior. He who stays in a state is subject to the legal order of that state, or, according to the old fiction, he "submits" himself to the state.[101] At the moment of the act, the author and the victim of a wrong move in social surroundings in which they may appreciate their risks and potential liabilities under the local law. The reasonable expectations of the parties cannot be protected otherwise.[102]

In recent years, however, this individualistic and educational theory has been partly replaced by the governmental consideration of social policy that regards the law of torts as a law of "social defense" and under which it appears that the state where the injury occurs has a predominant interest to protect the injured private interests and to determine the legal effects of injury. The primary object of the law of torts is to regulate the social order and prevent its infringement; the secondary concern is to compensate the victims of violations of this order. The state cannot fulfill this duty without including foreigners in its commands.[103]

This line of thought leads back to the more solid part of the ancient theory of territoriality. Every state has a legiti-

[100] CHESHIRE 267.

[101] As late as 1933, Mr. Justice Brandeis in Young v. Masci (1933) 289 U. S. 253 applied this idea to a nonresident owner of a car who authorizes its use in the state. See *infra* Chapter 25, p. 270 n. 72.

[102] RHEINSTEIN, "The Place of Wrong," 19 Tul. L. Rev. (1945) 4, 17ff. *Contra*: DRION, "De ratio voor Toepassing van vreemd recht in zake de onrechtmatige daad in het buitenland," Rechtsgeleerd Magazijn Themis 1949, 3, 63, who holds the idea of uniformity of decision for controlling.

[103] See the various arguments of 8 LAURENT 24 § 10; ROLIN, 1 Principes 577; LEREBOURS-PIGEONNIÈRE §§ 252 and 294; BARTIN, 2 Principes 417; POULLET § 317.

mate interest, right, and duty to determine the licit or illicit character and the effects of acts committed on its soil.[104]

In this sense, the law of torts has been classified in France under the heading of the "laws of public safety and police" (*lois de sureté et de police*), declared in article 3 of the Civil Code to be imperative.[105] These laws do not present "public policy" in contrast with a foreign applicable law, but, as public law, are territorial by virtue of their normal force.[106] Each state is said to be in the best position to evaluate its local conditions, as well as the habits and needs of its population.[107]

Finally, the interests of the injured person are emphasized when it is apparently felt that the natural place for the victim to seek redress would be the place where his injury occurred, and if he cannot sue in this jurisdiction, he should at least be treated upon the basis of its law.

Some of these arguments may appear phrased too neatly and open to one objection or another. But the principle of the *lex delicti commissi* ought not to be deduced from a single, all-embracing rationale of absolute validity. In searching the relatively most convenient local contact for an alleged tort, it is reasonable and relatively simple to connect it with the territory where it was committed. There remains, of course, the additional task of determining the territory in which a tort should be considered as having been committed, and this choice has been unhappily influenced by individual selection from the mentioned reasons for the *lex loci delicti commissi*.

The advantages of the principle of the *lex loci delicti commissi* are strong enough to have secured to it an almost universal adherence. The English rule, on the other hand, al-

[104] FEDOZZI 759: It is logical that the law governing on the territory determines the effects and consequences of its own violation; WALKER 522; BARTIN, 2 Principes 387 § 330.

[105] 3 FIORE § 1263; NIBOYET § 490.

[106] CRÉMIEU, 5 Répert. 493 No. 13.

[107] 2 ARMINJON (ed. 2) § 120.

though it has found favor with a solitary French author[108] and indulgent consideration in this hemisphere,[109] has lost ground in England itself. Cheshire recognizes fully the "superior claim of the *lex loci*." Inasmuch as the English rule requires actionability under the English law of the forum, he tried to excuse this requirement as a clear-cut application of the principle of public policy, easy to be applied because of its simplicity.[110] This is an exorbitant and harmful kind of public policy, however, explained only, as Hancock remarks, as a remainder from the time when the common law jurisdictions "dimly perceived" the conflicts problem.[111] The consequences in the courts of Canada are deterrent examples.[112] American and Continental lawyers alike claim that a state which assumes to regulate conduct carried on upon its soil ought to concede a corresponding power to all other states. While a state may refuse to apply in its criminal courts any criminal law other than its own, such an exaggerated extension of public policy in matters of private law contradicts the very idea of conflict of laws.

[108] VALÉRY 974 § 676.

[109] RHEINSTEIN, "The Place of Wrong," 19 Tul. L. Rev. (1945) 4, 23; 13 U. of Chi. L. Rev. (1945) 111 advocates it; FALCONBRIDGE, Essays 809 refutes it.

[110] CHESHIRE (ed. 2) 302, abandoned in later editions.

[111] HANCOCK, Torts 88.

[112] HANCOCK, Torts 89, *supra* n. 57.