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The Conflict of Laws: A Comparative Study,
Second Edition. Volume Three. Special
Obligations: Modification and Discharge of
Obligations

Ernst Rabel

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MICHIGAN LEGAL STUDIES



THE CONFLICT OF LAWS

A Comparative Study

THE CONFLICT OF LAWS

A Comparative Study

by

ERNST RABEL

VOLUME THREE

Special Obligations: Modification and Discharge
of Obligations

SECOND EDITION

prepared by

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EDITORIAL NOTE: The third volume of Ernst Rabel's comparative treatise on the conflict of laws was originally published in 1950. With the continued support of The University of Michigan Law School and the cooperation of the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg, this second edition of Volume III has been prepared. Plans for the revision of Volumes I and II were made before the death of the author on September 7, 1955, and the work was carried to completion by Dr. Ulrich Drobnig of the staff of the Institut in Hamburg. We were fortunate in obtaining the services of another well-qualified member of the staff of that Institut, Dr. Herbert Bernstein, who spent the academic year 1962-1963 as research associate at The University of Michigan Law School. As in previous revisions of this work, this volume has very few changes in the text, as distinguished from the footnotes. Citations and illustrations have been brought up to date to the end of 1962.

Introductory Note to First Edition

AMONG the multitude of conflicts principles that, according to various claims, should determine the law applicable to all contracts, only two have resisted the test of critical analysis. These, indeed, form an adequate groundwork. First, the freedom of parties to choose the law applicable to their contract must be recognized as a general rule without petty restraint. Second, in the absence of such agreement, a contract should be governed by the law most closely connected with its characteristic feature.

The first proposition is essential to the second. To deny party autonomy means rigid conflicts rules created by some superior authority. A scholastic doctrine may invest the law of the place of contracting with ineluctable force; a state may forbid stipulations for a foreign law. However, our modest task requires but a reasonable choice of law advisable for average use by courts and legislatures. This cannot aspire to ascertain more than subsidiary rules. It is not possible to achieve anything practical by attempting to coerce the parties into an inexorable law of our creation. This conception is perfectly consistent with a considered regard to the large significance of public law at the present time. It even allows and facilitates a line of thought leading to the subsidiary application of the private law of that state which, by its administrative law, preponderantly regulates certain kinds of business. This will appear in such contracts as maritime carriage of goods, employment, and insurance.

It has been further explained, in virtual agreement with a growing volume of authority, that, for our purpose, more

specific conflicts rules should be devised with local connections corresponding to the different types of transactions. The usual types, especially of business contracts, therefore, must be studied one by one. The characteristics of these contracts should be ascertained by comparative investigation of their economic and legal structure in the various countries and of their function in international life.

Part Nine is an attempt to demonstrate that this method leads to some definite and many suggestive conclusions. In a few matters such as money obligations, sales of goods, and workmen's compensation, excellent work has been accomplished by treatises, drafts, and even treaties, establishing a new range of observation on the international level. In others, much confusion must be cleared up, and some topics are full of difficulty. It may be well to re-emphasize that merely partial research is submitted here. The method followed in this work requires strict avoidance of the generalizations which are all too familiar in this branch of law. In the very first topic of this volume, it will only be possible to state that no sure conflicts rule can be formulated.

In such and in atypical cases, the courts must refer back to the general principle and weigh the individual circumstances and stipulations of the contract. Categories of transactions insufficiently treated here ought to find more competent and detailed consideration than I have been able to devote to them.

Whether localizing an individual contract or a type of contract, we do, of course, survey the multiple territorial connections involved (domicil, place of contracting, place or places of performance, etc.) and decide which is the most important. But, as said before,¹ scarcely any of these "criteria" from which courts have deduced in particular

¹ Vol. II (ed. 1) p. 432.

cases specific choices of law, command respect in themselves, and no general evaluation of them, hence, will be undertaken.

But should not one exception be advisable with respect to a criterion almost unchallenged in the civil law countries? I am referring to the contracts baptized by Saleilles² as "*contrats d'adhésion*." Carriers, banks, insurance companies, warehouses, manufacturers, traders, buying departments and many other enterprises establish standard forms or use forms drafted by organizations, for contracting with an indefinite number of persons. In these cases, the enterprise offers a ready-made contract, which the other party simply accepts by "accession."

The customer has little opportunity to bargain for conditions and none at all when the enterprise, by its own resources or through a cartel, enjoys a monopoly. This well-known fact of modern commercial life, the object of many discussions, leads in conflicts law to the conclusion that the customer who simply "adheres" to the offer, ought to understand that the contract has to serve its purpose on a single legal basis, irrespective of nationality and domicil of the customer. Hence, the law of the domicil of the enterprise, or of the branch concluding the transaction, is regarded as tacitly agreed upon, or at least presumably intended. The German courts have constantly argued to this effect, the French courts often, and the *Código Bustamante* has formally adopted this as the rule.³

² SALEILLES, *De la déclaration de volonté* (Paris 1901) 229. For a survey of the rich French and Italian literature on the nature and interpretation of these transactions, see DI PACE, "Il negozio di adesione nel diritto privato," 39 Riv. Dir. Com. (1941) 34-47. For a comprehensive theory, LUDWIG RAISER, *Das Recht der allgemeinen Geschäftsbedingungen* (Hamburg 1935).

³ Germany: For a list of cases, see NUSSBAUM, D. IPR. 231 n. 2; BATIFFOL 102 §§ 115-119 adopts the German view. Switzerland: BG. (Nov. 2, 1945) 71 BGE. II 287. *Código Bustamante*, art. 185: in the absence of an express or tacit intention, in contracts of adhesion the law of the party offering or preparing them is presumed to be accepted.

No such rule, however, exists in the United States. American courts rather seem inclined to react against the preponderance of one party by protecting the other and granting him the privilege of his own domiciliary law, directly or in the guise of the law of the place of contracting. On the subject of carrier's liability and life insurance, this phenomenon is particularly strong. We are thus warned not to presume generally that the law of the party issuing a form should govern.

Of course, the Continental argument is not valueless. Obviously, an enterprise of the kind mentioned is vitally interested in a secure, uniform basis on which to deal with an international public, and the latter profits by the more favorable conditions offered on such basis.

Also, the Supreme Court of the United States has recognized that a finance corporation in Pennsylvania lending funds in other states on standard terms at a rate of interest permitted at its place of business was not guilty of usury.⁴ Precisely for small loans issued in mass, the argument has an inevitable bearing. A good case may further be made out for the law of the business place where a bank provides professional services of all kinds to private customers, and an especially strong case for the law of the business place from which an insurance company delivers its policies. But in contrast to the sweeping statements in Europe and Latin America, we should not acknowledge an automatic subjection of mass contracts to the domiciliary law of the enterprise.

In Part Ten, the questions concerning modification and discharge of obligations are selected with regard to the interest they enjoy in conflicts law. Accordingly, the problems of performance do not appear in this Part, their relevant topics having been treated in Chapters 30 and 35.

⁴ *Seeman v. Philadelphia Warehouse Co.* (1927) 274 U. S. 403; Vol. II (ed. 1) p. 409.

On the other hand, the conflicts of law respecting negotiable instruments are too complex and important to be investigated before property law will be examined in Volume Four.

In sending out the present volume, I do not ignore the fact, emphatically stressed by some writers, that in this postwar period the organization in which international business thrived before and even after the First World War, has undergone very conspicuous changes. No one knows how much of the transformation is unrepealable, and where it will end. But after as much inquiry of American trade experts as was feasible, I am fairly satisfied that at this time our critical survey of past and present conflicts doctrines and the outlook for their reasonable progress ought not to be disturbed by the fear that it may shortly become obsolete.

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List of Abbreviations

[See also Bibliography.]

A. C.	Appeal Cases, English Law Reports, 1891-.
AG.	Amtsgericht (Germany).
Actas de las Sesiones	Actas de las Sesiones del Congreso Sud-Americano de Derecho Internacional Privado, Buenos Aires, 1889.
Adl. Clem.	Sammlung von Entscheidungen zum Handelsgesetzbuch, zusammengestellt von Adler und Clemens, fortgesetzt von Friedländer (Austria).
Ala.	Alabama Reports.
All E. R.	All England Law Reports, Annotated.
Allg. BGB.	Allgemeines Bürgerliches Gesetzbuch (Austria).
Allg. HGB.	Allgemeines Handelsgesetzbuch (Austria).
Allg. Wechselordnung	Allgemeine Wechselordnung (Germany).
A. L. R.	American Law Reports, Annotated.
Am. Dec.	American Decisions (Select Cases).
Am. J. Comp. Law	American Journal of Comparative Law.
Am. J. Int. Law	American Journal of International Law.
Am. Jur.	American Jurisprudence. San Francisco, New York, 1936-.
Am. Marit. Cas.	American Maritime Cases.
Am. Rep.	American Reports.
Am. Soc. Int. Law	American Society of International Law.
Am. U. L. Rev.	American University Law Review.
Annales de Droit Commercial	Annales de droit commercial et industriel français étranger et international, fondées par M. E. Thaller, Paris, 1887-.
Ann. Cas.	American Annotated Cases.
Annuaire	Annuaire de l'Institut de droit international.
Annual Digest	Annual Digest of Public International Law Cases, London.

Annual Survey	Annual Survey of American Law, New York University School of Law.
Annuario Dir. Comp.	Annuario di diritto comparato e di studi legislativi.
App.	Cour d'appel; corti d'appello.
App. Cas.	Appeal Cases, English Law Reports, 1876-1890.
App. D.C.	Appeal Cases, District of Columbia.
App. Div.	New York Supreme Court, Appellate Division Reports.
Arch. Civ. Prax.	Archiv für die civilistische Praxis (Germany).
Arch. Jud.	Arquivo judiciario (Brazil).
Ariz.	Arizona Reports.
Ark.	Arkansas Reports.
Asp. Marit. Cas.	Aspinall's Maritime Cases.
Atl.	Atlantic Reporter, National Reporter System (United States).
Atl. (2d)	Atlantic Reporter, National Reporter System, Second Series.
BAG.	Bundesarbeitsgericht (Germany).
BAGE.	Entscheidungen des Bundesarbeitsgerichts (Germany).
Bankarchiv	Bankarchiv, Zeitschrift für Bank- und Börsenwesen, Frankfurt a. M. und Berlin, 1901-.
Barb. S. C.	Barbour's Supreme Court Reports, New York, 67 vols.
Baxt. (Tenn.)	Baxter's Tennessee Reports, vols. 60-68.
Bay.ObLG.	Bayerisches Oberstes Landesgericht.
Bay.ObLGZ.	Sammlung von Entscheidungen des Bayerischen Obersten Landesgerichts in Zivilsachen.
BBl.	Bundesblatt der Schweizerischen Eidgenossenschaft.
B. C.	British Columbia Reports.
B. & C.	Barnewall and Cresswell, English King's Bench Reports.
Belg. Jud.	Belgique judiciaire. Gazette des tribunaux belges et étrangers.
Bell Oct.	Bell, Octavo Reports, Scotch Court of Session.
BG.	Bundesgericht (Switzerland).

BGB.	Bürgerliches Gesetzbuch (Germany).
BGBI.	Bundesgesetzblatt (Germany).
BGE.	Entscheidungen des Schweizerischen Bundesgerichtes. Amtliche Sammlung.
BGH.	Bundesgerichtshof (Germany).
BGHZ.	Entscheidungen des Bundesgerichtshofs in Zivilsachen (Germany).
Bibb (Ky.)	Bibb's Kentucky Reports, vols. 4-7.
Bing. N. C.	Bingham, New Cases, English Common Pleas.
B. & L.	Browning & Lushington, English Admiralty Reports.
Bl. f. Zürich. Rspr.	Blätter für zürcherische Rechtsprechung.
Bl. IPR.	Blätter für Internationales Privatrecht, Beilage der Leipziger Zeitschrift für Deutsches Recht.
B. Mon. (Ky.)	Ben Monroe, Kentucky Reports, vols. 40-57.
Bolze	Die Praxis des Reichsgerichts. Herausgegeben von Bolze (Germany).
Boyce	Boyce's Delaware Reports, vols. 24-30.
Brit. Year Book Int. Law	British Year Book of International Law.
B. & S.	Best & Smith, English Queen's Bench Reports.
Bull. Inst. Int.	Bulletin de l'Institut juridique international, Leyde. Originally: Bulletin de l'Institut intermédiaire international.
Bull. Soc. Législ. Comp.	Bulletin de la Société de législation comparée (France).
B. U. L. Rev.	Boston University Law Review.
BW.	Burgerlijk Wetboek (the Netherlands).
C.A.	Court of Appeals.
Cal.	California Reports.
Cal. App.	California Appeals Reports.
Cal. L. Rev.	California Law Review.
Cambr. L. J.	Cambridge Law Journal.
Cám. Apel.	Cámara de apelaciones de la capital (Argentina).
Cám. Com. Cap.	Cámara comercial de la capital (Argentina).
Cám. Fed. Cap.	Cámara federal de la capital (Argentina).
Can. Bar Rev.	Canadian Bar Review (Toronto).
Can. L. R.	Canada Law Reports, Exchequer Court and Supreme Court.

Can. L. T.	Canadian Law Times.
Can. Sup. Ct.	Canada Supreme Court Reports, 64 vols.
Cass.	Cour de cassation; Corte di cassazione.
Cass. civ.	Chambre civile de la cour de cassation.
Cass. req.	Chambre des requêtes de la cour de cassation.
Cass. soc.	Chambre civile, section sociale, de la cour de cassation.
C. B. (N.S.)	Common Bench Reports, New Series (Scott), 20 vols.
C.C.	Civil code; code civil; código civil.
C. C. A.	Circuit Court of Appeals (United States).
C. C. H.	Commerce Clearing House.
C. Civ. Proc.	Code of Civil Procedure.
C. Com.	Commercial code; code de commerce; código de comercio.
Ch.	Chancery Division, English Law Reports, 1891-.
Ch. D.	Chancery Division, English Law Reports, 1876-1890.
C.J.	Corpus Juris (United States).
C. J. S.	Corpus Juris Secundum (United States).
Cl. and F.	Clark and Finnelly's Reports, House of Lords Cases.
Clunet	Journal du droit international. Fondé par Clunet, continué par André-Prudhomme.
C. Marit.	Code maritime.
C. Obl.	Code of Obligations, Obligationenrecht (Switzerland) (See Swiss C. Obl.).
Código Bustamante	See Bustamante Code in the Table of Statutes.
Cod. Iust.	Codex Iustinianus.
Col. L. Rev.	Columbia Law Review.
Colo.	Colorado Reports.
Com. Cas.	Commercial Cases (England).
Commw. L. R.	Commonwealth Law Reports (Australia).
Conn.	Connecticut Reports.
Contemporary Law Pamphlets	Contemporary Law Pamphlets, New York University School of Law.
Cornell L. Q.	Cornell Law Quarterly.
C. P. Div.	Common Pleas Division, English Law Reports, 1875-1880, 5 vols.

Cro. Car.	Croke, English King's Bench Reports, <i>temp.</i> Charles I (3 Cro.).
Ct. Sess.	Scotch Court of Sessions Cases.
D.	Daloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine (France).
D.A.	Daloz, Recueil analytique de jurisprudence et de législation, (continuation of Daloz, Recueil hebdomadaire de jurisprudence) 1941-.
Dak.	Dakota Territory Reports.
Day (Conn.)	Connecticut Reports, by Day, 5 vols.
D. C.	District of Columbia.
Del.	Delaware Reports.
De Paul L. Rev.	De Paul Law Review.
Deutsche Rechts Z.	Deutsche Rechts-Zeitschrift, Tübingen, 1947-.
D.H.	Daloz, Recueil hebdomadaire de jurisprudence (France).
Dig.	Digesta (Roman Law).
Dir. Int.	Diritto internazionale. Pubblicazione periodica dell' Istituto per gli studi di politica internazionale, Milano.
Direito	Direito. Doutrina, legislação e jurisprudência, publicação bimestral (Brazil).
Dir. Marit.	Il diritto marittimo. Revista bimestrale di dottrina, giurisprudenza, legislazione italiana e straniera.
Disp. Prel.	Disposizioni preliminari; disposiciones preliminares; disposição preliminar.
DJZ.	Deutsche Juristenzeitung.
D. L. R.	Dominion Law Reports (Canada).
D. M. F.	Droit Maritime Français.
Dow & Cl.	Dow and Clark, English House of Lords Cases, 2 vols.
Dt. Justiz	Deutsche Justiz. Amtliches Blatt der deutschen Rechtspflege, 1933-1941(?).
Duke B. J.	Duke University Bar Association Journal.
EG. BGB.	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Germany).
Eng. Re.	English Reports (full reprint).

Eng. Rep.	Moak, English Reports (American reprint).
Ex. C. R.	Exchequer Court Reports (Canada).
Ex. D.	English Law Reports, Exchequer Division.
F.	Fraser, Scotch Sessions Cases, 5th Series.
F. (2d)	Federal Reporter, Second Series (United States).
Fallos	Fallos de la Suprema Corte de Justicia Nacional con la relación de sus respectivas causas. Publicación hecha por los doctores D. Antonio Tornassi y D. José Domínguez, Buenos Aires.
Fed.	Federal Reporter (United States).
Fed. Cas.	Federal Cases (United States).
Fla.	Florida Reports.
Foro Ital.	Il foro italiano.
Foro Ital. Mass.	Il massimario del foro italiano. Raccolta quindicinale delle massime delle sentenze della cassazione civile.
Foro Ital. Rep.	Il foro italiano, repertorio.
F. Supp.	Federal Supplement (United States).
Ga.	Georgia Reports.
Ga. App.	Georgia Appeals Reports.
Gaz. Pal.	Gazette du Palais (France).
Giur. Comp. DIP.	Giurisprudenza comparata di diritto internazionale privato.
Giur. Ital.	Giurisprudenza italiana.
Giur. Ital. Rep.	Repertorio generale annuale della giurisprudenza italiana.
GIU.	Sammlung von zivilrechtlichen Entscheidungen des Obersten Gerichtshofes, begründet von Glaser und Unger (Austria).
Gmürs Abh.	Abhandlungen zum schweizerischen Recht. Begründet von Dr. Max Gmür.
Handelsg.	Handelsgericht.
Hans. GZ.	Hanseatische Gerichtszeitung. (See also Hans. RGZ.)
Hans. RGZ.	Hanseatische Rechts- und Gerichts-Zeitschrift.
Harv. L. Rev.	Harvard Law Review.
Hast. L. J.	Hastings Law Journal.

Hbl.	Hauptblatt.
HGB.	Handelsgesetzbuch (Germany).
H. L.	House of Lords Cases (Clark), 11 vols. (England).
H. & N.	Hurlstone & Norman, English Exchequer Reports, 7 vols.
Hof	Gerechtshof (the Netherlands).
How.	Howard, United States Supreme Court Reports.
H. R.	Hooge Raad (the Netherlands).
H. R. R.	Höchstrichterliche Rechtsprechung (Germany).
ICC.	Interstate Commerce Commission Reports.
Ida.	Idaho Reports.
I. L. A.	International Law Association.
Ill.	Illinois Reports.
Ill. App.	Illinois Appellate Court Reports.
Ind.	Indiana Reports.
Ind. App.	Indiana Appellate Court Reports.
Ins. L. J.	Insurance Law Journal (New York and St. Louis).
Inst. Dr. Int.	Institut de droit international.
Int. Comp. Law Q.	International and Comparative Law Quarterly.
Int. Labour Rev.	International Labour Review (International Labour Office), Geneva, 1921-.
Int. L. Q.	International Law Quarterly.
Int. Priv. Law	International Private Law.
Intro. Law	Introductory Law.
Iowa	Iowa Reports.
IPR.	Internationales Privatrecht.
IPRspr.	Die Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts. Beilage der Zeitschrift für ausländisches und internationales Privatrecht (Z. ausl. PR.; RabelsZ.).
I. R.	Irish Law Reports.
Jahrh. KG.	Jahrbuch für Entscheidungen des Kammergerichts (Germany).
J. Air L. & Comm.	Journal of Air Law & Commerce.

Japan, C. Com. Ann.	The Commercial Code of Japan Annotated. Published by the Codes Translation Committee, the League of Nations Association of Japan. Tokyo, 1931.
Japan, Int. Priv. Law	Japanese Law of June 15, 1898, concerning the application of laws.
J. Bl.	Juristische Blätter (Austria).
Jherings Jahrb.	Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts (Germany).
Journ. des Trib.	Journal des Tribunaux. Bruxelles, 1882-.
J. Pub. L.	Journal of Public Law.
Jur. Anvers	See Jur. Port Anvers.
Jur. Arg.	Revista de jurisprudencia argentina (Buenos Aires).
Jur. Com. Brux.	Jurisprudence commerciale de Bruxelles.
Jurid. Rev.	Juridical Review (Scotland).
Jur. Mars.	Journal de jurisprudence de Marseille.
Jur. Port Anvers	Jurisprudence du Port d'Anvers (Belgian Court Reports).
Jur. Sup. Trib.	Jurisprudencia. Accordãos do Supremo Tribunal Federal, Rio de Janeiro, 1897-.
JW.	Juristische Wochenschrift (Germany).
JZ.	Juristenzeitung (Germany).
Kan.	Kansas Reports.
K. B.	English Law Reports, King's Bench.
KG.	Kammergericht (Germany).
Ky.	Kentucky Reports.
La.	Louisiana Reports.
La. Ann.	Louisiana Annual Reports.
La. App.	Louisiana Courts of Appeal Reports.
La Ley	La Ley. Revista jurídica argentina.
La. L. Rev.	Louisiana Law Review.
Law and Cont. Probl.	Law and Contemporary Problems, Duke University.
Law Q. Rev.	Law Quarterly Review (England).
L. C. J.	Lower Canada Jurist.
Lea (Tenn.)	Lea, Tennessee Reports, vols. 69-84.
L.Ed.	Lawyer's Edition, United States Supreme Court Reports.
Leipz. Z.	Leipziger Zeitschrift für Deutsches Recht.
LG.	Landgericht (Austria, Germany).

Lind.-Möhrling	Lindenmaier-Möhrling, Nachschlagewerk des Bundesgerichtshofs (Germany).
L. J. Ch.	Law Journal Reports, Chancery (England).
L. J. Q. B.	Law Journal Reports, New Series, Queen's Bench (England).
Ll. L. Rep.	Lloyd's List Law Reports (England).
L. R. A.	Lawyers' Reports, Annotated (United States).
L. R. A. & E.	English Law Reports, Admiralty and Ecclesiastical, 4 vols.
L. R. Ch.	English Law Reports, Chancery Appeal Cases, 1866-1875.
L. R. C. P.	English Law Reports, Common Pleas Division, 1866-1875, 10 vols.
L. R. P. C.	English Law Reports, Privy Council, Appeal Cases, 1860-1875, 6 vols.
L. R. Q. B.	English Law Reports, Queen's Bench, 1866-1875, 10 vols.
L. T. R.	Law Times Reports.
Man. R.	Manitoba Reports (Canada).
Markenschutz und Wettbewerb	Monatsschrift für Marken-, Patent- und Wettbewerbsrecht (Germany).
Mart. (La.)	Martin's Louisiana Reports, 12 vols.
Martens, Recueil	Nouveau Recueil général des traités et autres actes relatifs aux rapports de droit international. Publication de l'Institut de droit public comparé et de droit des gens à Berlin. Continuation du grand Recueil de G. Fr. de Martens, fondée 1817.
Mason	Mason, United States Circuit Court Reports, 5 vols.
Mass.	Massachusetts Reports.
Mass. L. Q.	Massachusetts Law Quarterly.
Md.	Maryland Reports.
Me.	Maine Reports.
Metcalf	Metcalf's Massachusetts Reports, vols. 42-54.
Mich.	Michigan Reports.
Mich. L. Rev.	Michigan Law Review.
Minn.	Minnesota Reports.
Minn. L. Rev.	Minnesota Law Review.
Misc.	Miscellaneous Reports (New York).
Miss.	Mississippi Reports.

Mitteilungen dt. Ges. Völker R.	Mitteilungen der deutschen Gesellschaft für Völkerrecht (Berlin).
Mixed Arb. Trib.	Mixed Arbitral Tribunal.
Mo.	Missouri Reports.
Mo. App.	Missouri Appellate Reports.
Mod. L. Rev.	Modern Law Review (England).
Monitore	Monitore dei Tribunali.
Mont.	Montana Reports.
Mont. & Ch.	Montagu and Chitty, English Bankruptcy Re- ports.
Moo. P. C. C.	Moore, English Privy Council Cases, 15 vols. (England).
Moo. P. C. Cas. (N. S.)	Moore's Privy Council Cases, New Series, 9 vols. (England).
Mor. Dict.	Morison, Dictionary of Decisions, Scotch Court of Session.
National Conference Handbook	Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings (United States).
N. C.	North Carolina Reports.
N. E.	Northeastern Reporter, National Reporter System (United States).
N. E. (2d)	Northeastern Reporter, National Reporter System, Second Series.
Neb.	Nebraska Reports.
Nederl. Tijds. Int. R.	Nederlands Tijdschrift voor Internationaal Recht.
N. F.	"Neue Folge," meaning new series, to indi- cate the beginning of new numbering in periodicals, collections of court reports, et cetera in the German language.
N. H.	New Hampshire Reports.
N. J.	Nederlandsche Jurisprudentie.
NJA.	Nytt Juridiskt Arkiv (Sweden).
N. J. Eq.	New Jersey Equity Reports.
N. J. Law	New Jersey Law Reports.
NJW.	Neue Juristische Wochenschrift (Germany).
Nouv. Revue	Nouvelle revue de droit international privé.
N. S.	New series, if added to court reports, periodi- cals, et cetera.

N. S. R.	Nova Scotia Reports (Canada).
N. W.	Northwestern Reporter, National Reporter System (United States).
N. W. (2d)	Northwestern Reporter, National Reporter System, Second Series.
N. Y.	New York Court of Appeals Reports.
N. Y. L. J.	New York Law Journal.
N. Y. St. Rep.	New York State Reporter.
N. Y. Supp.	New York Supplement, National Reporter System.
N. Y. Supp. (2d)	New York Supplement, National Reporter System, Second Series.
Nytt Jur. Ark.	Nytt Juridiskt Arkiv (Sweden).
N. Y. U. L. Q.	New York University Law Quarterly.
N. Y. U. L. Rev.	New York University Law Review.
Ob. Ger.	Obergericht.
Oberapp. Ger.	Oberappellationsgericht.
O Direito	O Direito. Revista mensal de Legislação, doutrina e jurisprudencia (Brazil).
OGH.	Oberster Gerichtshof (Austria).
Okla.	Oklahoma Reports.
Ohio S. L. J.	Ohio State Law Journal.
Ohio St.	Ohio State Reports.
OLG.	Oberlandesgericht (Germany and Austria).
O. L. R.	Ontario Law Reports (Canada).
OR.	Obligationenrecht (Switzerland).
Ore.	Oregon Reports.
O. W. N.	The Ontario Weekly Notes (Canada).
P.	English Law Reports, Probate Divison.
Pa.	Pennsylvania Reports.
Pac.	Pacific Reporter, National Reporter System (United States).
Pac. (2d)	Pacific Reporter, National Reporter System, Second Series.
Pand. Belges	Pandectes belges.
Parl. Cas.	Parliamentary Cases (House of Lords Reports).
Pasicrisie	Pasicrisie belge. Recueil général de la jurisprudence des cours et tribunaux de Belgique.
Pa. St.	Pennsylvania State Reports.

Pa. Super. Ct.	Pennsylvania Superior Court Reports.
P. D.	Probate Division, English Law Reports.
P. C.	Privy Council.
Pet. S. C.	Peter's United States Supreme Court Reports, vols. 26-41.
Phila.	Philadelphia Reports, 20 vols.
Poland, Int. Priv. Law	Polish Law of August 2, 1926, on International Private Law.
Prager Archiv	Prager Archiv für Gesetzgebung und Rechtsprechung, Prag, 1919-.
Praxis	Die Praxis des Bundesgerichts (Switzerland).
Priv. Int. Law	Private International Law.
Publications Permanent Court	Publications of the Permanent Court of International Justice, The Hague.
Q. B.	Queen's Bench, English Law Reports, 1891-.
Q. B. D.	English Law Reports, Queen's Bench Division, 1876-1890.
Que. Pr.	Quebec Practice Reports (Canada).
Que. S. C.	Quebec Official Reports, Superior Court (Canada).
RabelsZ.	(Rabels) Zeitschrift für ausländisches und internationales Privatrecht. [Former abbreviation: Z. ausl. PR.]
R. Arb. G.	Reichsarbeitsgericht.
Raym.	Lord Raymond, English King's Bench Reports, 3 vols.
Rb.	Rechtbank (the Netherlands).
R. C. L.	Ruling Case Law.
Recht	Das Recht, Übersicht über Schrifttum und Rechtsprechung, begründet 1897 von Dr. Hs. Th. Soergel, Berlin.
Rechtskund. WB.	Rechtskundig Weekblaad (Belgium).
Recueil	Recueil des cours de l'Académie de droit international de la Haye.
Recueil trib. arb. mixtes	Recueil des décisions des tribunaux arbitraux mixtes.
República Argentina, Segundo Congreso Sudamericano	Segundo Congreso Sudamericano de Derecho Internacional Privado, Montevideo 1939-40, ed. República Argentina, Ministerio de Relaciones Exteriores y Culto, Buenos Aires 1940.

Rev. Arg. Der. Int.	Revista argentina de derecho internacional.
Rev. C. Obl.	Revised Code of Obligations, Revidiertes Obligationenrecht (Switzerland).
Rev. Dir.	Revista de direito civil, commercial e criminal (Brazil).
Rev. Jur.	Revista juridica. Doutrina-jurisprudencia-legislação (Brazil).
Rev. Jur. Bras.	Revista de jurisprudencia brasileira (Brazil).
Rev. Sup. Trib.	Revista do Supremo Tribunal (Brazil).
Revue	Revue de droit international privé. Fondée par A. Darras.
Revue Autran	Revue internationale du droit maritime. Fondée et publiée par F. C. Autran. Paris, 1885-.
Revue Crit.	Revue critique de droit international.
Revue Dor	Revue de droit maritime comparé. Fondée par Leopold Dor. Paris, 1923.
Revue Dr. Int. (Bruxelles)	Revue de droit international et de législation comparée. Fondée par Rolin Jaequemyns, Asser et Westlake.
Revue Dr. Int. Comp.	Revue de droit international et de droit comparé (Belgium).
Revue Dr. Int. Marit.	Revue internationale du droit maritime, Paris, 1885-1922. (Usually cited as Revue Autran.)
Revue Trim. D. Civ.	Revue trimestrielle de droit civil (Paris).
Revue Trim. D. Com.	Revue trimestrielle de droit commercial (Paris).
RG.	Reichsgericht (Germany).
RGBL.	Reichsgesetzblatt (Germany).
RGZ.	Entscheidungen des Reichsgerichts in Zivilsachen (Germany).
Rheinische Z. f. Zivil- und Prozessrecht	Rheinische Zeitschrift für Zivil- und Prozessrecht des In- und Auslandes, 1908-1925.
R. I.	Rhode Island Reports.
Riv. Dir. Com.	Rivista del diritto commerciale.
Riv. Dir. Int. Comp. Lav.	Rivista di diritto internazionale e comparato del lavoro.

Riv. Dir. Lav.	Rivista di diritto del lavoro (Italy).
Riv. Dir. Priv.	Rivista di diritto privato.
Riv. Dir. Proc. Civ.	Rivista di diritto processuale civile.
Riv. Dir. Pub.	Rivista di diritto pubblico.
Rivista	Rivista di diritto internazionale.
Rocky Mt. L. Rev.	Rocky Mountain Law Review.
ROHG.	Reichsoberhandelsgericht (Germany).
ROHGE.	Entscheidungen des Reichsoberhandelsgerichtes (Germany).
ROLG.	Die Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Zivilrechts (Germany).
R. P. C.	Report of Patent Cases (England).
Rspr.	Die Rechtsprechung. Herausgegeben vom Verband österreichischer Banken und Bankiers; redigiert von Bergl, Löbel und Wahle (Vienna).
Rutgers U. L. Rev.	Rutgers University Law Review.
R. Versicherungs O.	Reichsversicherungsordnung, 1911.
S.	Sirey, Recueil général des lois et des arrêts (France).
S. A. L. J.	South African Law Journal.
S. A. L. R. Transvaal Prov. Div.	South African Law Reports, Transvaal Provincial Division.
St. Louis U. L. J.	St. Louis University Law Journal.
Schweiz, Jahrb. I. R.	Schweizerisches Jahrbuch für internationales Recht, Zürich, 1944-.
Scot. L. T.	Scots Law Times (Edinburgh).
S. C.	South Carolina Reports; Sessions Cases (Scotch); Supreme Court Reporter (United States).
S. C. R.	Supreme Court Reports (Canada).
S. Ct.	Supreme Court Reporter, National Reporter System (United States); Supreme Court; Suprema Corte.
S. E.	Southeastern Reporter, National Reporter System (United States).
S. E. (2d)	Southeastern Reporter, National Reporter System, Second Series.

Sem. Jud.	La semaine judiciaire (Switzerland).
Sess. Cas.	Sessions Cases (English King's Bench Reports); Scotch Court of Session Cases.
Seuff. Arch.	J. A. Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten.
SJZ.	Schweizerische Juristen Zeitung.
So.	Southern Reporter, National Reporter System (United States).
So. (2d)	Southern Reporter, National Reporter System, Second Series.
Sol. J.	Solicitor's Journal (London).
Strange	Strange's Reports, English King's Bench, 2 vols.
Striethorst	Rechtsgrundsätze der neuesten Entscheidungen des königlichen Ober-Tribunals. Geordnet nach dem Systeme der Gesetzbücher und herausgegeben von Theodor Striethorst.
Südd. Jur. Zeitg.	Süddeutsche Juristen-Zeitung, Heidelberg, 1946-.
Sup. Trib. Fed.	Supremo Tribunal Federal (Brazil).
S. W.	Southwestern Reporter, National Reporter System (United States).
S. W. (2d)	Southwestern Reporter, National Reporter System, Second Series.
Swiss C. Obl.	Das Obligationenrecht, Bundesgesetz betreffend die Ergänzung des schweizerischen Zivilgesetzbuches, March 30, 1911.
Sw. L. J.	Southwestern Law Journal.
Syracuse L. Rev.	Syracuse Law Review.
SZ.	Sammlung der Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen. Veröffentlicht von seinen Mitgliedern (Austria).
Tenn.	Tennessee Reports.
Tenn. L. Rev.	Tennessee Law Review.
Tex.	Texas Reports.
Tex. Civ. App.	Texas Civil Appeals Reports.
Tex. L. Rev.	Texas Law Review.

Themis	Θεμῖς (Themis) Weekly Law Journal, Athens, 1890-.
T. L. R.	Times Law Reports (Durnford & East) (England).
Trib. civ.	Tribunal civil (France).
Trib. com.	Tribunal de commerce (France).
Trib. sup.	Tribunal supérieur (France).
Tul. L. Rev.	Tulane Law Review.
U. B. C. L. Rev.	University of British Columbia Law Review.
U. C. L. A. L. Rev.	University of California Los Angeles Law Review.
Ugeskr. Retsv.	Ugeskrift for Retsvaesen (Denmark).
U. Ill. L. F.	University of Illinois Law Forum
U. L. A.	Uniform Laws, Annotated (United States).
U. of Chi. L. Rev.	University of Chicago Law Review.
U. of Detroit L. J.	University of Detroit Law Journal.
U. of Fla. L. Rev.	University of Florida Law Review.
U. of Miami L. Rev.	University of Miami Law Review.
U. of Pa. L. Rev.	University of Pennsylvania Law Review.
U. S.	United States Reports.
U. S. Av. R.	United States Aviation Reports.
U. S. C.	Code of the Laws of the United States of America.
U. S. C. A.	Code of the Laws of the United States of America, Annotated.
Utah	Utah Reports.
Va.	Virginia Reports.
Va. L. Rev.	Virginia Law Review.
Vand. L. Rev.	Vanderbilt Law Review.
Vict. L. R.	Victorian Law Reports (Australia).
Vt.	Vermont Reports.
W.	Weekblad van het Recht (the Netherlands).
Wall.	Wallace, United States Supreme Court Reports, vols. 68-90.
Warn. Rspr.	Die Rechtsprechung des Reichsgerichts auf dem Gebiete des Zivilrechts, herausgegeben von O. Warneyer (Germany).
Wash.	Washington State Reports.

Wash. & Lee L. Rev.	Washington & Lee Law Review.
Wayne L. Rev.	Wayne L. Rev.
Wend.	Wendell, New York Reports, 26 vols.
Whart. (Pa.)	Wharton's Pennsylvania Reports, 6 vols.
Wis.	Wisconsin Reports.
W. L. R.	Weekly Law Reports (England).
W. N.	English Law Reports, Weekly Notes.
W. Va.	West Virginia Reports.
W. Va. L. Rev.	West Virginia Law Review.
W. W. R.	Western Weekly Reports (Canada).
Yale L. J.	Yale Law Journal.
Year-Book	International Institute for the Unification of Private Law: L'Unification du droit/Uni- fication of Law [Year-Book].
Z. Ak. deutsches R.	Zeitschrift der Akademie für deutsches Recht.
Z. f. RV.	Zeitschrift für Rechtsvergleichung (Austria).
Z. ausl. Pr.	Zeitschrift für ausländisches und interna- tionales Privatrecht. Begründet von Ernst Rabel.
Z. bern. J.V.	Zeitschrift des bernischen Juristenvereins.
Zentralblatt	Zentralblatt für die juristische Praxis. Fort- setzung von Gellers Zentralblatt (Austria).
Z. f. d. Ges. Versich- erungs-Wissen- schaft	Zeitschrift für die gesamte Versicherungs- Wissenschaft.
Z. f. Ostrecht	Zeitschrift für Ostrecht, 1927-1934.
Z. Handelsr.	Zeitschrift für das gesamte Handelsrecht und Konkursrecht.
Z. int. R.	Niemeyer's Zeitschrift für internationales Recht.
Z. osteurop. R.	Zeitschrift für osteuropäisches Recht. 1925- 1927, 1934-1940.
ZPO.	Zivilprozessordnung (Germany and Austria).
Z. Schweiz. R.	Zeitschrift für schweizerisches Recht.

PART NINE
SPECIAL OBLIGATIONS

Money Loans and Deposits*

I. MONEY LOANS

1. Municipal Differences¹

IN THE systems of private law, rather by historical accident than on rational grounds, certain contrasts in construing a loan contract have survived. Thus, the Roman requirement of actual delivery of the *res*, that is, coins or their equivalent, persists in laws still considering loan to be a "real contract," the mere promise being only a preliminary agreement (*pactum de mutuo dando*).² At common law, the promise to pay money in consideration of the borrower's return promise forms a perfect contract.³ This result agrees with the modern construction of loan as a contract by mere consent.⁴

The common law doctrine that the creditor of a fixed sum of money cannot claim damages beyond the amount of the

* In recent years several studies have been published dealing with conflict-of-laws aspects of these transactions: NIEDERER, *Kollisionsrechtliche Probleme bei internationalen Anleihen*, Festgabe für Eugen Grossmann (1949); LOCHNER, *Darlehen und Anleihe im internationalen Privatrecht* (1954) [hereinafter cited as LOCHNER—see Bibliography, *infra* p. 539, for other short citation forms]; RENÉ SCHMID, *Kollisionsrechtliche Probleme bei internationalen Darlehen und Anleihen* (1954); VAN HECKE, *Problèmes juridiques des emprunts internationaux* (1955).

¹ VON SCHWARTZKOPPEN, 2 *Rechtsvergl. Handwörterbuch* 640.

² France: C. C. art. 1892.

Germany: BGB. §§ 607 par. 1, 610.

Italy: C. C. (1865) art. 1819.

Spain: C. C. art. 1753.

And most other codes.

³ JENKS, 1 *Digest* § 462.

⁴ Switzerland: C. Obl. art. 312; nevertheless the pact preliminary to loan has some role, C. Obl. art. 315.

loan and interest, is followed by few foreign codes;⁵ modern laws allow recovery of special damage.⁶ The main field for choice of law is furnished by the immense variety of usury laws. But time of repayment, burden of giving notice of termination, and the amount of interest due by force of law are also variously regulated.

Contracts involved. Conflicts rules concerning loans include ordinary agreements for opening of credit and principal debts secured by suretyship or pledge.

Rights involved. The usual problem raised in this subject matter deals with the law under which the duties of payment of interest and of repayment arise and are performable. Of course, the obligation, assumed by the potential creditor in a *pactum de mutuo dando* or consensual loan, of delivering the promised value likewise needs determination. But the conclusion will become obvious after the main discussion.

2. Connecting Factors

(a) *Place of contracting.* Many American decisions have determined the validity of loan contracts according to the law of the place of contracting. In most cases, however, no other localization was in question.⁷ A similar practice is observed in France.⁸ The only conclusion to be drawn is that the law of the forum has no imperative force.⁹

⁵ England: JENKS, 1 Digest §§ 284, 465.

Brazil: C. C. art. 1061; C. Com. art. 249.

Denmark: Law of April 6, 1855, § 3, see *Die Handelsgesetze des Erdballs*, Vol. 10, *Das Handelsrecht und Konkursrecht Dänemarks*, p. 67.

The Netherlands: C. C. art. 1286.

⁶ Germany: BGB. § 288 par. 2.

Italy: C. C. (1942) art. 1224 par. 2 replacing old art. 1231 which was disputed, see DE CUPIS, *Il danno* (Milano 1946) 189, 217.

Switzerland: C. Obl. art. 106.

⁷ For closer analysis, see BATIFFOL 203 §§ 229, 230.

⁸ Cass. req. (June 10, 1857) D. 1859.1.194, S. 1859.1.751; lower courts, see BATIFFOL 210 § 236.

⁹ BATIFFOL *id.* n. 3.

Again, where both parties are domiciled in the state of contracting, this state, of course, determines the law.¹⁰

(b) *The debtor's domicil.* In a view that has found expression in the Polish law, unilateral contracts are governed by the law of the domicil of the debtor.¹¹

The same rule has been adopted by the Swiss Federal Tribunal in a case where the sum of money was expressed in the currency of the debtor's state.¹² Likewise, the French Court of Cassation applied the law of Ecuador to determine the rate of interest due from a borrowing company domiciled there; the loan was to be utilized in the company's operation in the same country, although the lender was domiciled in Paris and made the funds available there.¹³

(c) *Place of repayment.* Many American decisions have resorted to the law of the place where repayment is due¹⁴ because the creditor's claim is deemed to be centered in this place. In some cases, the court presumed a corresponding intention of the parties,¹⁵ or the place coincided with the debtor's domicil and the place of his use of the money.¹⁶

As a result, the place held decisive has sometimes been the domicil of the debtor, but in the great majority of cases the business place of the lender.¹⁷ It is scarcely feasible to

¹⁰ Canada: *Stuart & Stuart, Ltd. v. Boswell* (1916) 26 D. L. R. 711 (English Money Lenders Act applied).

¹¹ Proposals by WALKER 406 § 5 (1) and (2), though with some qualification.

Poland: Int. Priv. Law, art. 9 No. 1; applied in Polish S. Ct. (Nov. 18, 1936) 4 Z. osteurop. R. (1937) 380, though the money had been sent to another country.

Same proposal, NIBOYET, 33 *Annuaire* (1927) III 222.

¹² BG. (Oct. 8, 1935) 61 BGE. II 242, 244. In this suit, the parties invoked the German law, but this is only an auxiliary instance following the prevailing practice.

¹³ Cass. req. (Feb. 19, 1890) Gaz. Pal. 1890.1.460, Clunet 1890, 495.

¹⁴ List of cases: BATIFFOL 199 n. 1.

¹⁵ *Nakdimen v. Brazil* (1917) 131 Ark. 144, 198 S.W. 524.

¹⁶ *Potter v. Tallman* (1861) 35 Barb. S.C. 182; *Lyon v. Ewing* (1863) 17 Wis. 61; 2 BEALE 1170 n. 3; BATIFFOL 200 n. 1.

¹⁷ See BATIFFOL 201 n. 2.

explain all these decisions on one ground. But we may suggest that, whether the decisions say so or not, preferably the loan was localized with the lender when the lender was a credit institution operating from a central place of business on a uniform basis in several states.

In the German practice, the place of repayment is emphasized on the general principle of *lex loci solutionis*.¹⁸ But before any choice of law, the *lex fori* states for the purpose of this choice where the money should be repaid.¹⁹ This means normally the domicile of the debtor.²⁰ By the same method, the domicile of the creditor should be decisive in Switzerland.²¹

Recent advocates of *lex loci solutionis* recommend it as respects repayment of the loan²² and the payment of interest.²³

(d) *The creditor's domicile.* Some writers have urged the law of the lender.²⁴ A rational attempt has also been made to infer this approach from the situation of the parties. The creditor is menaced by specific dangers, such as the debtor's insolvency, money depreciation, and difficulty of legal enforcement, whereas the borrower may use the funds at his pleasure and should mitigate possible damage; the risk of the creditor should at least be measured under his law.²⁵ However, this is scarcely a consideration within the contemplation of the parties.

(e) *Place of using the money.* Certain French decisions have applied the law of the place where the loan should be

¹⁸ RG. (Sept. 30, 1920) 100 RGZ. 79; (March 12, 1928) JW. 1928, 1196.

¹⁹ See Vol. II (ed. 2) p. 473.

²⁰ RG. (Feb. 16, 1928) IPRspr. 1928 No. 35; (Jan. 14, 1931) *id.* 1931 No. 30.

²¹ BG. (Nov. 7, 1933) 59 BGE. II 397, 398; but see Vol. II (ed. 2) p. 474 n. 168.

²² BATIFFOL § 238.

²³ HAMEL, 2 Banques 452 n. 2 § 920.

²⁴ 2 MEILI 55; NOLDE, Draft, 33 Annuaire (1927) II 940; SCHOENENBERGER-JAEGGI Nos. 280-281.

²⁵ HERZFELD, Kauf und Darlehen 75.

"réalisé."²⁶ The writers question what this means, viz., whether the courts point to the place of utilization or consumption of the loan or to the place where the money is delivered.²⁷ The latter opinion emphasizing the place where the money is in fact delivered to the borrower has been explained by the technical construction of loan in French law as a real contract; the contract is completed only by delivery. But the point is obscure. It should be noted in addition that the cases dealt only with the scope of a French Law of September 3, 1807, on the legal rate of interest and reached the result that it was confined to "civil," i.e., noncommercial, loans contracted and consumed in France. Hence, the ordinary conflicts rule was not necessarily concerned.

3. Rationale

Loans may be granted either by financial institutions on a large scale to an indefinite number of customers or in isolated cases on individual terms. Each of these types requires separate discussion, although perhaps not different conflict rules.

(a) *Individually determined loans.* It may be taken for granted that no one objects to the law of a place at which both parties have their domicils and make the contract. Furthermore, the place where the loan is to be repaid, according to express stipulation or an unequivocal business usage, may be regarded as a characteristic localization of

²⁶ Cass. civ. (Dec. 21, 1874) D. 1876.1.107, S. 1875.1.78, Clunet 1875, 353; Cass. req. (Feb. 19, 1890) Clunet 1890, 495; see *supra* n. 13; Cour Paris (May 23, 1912) S. 1913.2.21, Gaz. Pal. 1912.2.13 commented upon by BATIFFOL 212.

As an additional element for applying German law to a loan granted by a Swiss institution to a German brewery, the Swiss Federal Tribunal stressed the purpose of the loan, viz., for installations in the factory. BG. (Sept. 18, 1934) 60 BGE. II 294, 301.

²⁷ For the first interpretation, BATIFFOL 211 § 237 n. 2 criticizing SAVATIER in Planiol et Ripert, 11 *Traité Pratique* (ed. 2) 478 § 1149 and authors cited by the latter.

the only obligation flowing from a completed loan.

The same cannot be said of a place of repayment solely determined by law,^{27a} since this very law ought to be selected and the municipal laws are far from agreeing where the payment is "performable."

In the civil law codes, with some difficulty, a common denominator may be found. The money is either to be paid to the creditor at his residence as of the time of contracting,²⁸ or it is to be sent to him at the debtor's risk and charge, although the "place of performance" may remain at the debtor's domicile.²⁹ It may therefore be suggested that the creditor's country should prevail.³⁰ This conclusion appears weak, however, if confronted with the common law. The principle that the debtor must seek the creditor, strong as it has remained, has no bearing since it is limited to places within the realm, or in the United States, within the debtor's state. If a contract has been made outside this state, American courts consider payment due at the place of contracting, unless the creditor designates an authorized agent in the state of the debtor.³¹ In interstate and international contracts this conception seems to exclude the law of the creditor's place.

In conclusion, there is no general conflicts rule for a loan individually contracted between private parties.^{31a}

^{27a} *Accord*, VAN HECKE, *supra* n. *, at pp. 68 ff.; *contra*: LOCHNER 76 ff.

²⁸ The Netherlands: C. C. art. 1429 par. 2.

Switzerland: Rev. C. Obl. art. 74.

Japan: C. C. art. 574, *cf.* 484.

²⁹ Austria: Allg. BGB. § 905; Allg. HGB. art. 325.

Germany: BGB. § 270.

³⁰ The result would agree with the writings cited *supra* ns. 24, 25, but is opposed to the prevailing German doctrine regarding § 269 BGB., see Vol. II (ed. 2) p. 473 n. 166.

³¹ United States: Chase, J., in *Weyand v. Park Terrace Co.* (1911) 202 N. Y. 231, 241, 95 N. E. 723; WILLISTON, 6 Contracts § 1812; 40 Am. Jur., Payment §§ 16-19.

^{31a} The new Restatement urges "the local law of the state where the contract requires that repayment be made"; see Restatement (Second), Tent. Draft No. 6 (1960) § 346k. In agreement with the view taken above, this rule

(b) *Mass operation by financial institutions.* The operation of banks and loan or savings associations necessarily involves central organization and conditions in which business is conducted and planned substantially for all the territory to be embraced. Despite concessions that may have to be made to the diverse state laws, it is vital for such institutions to base calculations and forms on one given law. Commonly, the borrower not only does not care what law may apply, but he does not expect his own domicil to be taken into account in this connection. This is manifest if he sends his application for credit to the address of the company in another state or deals with a company representative who only solicits applications, action on which is understood to be left to the central office. Not because the last act of concluding the contract occurs in the state of the company, but because this locality is prominent in the contemplation of the parties, does it determine the law applicable. The result agrees with the bulk of the cases, which stress either the place where the transaction is concluded by the company's consent, or the place of repayment, or in Europe and under the *Código Bustamante* the mass character of the operation.³²

It follows, however, that this approach has definite limits. A significant divergence occurs when the foreign corporation operates through a permanent agency in the state of the

does not apply unless the place of repayment is designated either by the parties or by business usage; see Comment, *id.* at 138. For a useful study of express choice of law clauses in loan transactions, see SOMMERS, BROCHES & DELAUME, "Conflict Avoidance in International Loans and Monetary Agreements," 21 *Law and Cont. Probl.* (1956) 463. Additionally, one of the authors has afforded a study of jurisdictional clauses; see DELAUME, "Jurisdiction of Courts and International Loans," 6 *Am. J. Comp. Law* (1957) 189.

³² Germany: ROHG. (Jan. 13, 1877) 21 ROHGE. 288; Bay. ObLG. (March 17, 1928) 28 Bay. ObLGZ. 259; OLG. Königsberg (Feb. 14, 1902) 57 *Seuff. Arch.* 345 (bank deposit).

Switzerland: BG. (Nov. 22, 1918) 44 BGE. II 489; HERZFELD, *Kauf und Darlehen* 61.

Código Bustamante, art. 185.

borrower, which issues loans in the name of the company. In this case, the contract has a local center. It should not make any difference that the agent may have to ask for the assent of the central office, where this appears as a matter of internal administration. Nor should the fact in itself that the company is considered to do business in the state be decisive, although many legislators think otherwise. State supervision over loans cannot be compared in intensity and importance with state intervention in such matters as insurance or utilities. The vague and inconclusive concept of what the states mean by doing business does not present a sound basis for choice of law. It should be noted, moreover, that even in the case where the customer deals with an agency or branch, it is this and not his own residence that is significant.

As a result, it is always the place of business of the lender that localizes a loan of money to be repaid in kind.^{32a} If a branch or agency of the lender negotiates the contract, the question to be asked is not where, but by which office, functioning as a party to the contract, the loan is issued. This fact may at times be doubtful, but no more than in other cases of agency. A presumption would be helpful in the case of foreign corporations advertising offers of small loans with reference to their local agencies, that the agent is authorized to contract, and therefore the local law is implied.

4. The Obligation to Give the Loan

Whenever a loan or credit is promised by a finance corporation, the place of its establishment has a double function: it figures as the domicile of the promisor and as the center of the obligation of repayment. It does not seem

^{32a} *Accord*, EHRENZWEIG, Conflict 524; Restatement (Second), Tent. Draft No. 6 (1960) 139; Uniform Commercial Code § 4-102; VAN HECKE, *supra* n. *, at 69; LOCHNER 18 ff.

doubtful that a bank credit is governed by the local law of the bank. For isolated contracts between private parties, again, no general rule is needed or possible.

II. BONDS (DEBENTURES)

International credits are created by the most varied methods.³³ We are not dealing here with credit operations between sovereign states, nor with state guarantees for bolstering the credit of other governments or of individual borrowers, lately much discussed in public international law.³⁴ The loans expressed in partial obligations, however, which form our subject matter may be contracted by states or other public entities as well as by private persons.

(a) *American loans of the 1920's.* After the First World War, during the great wave of private American loans to European states, municipalities, and corporations, the usual type of loan conformed perfectly to the technique used in large domestic loans by New York banks. It has been said that most debentures and bonds of this group contained an express submission to the law obtaining in the state of New York. Such a clause, more or less clearly drafted, at any rate,³⁵ was frequently inserted in the "Trust Deed," if not in the text of the bond. But even without stipulation, the transaction was commonly impregnated by the unmistakable style of New York. As a German court described such a loan,³⁶ the bonds were issued by a New York bank; the sums expressed in the currency of the United States; the external appearance, form, and text of the securities as well as the concepts and stipulations of the debenture conformed to

³³ For a general survey, unfortunately little documented, see LÉON MARTIN, "Les emprunts internationaux," *Nouv. Revue* 1943, 229-276, 525-571.

³⁴ J. FISCHER WILLIAMS, 34 *Recueil* (1930) 81, 137; LAUTERPACHT 5; MANN, "The Law Governing State Contracts," 21 *Brit. Year Book Int. Law* (1944) 11 ff.

³⁵ HAUDEK 105 n. 3.

³⁶ OLG. Köln, Senate of Saarlouis, JW. 1936, 203.

the habits, views, and needs of the American finance and monetary market; everything was calculated for admission to the stock exchange of New York. Also, the trust deed was usually agreeable to the American standard and modified only with respect to foreign mortgages to meet local exigencies.

This characterization corresponded with the distribution of economic power :

“When the post-war loans were floated, the American bankers were largely in a position to dictate the terms; and the loan agreements were usually drafted in New York and merely passed upon or modified abroad.”³⁷

(b) *Decisive connection.* This transaction as well as the ensuing negotiable instruments were doubtless centered in New York. The purely American character of the contract created obligations, naturally governed by American law, between the parties and their successors deriving rights from the original transaction.

The law of the place of contracting, in such cases, can certainly not govern on its own merits. Nor has the debtor's domicil any importance. Also, the places of payment available to bondholders should not be overemphasized. It is true that in the loan contract, during the period between the two world wars, the debtor, whether a private or municipal corporation or a state, usually undertook to place all sums due for principal, premium, or interest on deposit with the bank in Manhattan charged with the service of payment, in immediately available funds, several days before the payment date. Thus, the debtor is significantly bound to the main place where payments are due. But this is only characteristic of the market at which the bank is located.

The lessons of experience point to two conclusions. In

³⁷ QUINDRY and FEILCHENFELD, 2 Bonds and Bondholders (1934) § 634.

the first place, the most vital principle for every sound treatment of debenture rights is the economic and legal equality to be enjoyed by all holders of the same bond issue. Bonds are not so much characterized by the individual position of the particular creditor in relation to the debtor, as by the conditions appearing in the fundamental contract, defining the total claim of which the bondholder possesses a part. The serial number indicates this part of the debt; conditions of payment, redemption, conversion, and notice are agreed upon in the debenture. The total debt is also affected by such events as moratorium, mortgage foreclosure, consolidation, amortization, and premature repayment.³⁸ The modern laws for the protection of bondholders contemplate associations or trustees acting in their common interest, et cetera.

In the second place, if the creditors of a bond issue are to be treated on the same footing, the applicable law can be chosen only once and for all on the basis of the original contract. This conclusion is probably universally recognized, but exactly what local contact it indicates has scarcely been discussed.

It has been correctly stated in France, however, that where the place of issue, the currency, and the place of payment coincide, neither the debtor's nationality nor domicile—as once was claimed³⁹—nor the purpose or place of use of the money is material.⁴⁰ Likewise we may agree with a Canadian decision that where a bond issue was made in British Columbia, the debtor being there at the time, the mortgage being there situated, and the bulk of the provisions performable there, it did not matter that the three trustees named in the deed were residents of Oregon.⁴¹ In a

³⁸ Swiss BG. (Nov. 10, 1923) 49 BGE. III 185.

³⁹ 2 BAR 135; 2 MEILI 274; 2 FRANKENSTEIN 354.

⁴⁰ LAPRADELLE, Note, *Nouv. Revue* 1941, 204.

⁴¹ *British Columbia: Harris Investments, Ltd. v. Smith* [1934] 1 D. L. R. 748, 48 B.C. 274.

typical case of an internal American bond indenture, an Ohio corporation was the borrower, the mortgaged property was in Ohio, and the deal for the sale of the bonds was closed in New York, whereas an Ohio bank was named the trustee for the security of the loan and the service for payment was stipulated simultaneously through the participating banks of New York and Ohio.⁴² Clearly in that case, the New York market was looked to, if not for the volume of trade, at least for the leading significance of its quotations. Indeed, if similar combinations appear in international finance, it would seem that the main emphasis, despite multiple connections, always rests on the market on which the issue principally relies. This market should be selected as the decisive factor if a neat rule is desired.⁴³ Hence, special rules are needed if the issue is distinctly divided into partial "*tranches*" to be placed on several international markets and the creditors are granted choice of currency (to be discussed in the next chapter). That issues of bonds may be subject to protective administrative regulation at any place involved,⁴⁴ is important but should not affect choice of law.

III. LOANS TO STATES

Practice and discussions of the difficult border line between international public law and the private law, in the writer's opinion, converge in the result that loans made to a state by a private money lender in another country are subject to private law. This law, in the case of a private lender, moreover, is a particular state's law; it is not international law as ascertained by consulting the general prin-

⁴² Republic Steel Corporation to Central United National Bank of Cleveland and H. R. Harris Trustees, Purchase and Improvement Mortgage, Nov. 1, 1934.

⁴³ Possibly, NUSSBAUM, D. IPR. 331, referring in an undefined manner to the "issue" or the placing of securities on public sale, has the same result in view. Clearly to the same effect: VAN HECKE, *supra* n. *, 70; SCHMID, *supra* n. *, at 72, 79 ff.; probably also LOCHNER 43 ff., 52 ff.

⁴⁴ FICKER, 4 Rechtsvergl. Handwörterbuch 473 f. No. 9.

ciples of the civilized nations.⁴⁵ Whether the debtor state nevertheless enjoys exemption from suit is another, and a jurisdictional, question.

The main question is whether the governing law is regularly that of the debtor state, a view generally assumed and the one adopted by the World Court.⁴⁶ The difficulties that this court immediately encountered and failed to master⁴⁷ show that the rule is no longer tenable.^{47a} It is likewise confusing to believe that, because one party to the contract is an international person, the contract loses its national character and becomes delocalized and internationalized.⁴⁸

The Supreme Courts of Austria, Denmark, England, Norway, and Sweden had no hesitation in subjecting the American loans to their respective governments to the abrogation of the gold clause by the Joint Resolution of Congress of June 6, 1933;⁴⁹ a national law of the debtor

⁴⁵ See LAUTERPACHT 5.

⁴⁶ Brazilian and Serbian loans, Publications Permanent Court (1929) Series A, Nos. 20/21; German RG. (Nov. 14, 1929) 126 RGZ. 196.

⁴⁷ Cf. the literature referred to *supra* n. 34.

^{47a} *Accord*, VAN HECKE, *supra* n. *, at 70 ff.; LOCHNER 68-69; I BORCHARD, State Insolvency and Foreign Bondholders (1951) 65 ff.

⁴⁸ Thus, MANN, "The Law Governing State Contracts," 21 Brit. Year Book Int. Law (1944) 11, 31, whose tendency seems to be approved by JESSUP, A Modern Law of Nations (1948) 139 n. 39, 141. Cf. also MANN, "The Proper Law of Contracts Concluded by International Persons," 35 Brit. Year Book Int. Law (1959) 34, 43 ff. and DELAUME, "The Proper Law of Loans Concluded by International Persons: A Restatement and a Forecast," 56 Am. J. Int. Law (1962) 63, 69 ff., giving an account of the practice of the International Bank for Reconstruction and Development relating to loans granted to private borrowers. For a discussion of the implications of these and similar instances, see RAY, "Law Governing Contracts Between States and Foreign Nationals," 1960 Institute on Private Investments Abroad 5.

⁴⁹ Austria: OGH., Opinion *de pleno* (Nov. 26, 1935) 9 Z.ausl.PR. (1935) 891.

Denmark: S. Ct. (Jan. 1, 1939) Vereeniging voor den Effectenhandel à Amsterdam v. Ministre des Finances, 40 Bull. Inst. Int. (1939) 284.

England: Rex v. International Trustee for the Protection of Bondholders A. G. [1937] A. C. 500—H. L.

Norway: S. Ct. (Dec. 8, 1937) Norwegian Government (Ministère des Finances) v. Stavanger Sparekasse etc., 38 Bull. Inst. Int. (1938) 71.

Sweden: S. Ct. (Jan. 30, 1937) Skandia Insurance Co., Ltd. v. Swedish National Debt Office, 18 Brit. Year Book Int. Law (1937) 215, Clunet 1937, 925, 4 Nouv. Revue (1937) 402.

country, on the contrary, would not have had the power to reduce the debt with international force. The Swedish *tranche* of the international Young Loan to Germany was determined under Swiss law by the Swiss Federal Tribunal.⁵⁰

In the future, of course, a fair protection of an investment may be accomplished by treaty through the efforts started before the last war,⁵¹ and if high hopes are fulfilled, by an international judicial forum. "Some day," it has been said, "we shall be led to create a veritable international law of business but this will be a future very remote."⁵²

IV. MONEY DEPOSITS

The old controversy whether or to what extent a deposit of fungible things, to be acquired by the depositary and to be returned by him in unascertained equivalents of the same class (*depositum irregulare*) should follow the municipal rules of loan,⁵³ has produced a contrast among the national laws. However, a money deposit with a bank ought to be considered a loan everywhere.⁵⁴ Moreover, there is no reason to establish different rules for the choice of law because of such variations.

A deposit of money, whether as a sum or *in specie*, is naturally bound to the place of the bank or savings institu-

⁵⁰ BG. (May 26, 1936) 62 BGE. II 140, Revue Crit. 1937, 138; (Sept. 28, 1937) Clunet 1939, 192.

⁵¹ See Int. Law Association, 40th Report (1939) 192 ff.; Report of the Committee for the Study of International Loan Contracts (Geneva 1939) League of Nations C.145.M.93.1939 II A 10; Draft of Uniform Preliminary Rules Applicable to International Loans, Institute for the Unification of Private Law in Rome ("L'Unification du droit") published by this Institute (1948) 223.

⁵² CASSIN, in 1 Travaux du comité français de droit international privé (1934) 97.

⁵³ See VON SCHEY, Die Obligationsverhältnisse des österr. allg. Privatrechts (1890) 55, (1895) 351.

⁵⁴ See HAMEL, 2 Banques 95 ff. §§ 752, 753 on the contrast between French and German construction.

tion to which it is entrusted,⁵⁵ on the double ground that the money is brought to that place to be conserved and repaid there and that the transaction is one of a mass of similar deals by the institution. Storage or warehouse contracts and agreements for the custody of valuable objects by innkeepers are similarly localized.

Even though, exceptionally, a deposited object may be recoverable at a place different from that of the domicile of the depositor or bailee, the contract will be most conveniently determined by the law of the latter place.

In general, it seems settled that the customer of a branch of a bank is to be treated under the law of the branch rather than that of the principal establishment situated in another country. In English decisions, repeatedly a bank debt has been regarded as tied primarily to the branch where the account is kept, for the purposes of legal representation, collection, administration, and redelivery.⁵⁶

A question different from that of the applicable law is whether the customer may or must sue the bank at the place of its branch; he has been required to do so as a measure of convenience for the administration of bank business, so long as he has no prevailing contrary interest.⁵⁷

⁵⁵ 3 FIORE § 1204; NOLDE, Draft, 33 *Annuaire* (1927) II 941 No. 14; FEDOZZI-CERETI 748 shuns any rule.

⁵⁶ *Rex v. Lovitt* [1912] A. C. 212, 219; *Frankman v. Anglo-Prague Credit Bank* [1948] 2 All E. R. 1025, 1030, C. A., per Lord Goddard, C. J.

⁵⁷ England: *Clare & Co. v. Dresdner Bank* [1915] 2 K. B. 576; see *N. Joachimson v. Swiss Bank Corp.* [1921] 3 K. B. 110, 127; only in the case of nonpayment has the customer the right to sue the bank at its head office, apparently for damages rather than debt, see *Hill, J.*, in *Richardson v. Richardson* [1927] P. 228, 232, 234. From *Maude v. Commissioners of Inland Rev.* [1940] 1 K. B. 548, *KAHN-FREUND* in *Annual Survey of English Law* 1940, 255 concludes that the customer may pay at the bank's headquarters, but the bank owes him at the place of the branch.

United States: Note, "Branch Banks," 50 A. L. R. 1340, 1357.

Germany: RG. (June 25, 1919) 96 RGZ. 161 (semble).

For details, see *RABEL*, "Situs Problems," 11 *Law & Cont. Probl.* (1945) at 130.

Special Problems of Money Obligations¹

THE extreme instability of the monetary systems in the entire world has caused a great number of difficulties involving conflicts law. Recent writers have felt compelled to devote a separate chapter to money obligations.

Fortunately, one principle may be claimed to prevail over occasional objections: the law of the contract governs the amount due. The special law of the place of payment has influence only on the "mode of performance," while exceptions to the principle may be made for the sake of public policy.

¹ Selected literature, including comparative research: United States: NUSSBAUM, *Money* (1950); WEIGERT, "The Abrogation of Gold-Clauses in International Loans, and the Conflict of Laws," *Contemporary Law Pamphlets*, Ser. 4 No. 4 (1940); FREUTEL, "Exchange Control, Freezing Orders and the Conflict of Laws," 56 *Harv. L. Rev.* (1942) 30; RASHBA, "Foreign Exchange Restrictions and Public Policy in the Conflict of Laws," 41 *Mich. L. Rev.* (1943) 777, 1089; CABOT, "Exchange Control and Conflict of Laws: An Unsolved Puzzle," 99 *U. of Pa. L. Rev.* (1951) 476; DACH, "Conversion of Foreign Money: A Comparative Study of Changing Rules," 3 *Am. J. Comp. Law* (1954) 155; DELAUME, "Gold and Currency Clauses in Contemporary International Loans," 9 *Am. J. Comp. Law* (1960) 199; HAUSER, "The Use of Index Clauses in Private Loans: A Comparative Study," 7 *Am. J. Comp. Law* (1958) 350; NUSSBAUM, "The Legal Status of Gold," 3 *Am. J. Comp. Law* (1954) 360.

England: MANN, *Money* (ed. 2, 1953).

Continental laws: NUSSBAUM, "La clause-or dans les contrats internationaux," 43 *Recueil* (1933) I 559; RABEL, "Golddollar-Anleihen mit Vereinbarung des New Yorker Rechts," 10 *Z. ausl. PR.* (1936) 492; HAMEL, "L'application des lois monétaires annulant les clauses-or et les principes des conflits des lois," *Nouv. Revue* 1937, 499; BAGGE, "L'effet international de la législation américaine clause-or," 64 *Revue Dr. Int. (Bruxelles)* (1937) 457, 786; DOMKE, "Die Amerikanische Goldklauselgesetzgebung," 13 *Annuario Dir. Comp.* (1938) I 209; *id.*, "Les efforts législatifs tendant à restreindre la validité de la clause-or," *Revue Crit.* 1938, 22; HAMEL, BERTRAND & ROBLOR (eds.) *Le contrôle des changes; ses répercussions sur les institutions juridiques* (1955); KEGEL, *Probleme des internationalen Enteignungs- und Währungsrechts* (1956); KÄGI, *Der Einfluss des Devisenrechts auf internationale schuldrechtliche Verträge* (1961).

I. MUNICIPAL LAWS

A. NOMINALISM

1. Devaluation

A monetary sign has the value printed on its face. This is the nominalistic principle. In the discharge of obligations, no heed is given to the oscillations of monetary value that continually accompany international financial intercourse. In periods where a currency is stable, fluctuating within a small margin in a free exchange market, nominalism has a sound inner foundation. Throughout history, however, innumerable embarrassed rulers have enforced the principle in the wildest crises by manipulating the weight and metal composition of their stamped coins and, in more recent times, under the modern pattern by releasing floods of paper money from their printing presses. A quite different devaluation in the United States has accomplished the same result by making a dollar of $15 \frac{5}{21}$ grains of nine-tenth fine gold the same legal tender as the former dollar of $25 \frac{8}{10}$ grains, and by legally equalizing a dollar bill to a gold dollar coin.

When in November, 1923, the German "mark" was degraded to one billionth of its former value, the German Supreme Court could no longer restrain its rebellion against the rule that "mark" is equal to "mark." The Second World War has left all of Europe in the clutches of inflation, which in the case of Hungary for a time reached the proportions of quintillions.

Inflation and its opposite, deflation, when carried to such extremes, are sooner or later adjusted by stabilization of the nominal money values or ended outright by a new currency. The rules that in such cases determine the relation between the old and new monetary units pertain to domestic public law, but imply a change in the rules of domestic

private law. Consequently, the conflicts problem arises: to what persons and obligations do the latter rules apply?

Some old codes,² reflecting the sentiment of natural justice, have expressly put the losses suffered through debasement or alteration of coined money on the borrower. The creditor should receive exactly the value represented by the indicated sum of coins of a certain standard, weight, and fineness. Thus, nominalism has been partly replaced by a "metallistic" doctrine. In the United States, since the monetary catastrophes of the Civil War, a highly stereotyped stipulation has served in place of such a rule. In present legislation, the nominalistic doctrine is firmly and universally settled. In a vain effort to draw an analogy, a few writers, in the desperation of inflation, invoked the old rules regarding the loan of coined money.

2. Protective Stipulations³

Gold coin clause. Customary usage has produced various formulas. In the United States, the clause generally employed before 1933 read: "to pay X dollars in gold coin of the United States of, or equal to, the standard of weight and fineness existing on (the day of contracting)." The analogous clause in France and Germany more briefly stipulated for X francs in gold or X marks in gold or in *Reichs-Goldwahrung*, or the like.

Thus, in the "gold coin clause," *clause especes-or*, *clausula curso-oro*, *Goldmunz-Klausel*, the debtor promises to pay gold coins of the currency specified. But although this suffices so long as gold coins are available in addition to depreciated bills, a crisis usually tends precisely to chase the precious metal out of circulation, often causes prohibitions of gold

² E.g., Austria: Allg. BGB. § 988 *in fine*.

³ For literature, see NUSSBAUM, *Vertraglicher Schutz gegen Schwankungen des Geldwertes* (Beitrage zum auslandischen und internationalen Privatrecht, Heft 1) (1928); NUSSBAUM, *Money* 223 n. 1.

exportation and trade, and sometimes leads to seizure by the state, as happened in the Roosevelt era.

In one opinion, the doctrine of impossibility was employed; the requirement of paying in gold coins was considered a frustrated specification of the modality of performance; hence, the debtor could simply discharge his obligation in bills of the stipulated currency.⁴ This leaves the clause ineffective in the very case where it is most needed and makes it almost senseless. In the words of the World Court, "The treatment of the gold clause as indicating a mere modality of payment without reference to a gold standard of value, would be, not to construe but to destroy it."⁵ The highest courts of almost all countries⁶ have finally rallied to the view that gold coin clauses induce a tacit additional agreement that in any event the creditor should

⁴ United States: *Irving Trust Co. v. Hazlewood* (1933) 148 Misc. 456, 265 N. Y. Supp. 57.

Australia: *Jolley v. Mainka* (1933) 49 Commw. L. R. 242.

Belgium: Cass. (June 12, 1930) *Pasicrisie* 1930.1.245; (April 27, 1933) *Clunet* 1933, 739.

England: *Feist v. Société Intercommunale Belge d'Electricité* [1933] Ch. 684—C.A. (reversed).

Germany: RG. (Jan. 11, 1922) 103 RGZ. 384; (March 1, 1927) 107 RGZ. 370; (May 24, 1924) 108 RGZ. 176 (overruled).

Switzerland: Fed. Council (Jan. 15, 1924) 20 SJZ. 309.

⁵ Publications Permanent Court (1929) Series A, Nos. 20/21 at 32; *Clunet* 1929, at 996.

⁶ Most decisions, it is true, wind up by declaring the clause invalidated by the Joint Resolution of Congress.

England: *Feist v. Société Intercommunale Belge d'Electricité* [1934] A. C. 161—H. L.; *New Brunswick Ry. Co. v. British and French Trust Corp.* [1939] A. C. 1—H. L.

Austria: OGH. plenary decision of the "large senate" (Nov. 26, 1935) *Clunet* 1936, 442, 717; OGH. (June 1, 1937) 37 Bull. Inst. Int. (1937) 245.

Czechoslovakia: S. Ct. (Dec. 10, 1936) *Prager Archiv* 1937, 1067; (June 11, 1937) *id.* 1937, 2088.

Denmark: S. Ct. (June 21 and Oct. 6, 1933) *Ugeskr. Retsv.* 1933, 703, 1028, 7 Z.ausl. PR. (1933) 960, 962.

Germany: RG. (May 28, 1936) JW. 1936, 2058.

The Netherlands: H. R. (March 13, 1936) two decisions, W. 1936 Nos. 280, 281, 34 Bull. Inst. Int. (1936) 304, one of which, the Royal Dutch case, applies Dutch law, see *infra* n. 49.

Sweden: S. Ct. (Jan. 30, 1937) *Scandia Ins. Co., Ltd. v. The Swedish National Dept Off.*, 64 NJA. (1937) 1, 11 Z.ausl.PR. (1937) 286.

receive in actual currency the value embodied in the original amount, or, in other words, imply a gold value clause, as described hereafter.

The House of Lords, then, construed a promise to pay 100 pounds "in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928," as though the clause ran thus: "pay in sterling a sum equal to the value of 100 pounds if paid in gold coin of the United Kingdom of or equal to the standard, etc."⁷

Gold value clause (clause valeur-or, Goldwert-Klausel). Earlier American contracts expressly provided for payment alternatively of gold coins or of the amount in paper necessary to purchase the gold at the place of payment.⁸ In modern practices, the same result, thus reached directly, is generally obtained by a promise to pay a quantity of money determinable according to the value of gold coins of a certain currency: gold pounds, gold dollars, etc. These expressions and the implied meaning of gold coin clauses just mentioned have dominated the documents of loans and insurance in recent decades. Hence, the often emphasized difficulty of discerning the exact nature of a gold clause has no longer any considerable practical importance.

Commonly the unit referred to in the first place belongs to a certain currency, English pound, Argentine peso, etc., but during the German crisis of 1923 the clause was usually based on a purely imaginary unit, the "gold mark," equal to 10/42 United States dollars. It was held that this clause was not linked with the American currency and that therefore after as well as before the devaluation in the United States, it meant an obligation to pay a sum of German money equivalent to the value of the original gold dollar.⁹

⁷ Feist Case, *supra* n. 6, per Lord Russell of Killowen, at 172.

⁸ NUSSBAUM, Money 229 f.

⁹ RG. (Dec. 14, 1934) 146 RGZ. 1, 5; (July 5, 1935) 148 RGZ. 42, 44; Clunet 1936, 412; cf. STOEBER, 52 Z.int.R. (1938) 240.

Analogous decisions were rendered in other countries.¹⁰

Gold bullion clause. The early protective clauses, as well as recent attempts to avoid the dangers of money claims, resorted to plain obligations to pay a quantity of fine gold. In an American case of 1936, an ancient contract of long term lease fixed the yearly rent at 557,280 grains of pure unalloyed gold. The court held that this clause did not fall within the Joint Resolution of June 5, 1933, since no reference was made to American currency. As delivery of gold bullion was impossible, the equivalent in paper dollars was awarded as damages.¹¹ The Supreme Court of the United States, however, dealing with another lessee's promise to pay "a quantity of gold which shall be equal to \$1500 of the gold coin of the United States, etc.," held the Joint Resolution applicable on the ground that the contract intended the payment of money rather than the delivery of a commodity. The lessor was a corporation which had nothing to do with gold transactions and wanted simply a safe amount of money.¹² This decision, despite the difference in the clauses, overrules the first case and leaves open, as mere commodity obligations, only those stipulations of a quantity of gold that treat gold as merchandise for industrial or dental purposes, or presumably, those concluded between gold dealers.

The French Code and several followers have recognized loans given in bars (*lingots*) as independent of money

¹⁰ Belgium: PIRET, *Les variations monétaires et leurs répercussions en droit privé belge* (1935) 256 ff.

Czechoslovakia: S. Ct. (Oct. 22, 1937) 4 Z.osteurop.R. (1938) 467.

Sweden: S. Ct. (April 27, 1935) 33 Bull. Inst. Int. (1935) 278.

Italy: App. Milano (July 19, 1934) 9 Z.ausl.PR. (1935) 201, but *contra*: Cass. (Jan. 10, 1936) 34 Riv. Dir. Com. (1936) II 386.

¹¹ Joint Resolution of June 5, 1933, 48 Stat. 112, 31 U. S. C. § 463; *Emery Bird Thayer Dry Goods Co. v. Williams* (D. C. W. D. Mo. 1936) 15 F. Supp. 938.

¹² Mr. Justice Cardozo in *Holyoke Water Power Co. v. American Writing Paper Co.* (1936) 300 U. S. 324, 336.

changes.¹³ Apart from this special and rare case, no authority in Europe is known to treat the question. In the writer's opinion, the Supreme Court of the United States has evidently found the right solution.¹⁴

Other clauses. Commodities such as wheat, rye, coal, and kalium have temporarily been used as objects not susceptible of devaluation by monetary depreciation.¹⁵ More important are the clauses establishing sliding prices.¹⁶

3. Legislation against Protective Clauses

(a) *Gold clauses* of all kinds are destined to be swept away in one way or another in time of crisis. In the wake of the First World War and of the depression, gold coin clauses not frustrated by the disappearance of gold succumbed, like the pure gold value clauses, to emergency legislation in all but a few countries.¹⁷ The exceptions include England, where it has been held that gold value clauses are not affected by public policy;¹⁸ and no statute has affected their force. It is known, however, that gold clauses

¹³ French C. C. art. 1896; Italian C. C. (1865) art. 1823, repealed in C. C. (1942); Spanish C. C. art. 1754 (2); the Netherlands C. C. art. 1795.

¹⁴ See *supra* n. 12. *Contra*: as it seems, MANN, *Money* (ed. 2) 59 n. 2; M. WOLFF, *Priv. Int. Law* (ed. 2) 467 n. 3.

¹⁵ On these expedients in Germany in the 1920's, particularly the rye mortgage bonds, see NUSSBAUM, *Vertraglicher Schutz* etc., *supra* n. 3, 75. Promises of lessees to pay the rent in grains have been held valid in France, even by CAPITANT, D. H. 1926, *Chronique* 33, who was a rigorous advocate of the nullity of protective clauses, and by NOGARO, *Revue Trim. D. Civ.* 1925, 5 at 8.

¹⁶ See NUSSBAUM, *Money* 302; DAWSON and COULTRAP, "Contracting by Reference to Price Indices," 33 *Mich. L. Rev.* (1935) 685; HUBERT, "Observations sur la nature et la validité de la clause d'échelle mobile," 45 *Revue Trim. D. Civ.* (1947) 1 (inclining to invalidity) and TOULEMON, "L'indice-or," 1 *Revue Trim. D. Com.* (1948) 364 (for validity); MEZGER, "Der Kampf um die Indexklauseln in Frankreich," 24 *RabelsZ.* (1959) 437; DUDEN, *Wertsicherungsklauseln*, 40. *Deutscher Juristentag* (Hamburg 1953) Vol. 1, pp. 1-64.

¹⁷ For the other countries, see NUSSBAUM, "Comparative and International Aspects of American Gold Clause Abrogation," 44 *Yale L. J.* (1935) 53, 60, 61; MANN, *Money* (ed. 2) 128 n. 6.

¹⁸ *Feist Case*, *supra* n. 6; cf. MANN, *Money* (ed. 2) 126.

are uncommon in England and therefore offer no threat to the currency. Other countries in which devaluation did not affect gold clauses are Czechoslovakia¹⁹ and Switzerland.²⁰

(b) *French doctrine.*²¹ From the 18th century, the French writers protected the monetary maneuvers of the kings by a theory that all stipulations evading prescriptions of legal tender are void. When a Law of August 12, 1870, invested the notes of the Banque de France with *cours légal* and freed the bank of its obligation to cash the notes (*cours forcé*), the Court of Cassation held previous stipulations for payment in gold or silver coins to be void, because they would impair the "liberating effect of the paper money" and thus conflict with the compulsory legal tender of the paper bills.²² During the continuous downward trend suffered by the French franc after the First World War, this practice was maintained and fortified. In the whole range of domestic contracts, clauses protecting the creditor against the depreciation of the French currency are regularly declared ineffective.

This doctrine, however, has not been extended to "international payments," to be discussed with the international scope of gold clause restrictions.

The French theory that a compulsory legal tender is necessarily opposed to protective clauses, is not shared anywhere else. Its effect distinguishes the French law in the twofold respect that, in the domestic field, gold clauses are retroactively invalid without express legislative provision, while, in the international field, their validity is maintained without restriction.

¹⁹ S. Ct. (Dec. 10, 1936) 4 Z.osteurop.R. (1937) 54; (June 11, 1937) Prager-Archiv 1937, 2088.

²⁰ GUIBAN, 56 Z. Schweiz. R. (N. F.) (1937) 260a, 276a, 295a; BG. (Feb. 1, 1938) 64 BGE. II 88, 101.

²¹ MESTRE et JAMES, *La clause-or en droit français* (1926); SCHKAFF, *La dépréciation monétaire* (ed. 2, 1926); CAPITANT, D. H. 1926, *Chronique* 33, 1927, *Chronique* 1; NUSSBAUM, *Money* 262.

²² Cass. civ. (Feb. 11, 1873) D. 1873.1.177.

B. FOREIGN MONEY DEBTS

Rules concerning the payment of debts expressed in terms of foreign currency are of two categories. English courts have developed rules of procedure tending to exclude awards of foreign money; in the United States these rules have generated effects in the field of substantive private law. Continental codes have determined the extent to which a party may modify a contractual promise to pay in foreign money, in rules of a purely substantive character.

No consideration will be given here to emergency laws which go so far as to annul contracts for payment in foreign money, as for instance, the French Law of April 17, 1942, prohibiting resident individuals and juristic persons established in France from signing insurance contracts in foreign money.

1. Right to Conversion

If foreign coins or notes are bought, either in specific pieces or as unascertained goods, they are a commodity. But when foreign money is the object of a debt, it is not a commodity, as was sometimes believed by American courts.²³ The obligation is "a monetary obligation couched in terms of a foreign currency."²⁴

The debtor, however, in an old commercial tradition,²⁵ enjoys the option (*facultas alternativa*) of paying the debt in equivalent units of the local currency in force at the place

²³ See *Guaranty Trust Co. of N. Y. v. Henwood* (C. C. A. 8th 1938) 98 F. (2d) 160, 166; NUSSBAUM, *Money* 341.

²⁴ German B.G.B. § 244; 106 RGZ. 77.

²⁵ SCACCIA, *Tractatus de commerciis et cambio* (ed. 1669) § 2 gl. 5 Nos. 185, 188; L. GOLDSCHMIDT, *Handbuch des Handelsrechts* (1868) 1153 n. 35; ASCARELLI in *Riv. Dir. Com.* 1923 I 447, and in his book, *La Moneta* 24.

of payment.²⁶ This rule has been elaborated in the Geneva uniform laws on bills of exchange and on checks.²⁷

This unilateral privilege of the debtor, however, may be waived by agreement of the parties, ordinarily expressed by the clause of "effective" payment.²⁸

Business conceptions in the United States agree with these rules.²⁹

A great controversy, however, has often arisen with respect to the date determining the rate of conversion from the foreign into the domestic currency. In theory and in practice in civil law countries the just view prevails: conversion must be made with reference to the time of actual payment, in order to give the creditor the exact value of his claim, no more and no less.³⁰ Unfortunately, the language of the Geneva Uniform Law on negotiable instruments

²⁶ E.g., Allg. Wechselordnung (1848) art. 37; German BGB. § 244; Swiss C. Obl. art. 84 par. 2; Scandinavian Law of Bills of Exchange, of 1880, art. 35. See the list of laws in F. MEYER, *Weltwechselrecht* 290; VIVANTE, 4 *Trattato Dir. Com.* § 1566 n. 106.

²⁷ Treaty on Bills of Exchange, art. 41; on Checks, art. 36.

²⁸ E.g., art. 41 *sub* III, *supra* n. 27; BGB. § 244 par. 1 *cit.*; "lending" of foreign money implies a sufficient agreement, 153 RGZ. 385.

²⁹ See the proposal of Commissioners on Uniform State Laws, National Conference Handbook (1933) 160.

³⁰ Argentina: App. Buenos Aires Comm. (Oct. 15, 1924) 10 *Revue Dor* 72.

Austria: OGH. (April 25, 1922) 5 *Rspr.* 110, 295; (Feb. 27, 1934) *id.* 1934,

64.

Belgium: App. Bruxelles (June 8, 1921) *Pasicrisie* 1921.2.111.

Egypt: Mixed App. Alexandria (Jan. 8, 1930) 23 *Revue Dor* 279.

France: Cass. req. (Nov. 8, 1923) *Clunet* 1923, 576; civ. (Dec. 5, 1927) *id.* 1928, 660; req. (March 19, 1930) *id.* 1931, 1082; civ. (July 8, 1931) *id.* 1932, 721, but *contra*: for the date of maturity, Cass. req. (Feb. 13, 1937) *Clunet* 1937, 766. The latter solution with the additional damages for default is advocated by HAMEL, 2 *Banques* 470.

Germany: RG. (Feb. 20, 1920) 98 RGZ. 160; Plenary Ct. (Jan. 24, 1921) 101 RGZ. 312.

Italy: Cass. (July 27, 1939) *Taccone v. Uff. Bottonieri*, *Dir. Int.* 1940, 267.

Switzerland: BG. (June 27, 1918) 44 BGE. II 213; (May 23, 1928) 54 BGE. II 257; (Feb. 11, 1931) 57 BGE. II 69. When speaking of the date of maturity, the court has awarded damages for debtor's default between maturity and payment, see NUSSBAUM, *Money* 425 n. 14.

points to the date of maturity.³¹ An older laborious attempt by the International Law Association to unify the views on this question failed.³²

2. Judicial Conversion³³

In contrast to most civil law courts, English and American courts do not allow themselves to order payment of foreign money.³⁴ The date for determining the rate of conversion into the domestic currency raises difficult questions. It has been settled by the House of Lords that damages in tort should be converted as of the date of wrong,³⁵ and a similar rule prevails with regard to damages for breach of contract.³⁶ The case of a liquidated debt was doubtful,³⁷ but has been decided as of the date when the debt matured.³⁸

The Supreme Court of the United States has developed

³¹ See German RG. (July 1, 1924) 108 RGZ. 337; (March 17, 1925) 110 RGZ. 295, commenting on the identical German provision.

³² Vienna Rules 1926, Report of the 34th Conference (1927) 543 ff., 718 ff.; STOURM, 14 *Revue Dor* (1926) 52; 15 *id.* 18.

³³ See McCORMICK, *Damages* 190 and cited literature; Note, 40 *Harv. L. Rev.* (1927) 619; also 2 BEALE 1341 ff.

³⁴ England: *Manners v. Pearson & Son* [1898] 1 Ch. 581, 587; *Graumann v. Treitel* [1940] 2 All E. R. 188.

United States: Statute of April 2, 1792, c. 16 § 20, 1 Stat. 250, 31 U. S. C. A. § 371: ". . . all proceedings in the courts shall be kept and had" (in dollars).
Canada: *Rev. Stat.* 1927, c. 40 s. 15 (1).

³⁵ *Celia, S. S. v. The Volturmo, S. S.* [1921] 2 A. C. 544, 563 f. per Lord Wrenbury, as interpreted in several cases, last, *Ottoman Bank v. Chakarian* [1930] A. C. 277—P. C.

³⁶ *Di Ferdinando v. Simon, Smits & Co.* [1920] 2 K. B. 704, *aff'd* [1920] 3 K. B. 409—C. A.; *Barry v. Van den Hurk* [1920] 2 K. B. 709; *Lebeaupin v. Crispin and Co.* [1920] 2 K. B. 714—C. A.; *Madeleine Vionnet et Cie. v. Wills* [1940] 1 K. B. 72—C. A.; *Privy Council in Ottoman Bank v. Chakarian*, *supra* n. 35.

Australia: *McDonald v. Wells* (1931) 45 *Commw. L. R.* 506—High Court of Australia.

³⁷ See the discussion by MANN, *Money* (ed. 2) 318 ff.

³⁸ *Lloyd Royal Belge v. Louis Dreyfus & Co.* (1927) 27 *Ll. L. Rep.* 288; *Graumann v. Treitel* [1940] 2 All E. R. 188; *cf. ibid.* editorial note; CHESHIRE (ed. 6) 709. Also for promissory notes and bills of exchange, *Salim Nasrallah Khoury v. Khayat* [1943] A. C. 507.

Scotland: *Macfie's Judicial Factor v. Macfie* (1932) *Scot. L. T.* 460.

Canada: *Simms v. Cherenkoff* (1921) 62 *D. L. R.* 703.

Australia: *In re Tillam Boehme and Tickle Pty., Ltd.* [1932] *Vict. L. R.* 146.

this theory into a rule of substantive law by which an obligation expressed in foreign currency is converted *ipso jure*, at the rate in effect on the day of breach or default of the debtor, so as to give the creditor an optional right to be paid in dollars.³⁹ This automatic transformation by American law, however, depends on the fact that the obligation is governed by American law and, in the case in which it was proclaimed, seems to have been grounded in addition on the fact that the place of payment was in the country. In another case, where just to the contrary German law governed and the debt was payable in Germany, Mr. Justice Holmes, speaking for the majority, subjected the obligation to conversion only "at the moment when suit was brought," or as this should be understood, at the date of the judgment.⁴⁰ The courts of New York have a different theory,⁴¹ that under ordinary circumstances the rate on the date of breach would control the effect of the breach on foreign debts, but they admit exceptions in favor of the rate of exchange at the time of the judgment.⁴²

The mystic power of territorial law in the theory of Mr. Justice Holmes, the doubts and, above all, the hardships caused by all these premature conversions have been sufficiently criticized.⁴³ It follows that calculation according to the rate at the time of judgment is the lesser evil, so long as no satisfactory machinery is found for leaving the conversion to the enforcement officer or a supervisory court.

³⁹ Mr. Justice Holmes in *Hicks v. Guinness* (1925) 269 U. S. 71, even in a case of an account stated.

⁴⁰ *Deutsche Bank Filiale Nürnberg v. Humphrey* (1926) 272 U. S. 517; see FRAENKEL, "Foreign Moneys in Domestic Courts," 35 Col. L. Rev. (1935) 360, 385.

⁴¹ *Hoppe v. Russo-Asiatic Bank* (1923) 235 N. Y. 37, 79, 138 N. E. 497; *Comptoir Commercial d'Importation v. Zabriskie* (1926) 127 Misc. 461, 216 N. Y. Supp. 473, *aff'd*, 222 App. Div. 736, 225 N. Y. Supp. 808; *Sokoloff v. National City Bank* (1928) 250 N. Y. 69, 164 N. E. 745.

⁴² See FRAENKEL, *supra* n. 40, at 389. But see *Transamerica General Corp. v. Zunino* (1948) 82 N. Y. Supp. (2d) 595, 604.

⁴³ NUSSBAUM, *Money* 370; MANN, *Money* (ed. 2) 325; M. WOLFF, *Priv. Int. Law* (ed. 2) 461 § 447.

C. INTERNATIONAL BOND ISSUES

Numerous American bonds, like the shares of certain American corporations, circulate all over the world, but their legal characteristics are untouched by any foreign law. Indeed, neither the fact that they are bought in mass and quoted on foreign stock exchanges,⁴⁴ nor still less that a loan is floated in a country other than that of the debtor,⁴⁵ alter the purely domestic character of the bonds. The normal distinctive characteristic of an issue relevant for international consideration is the alternative fixation of the money amount in two or more currencies, by a "multiple currency" clause, at the option of the bondholder. Such clauses, however, are of different classes. Their two main types, known under their French names, may be termed here option of currency and option of collection.

1. Option of Currency (*Option de Change*)

In the typical international loan which is to be offered to the capital markets of several countries, the sum of interest and principal is fixed from the start in the currencies of all participating places and payable, at the option of the holder, at any of these places. Thus, the bonds and coupons of a loan of the municipality of Vienna in 1902 expressed the principal sum as 100 kronen—85 marks—105 francs—4.3 pounds sterling—20 dollars of the United States, in gold coin.⁴⁶ Here there are several obligations, each independent of the others, as alternative obligations are. Devaluation of one or more of the currencies does not affect the right of the

⁴⁴ On the contrary tendency of certain courts, see *infra* ns. 49, 91.

⁴⁵ In discussions of the International Law Association on suretyship for international loans, the reporter, B. VAN NIEROP, contended that just this was the criterion of an international loan, 40th Report (1938) 192, also *Nouv. Revue* 1940, 368. This view may be exact from a purely financial point of view, but is misleading in legal respects.

⁴⁶ 126 RGZ. 196, 208.

creditor to ask payment at the place where the money has full value. Although this clause is intended to induce the prospective investors of a certain place by offering payment also at this place, no restriction to the original subscribers of this place or their successors is attached, because the bonds are also intended to be negotiated throughout the world. This makes it possible for all holders to claim the sum at the place of least devaluation.

The loan, in fact, despite the currency option is "indivisible,"⁴⁷ granting every holder exactly the same rights. Whether the Joint Resolution of the United States Congress, of June 5, 1933, affected multiple currency clauses, is controversial.⁴⁸

2. Option of Collection (*Option de Place*)

The American loans of the 1920's to European corporations usually contained a clause that both principal and interest of the bonds as well as any premium on the principal shall, in addition to being payable in Manhattan, also be collectible at the option of the holders, at the city office of a New York bank in London, and at certain indicated banks in Amsterdam, Zürich, Stockholm, etc., in each case at the then current buying rate of the respective banks for sight exchange on New York. This means that the amounts are not only primarily expressed in, but based on, the American currency, which is therefore decisive in all future events. The holder has the choice of several places for his convenience, to obtain substantially the same value at all times.

⁴⁷ United States: *McAdoo v. Southern Pacific Co.* (D. C. N. D. Cal. 1935) 10 F. Supp. 953.

Austria: OGH. (June 1, 1937) 37 Bull. Inst. Int. (1937) 245.

France: Cass. civ. (June 19, 1933) *Clunet* 1934, 939. To the same effect:

Germany: RG. (July 1, 1926) *JW.* 1926, 2675; (Dec. 22, 1927) 27 *Bankarchiv* 162.

Switzerland: BG. (May 23, 1928) 54 *BGE.* II 257, *Clunet* 1929, 497.

⁴⁸ See cases *infra* ns. 104-108.

This situation has been universally recognized with respect to many loan issues⁴⁹ despite numerous objections drawn from forced interpretation of stipulations or code provisions, or from an ambiguous wording of certain contracts.⁵⁰ But a few courts have, indeed, incorrectly attempted to help creditors evade the American Joint Resolution by contending that any place of issue suffices to subject the debt to the local law.⁵¹

The character of the option of collection, just explained, is not only certain if the bonds are issued at one place, but also in case the bonds are issued in several countries when an identical external form of the bonds is employed.⁵² Even though several "*tranches*" (divisions of the issue) may be formed, the languages being different, the collection clause exclusively decides the rate and therefore the content of the obligation. Such view alone, "giving deciding weight to the wording of the clause, conforms to the significance of bonds as incorporating rights and to the needs of international intercourse."⁵³

II. CONFLICT OF LAWS

A. *LEX PECUNIAE*

By indicating the currency of a state, the parties refer, or the law refers, to the legal prescription defining certain units of measurement. What a French franc is, is decided

⁴⁹ Publications Permanent Court (1929) Series A, Nos. 20/21 at 35; App. Haag (Jan. 14, 1935) N. J. 1935, 119.

Belgium: App. Bruxelles (Feb. 4, 1936) *Pasicrisie* 1936 II 52, 54.

France: Cass. (Feb. 24, 1938) *Revue Dr. Int. (Bruxelles)* (1938) 323.

Italy: App. Napoli (Feb. 21, 1936) *Foro Ital.* 1936 I 498.

The Netherlands: H. R. (March 13, 1936) N. J. and W. 1936, No. 280, 34 *Bull. Inst. Int.* (1936) 304 (Royal Dutch case).

⁵⁰ The ambiguous formulations would fill a voluminous chapter. See NUSSBAUM, *Money* 455 ff.; MANN, *Money* (ed. 2) 158 ff.

⁵¹ *Infra* ns. 85, 90, 91.

⁵² This refutes the main defense argument based on the nationality of the holder. See the convincing reasoning of the Plenary Opinion of the Austrian Supreme Court (1935) 9 *Z. ausl. PR.* (1935) 899.

⁵³ RG. (July 1, 1926) JW. 1926, 2675; (Dec. 22, 1927) 27 *Bankarchiv* 162, against former decisions; see RABEL, 10 *Z. ausl. PR.* (1936) 505.

at any time according to the French legal provisions then in force, that is, under the principle of nominalism, those of the numerous French currency laws which are in force at the time of the payment or judgment respectively, including the provisions determining legal tender.⁵⁴

This reference, however, indicates the only importance of the foreign currency laws as such. Even provisions on legal tender do not affect the obligation except by the fact that they are a part of the law governing the mode of performance.

A contrary theory, establishing a veritable "law of currency" (*Währungsstatut*), i.e., a conflicts rule providing that the fate of an obligation should be decided by the changes of the monetary system referred to, has been suggested.⁵⁵ The discussion of this problem took place with particular respect to revalorization (see *infra* B 3).

B. LEX CONTRACTUS

The copious discussion of the law governing money debts, and notably bonds, has developed a wholesome unifying tendency, in ascribing to one law the great bulk of problems. What local connection serves to determine this law depends on the nature of the contract—which would seem trite if it were not forgotten all too often.⁵⁶ As shown before, in the case of bonds, this is the law of the country of the financing institution and the principal market. We

⁵⁴ Great Britain: *Ottoman Bank of Nicosia v. Chakarian* [1938] A. C. 260, 270, per Lord Wright—P. C.

Canada, Ontario: *Derwa v. Rio de Janeiro Tramway, Light & Power Co.* [1928] 4 D. L. R. 542.

Czechoslovakia: S. Ct. (Jan. 19, 1934) (Dec. 12, 1934) 10 Z.ausl.PR. (1936) 172.

⁵⁵ Theory of NEUMEYER and NUSSBAUM, see *infra* n. 65.

⁵⁶ Even a recent book by GUTZWILLER, *Der Geltungsbereich der Währungsvorschriften* (Freiburg 1940) 92 ff. looks for a law applicable to "obligations expressed in a determinate currency" (p. 103) without distinguishing the nature of the contracts. He believes that "currency debts" do not show a *lex causae* in numerous cases (p. 107). This makes for more uncertainty (pp. 107 ff.) than is conceded in the present book.

are thereby enabled to deal shortly with a variety of subjects to which the principle ought to extend.

1. Content of Debt

*Currency in which the debt is payable.*⁵⁷ Whether a clause is meant as option of place of payment or only as option of collection, and what amount of money is "*in obligatione*" (money of account, *monnaie de compte*) depends on the law of the contract.⁵⁸ What constitutes payment sufficient to discharge the obligation is an almost identical question and is certainly not to be decided under any other law.⁵⁹ English cases, after hesitation, have taken the same view when after accord and satisfaction, the question was whether an offer for nonliquidated damages has a basis in a still-existing obligation.⁶⁰ Also the faculty to deposit the sum due with the court follows the governing law.⁶¹

2. Default

The qualification and effect of default is governed by the same law. This extends to the question whether damages on the ground of default are awarded in excess of interest; whether damages are granted because of a loss through devaluation of the currency in which the obligation is expressed;⁶² how unliquidated damages are to be measured;⁶³

⁵⁷ RG. (July 13, 1929) Leipz. Z. 1930, 306, *cf.* MELCHIOR 281, 284.

⁵⁸ MELCHIOR 277 ff.; MANN, Money (ed. 2) 158; BATIFFOL, Traité (ed. 3) 680 n. 48.

⁵⁹ DICEY (ed. 7) 804; CHESHIRE (ed. 6) 254-255, but incorrectly at 708 (*lex fori*).

⁶⁰ Ralli v. Dennistoun (1851) 6 Exch. 483, 155 Eng. Re. 633. Not contrary, Lord Maugh in The Baarn [1934] P. 171, 185—C. A.; see MANN, Money (ed. 2) 294.

⁶¹ United States: Zimmermann v. Sutherland (1927) 274 U. S. 253. Probably to the same effect, The Baarn [1933] P. 251—C. A.

⁶² United States: Transamerica General Corp. v. Zunino (1948) 82 N. Y. Supp. (2d) 595, 604.

England: Scrutton, L. J., in Société des Hôtels Le Touquet Paris-Plage v. Cummings [1922] 1 K. B. 451, 461.

Germany: RG. (Jan. 8, 1930) IPRspr. 1930 No. 48 and others.

⁶³ MANN, Money (ed. 2) 238, 253; *contra*: CHESHIRE (ed. 6) 708 (*lex fori*).

and whether rescission may be based on the diminution of the purchasing power of the money equivalent.

3. Revalorization

Evidently, the law of the contract also governs the question whether a subsequent statute or judicial equity adjusts depreciated money debts.⁶⁴ In a contrary isolated opinion, the law of the currency rather than that of the obligation applies.⁶⁵ Hence, French rules would decide against any revaluation of a debt couched in French francs, although the debt arises from a German contract and its amount under the German rules is transformed into certain percentages of the new currency. An English debt of German marks would have to be revalorized in American courts. The currency, however, in which a debt is expressed, has nothing to do with the equitable increase of the debt to a higher content.^{65a}

⁶⁴ Prevailing opinion adopted by the courts in:

England: *Anderson v. Equitable Assurance Society of the United States* (1926) 134 L. T. R. 557, 565, 566—C. A.; see also *Re Schnapper* [1936] 1 All E. R. 322, cf. MANN, Money 205 ff.

Austria: OGH. (Sept. 11, 1929) JW. 1929, 3519, Clunet 1930, 750; (March 12, 1930) JW. 1930, 2480, Clunet 1931, 196 (Austrian law on mark debts); (April 24, 1927) JW. 1927, 1899 (German law on a German debt).

Czechoslovakia: S. Ct. (Nov. 11, 1924) JW. 1925, 574; (Jan. 19 and Dec. 16, 1934) 10 Z.ausl.PR. (1936) 172.

Germany: 119 RGZ. 259, 264; 120 *id.* 70, 76; 121 *id.* 337; see MELCHIOR 294 and constant practice. The currency reform in the Western Zone of Germany has raised new questions; on the municipal problems, see VON CAEMMERER, 3 Südd. Jur. Zeitg. (1948) 497.

The Netherlands: See 6 Z.ausl.PR. (1932) 856; H.R. (Jan. 2, 1931) W. 12259.

Sweden: S. Ct. (May 27, 1930) Nytt Jur. Ark. 1930, 507; (Oct. 16, 1930) *id.* 513, as cited in MICHAELI 321 f.

Switzerland: 51 BGE. II 303; 53 *id.* II 76; and constant practice.

⁶⁵ RG. (March 5, 1928) 120 RGZ. 277, 279; (Feb. 9, 1931) JW. 1932, 583; NEUMEYER, 1 Int. Verwaltungs R. III 368 ff.; NUSSBAUM, D. IPR. 254. *Contra*: SCHLEGELBERGER, 3 Z.ausl.PR. (1929) 869 and the overwhelming majority of German writers.

^{65a} Cf. BACH, "Influence de la dépréciation monétaire sur les rapports de droit international privé," in Durand, (ed.), Influence de la dépréciation monétaire sur la vie juridique privée (Paris 1961) 311.

4. Gold Clause

The law applicable to the obligation in general naturally determines the existence and construction of a gold clause;⁶⁶ its character as a gold coin or gold value clause;⁶⁷ and the legislative measures upholding or impairing the clause.⁶⁸ The last-mentioned application gave an excellent method for treating the very numerous intra-European transactions in which gold dollars were promised merely for the reason that the American currency appeared the most constant measure of value, without any thought of submitting to American law. In these cases, the American Joint Resolution was correctly discarded.⁶⁹ In other categories of cases, however, the application of the general law of the contract has encountered various obstacles, particularly in the extraordinarily wide repercussions of the Joint Resolution.

The international scope of the Joint Resolution. The

⁶⁶ England: *St. Pierre v. South American Stores (Gath & Chaves) Ltd.* [1937] 3 All E. R. 349, 352, 354—C. A.

⁶⁷ Denmark: S. Ct. (Dec. 13, 1934) 9 Z.ausl.PR. (1935) 280.

Finland: *Helsingfors* (Dec. 23, 1937) 38 Bull. Inst. Int. (1938) 280.

⁶⁸ England: *International Trustee for the Protection of Bondholders A. G. v. The King* [1936] 3 All E. R. 407; [1937] A. C. 505 (Lord Wright's judgment), reversed on other grounds, H. L. [1937] A. C. 500.

Canada, Ontario: *Derwa v. Rio de Janeiro Tramway, Light & Power Co.* [1928] 4 D. L. R. 542.

Austria: OGH. (Sept. 11, 1929) Rspr. No. 332; (July 8, 1935) Rspr. No. 164; (Dec. 5, 1935) *Clunet* 1937, 127; (June 1, 1937) 37 Bull. Inst. Int. (1937) 245. Opinion (Nov. 26, 1935) *Clunet* 1936, 442, 717.

Denmark: See decisions *supra* Ch. 34 n. 49, and this Ch. n. 67.

Egypt: App. Mix. Alexandria (Feb. 18, 1936) D. 1936.2.78.

Germany: RG. (Oct. 6, 1933) JW. 1933, 2583.

Italy: Trib. Torino (July 7, 1934) *Foro Ital.* 1934.1.1351; App. Napoli (Feb. 21, 1936) *Foro Ital.* 1936.1.498.

Norway: S. Ct. (Dec. 8, 1937) 38 Bull. Inst. Int. (1938) 71, *Revue de sciences et de législation financière* 1937, 646.

The Netherlands: H. R. (March 13, 1936) *Case of Bataafsche Petroleum Co.*, N. J. 1936, 506.

Sweden: S. Ct. (Jan. 30, 1937) 36 Bull. Inst. Int. (1937) 327, 11 Z.ausl.PR. (1937) 286. ENGLISH in 3 *Guld Klausulmålet* (Stockholm 1937) 130.

⁶⁹ Czechoslovakia: S. Ct. (Oct. 22, 1937) 4 Z.osteurop. R. (1938) 467: the clause serving only to protect against a devaluation of the Czecho-crown does not justify the payment of a reduced amount in Kc in case of a dollar decline.

Germany: Cf. *supra* n. 9 on "goldmark" clauses.

Congressional Act of June 5, 1933, was evidently intended for the broadest conceivable application. According to its text, it extends to all gold clauses attached to obligations payable in money of the United States; no mention is made of the law governing the debt, nor is a domestic place of payment⁷⁰ or a domestic domicile of the parties required. This wide scope has been recognized by the courts.⁷¹ Attempts repeatedly made in foreign courts to claim the full gold value of a debt on the ground that the Joint Resolution was not meant to cover bonds issued or payable in a foreign country, were futile.⁷²

It would seem that Congress, without considering the problem closely, intended to give the Act the largest possible territorial scope, without, however, wishing to transcend the traditional limits of sovereignty.⁷³ In fact, no such transgression has been committed in judicial decisions. In the outstanding New York case of a loan between foreign parties, where the court declared the broad domain of the Resolution, the loan had been floated and the bonds were payable in New York; it was expressly stated that the law of New York governed the obligation.⁷⁴

Another unfounded attempt has sometimes been made to bar the Joint Resolution from the applicable American law because the parties did not contemplate the possibility that the apparently safest currency of the world would be depreciated by such an extraordinary measure, and their intention therefore was restricted to the American law previous to the Resolution. But since the parties definitely excluded the European laws as unreliable, they could not limit the Ameri-

⁷⁰ But see the obiter dictum by Learned Hand, J., in *Anglo-Continental Treuhand, A. G. v. St. Louis S. W. Ry. Co.* (C. C. A. 2d 1936) 81 F. (2d) 11.

⁷¹ *Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland* (1935) 269 N. Y. 22, 198 N. E. 617, cert. denied, 297 U. S. 705. Notes, 45 Yale L. J. (1936) 723, 34 Mich. L. Rev. (1936) 726.

⁷² Such arguments have been rejected in Germany, *OLG. Düsseldorf* (Sept. 26, 1934) IPRspr. 1934 No. 93 (b); *RG.* (May 28, 1936) JW. 1936, 2058.

⁷³ *RABEL*, 10 Z.ausl.PR. (1936) at 507.

⁷⁴ *Supra* n. 71.

can law to certain cases and leave the others without applicable law.⁷⁵

Exceptional statutes. In two countries, gold clauses have been invalidated if the law of the currency so stated.⁷⁶ A National Socialist German law even declared that all bonds issued abroad for sums expressed in a foreign currency, should be devaluated according to the devaluation of the foreign currency, irrespective of a gold clause attached.⁷⁷ The German state thus undertook to invalidate a gold clause valid under all foreign laws involved, merely because a domestic court was seized of the matter. The law was a countermove against a questionable judgment of the Reichsgericht excluding the application of the Joint Resolution to American bonds circulating in Germany, on the ground of alleged National Socialist principles,⁷⁸ but is itself guilty of an outrage. It has rightly been refused recognition in Switzerland.⁷⁹

French doctrine of international payment. Despite the practice of considering gold clauses void as offending the *cours forcé* of French bank notes, the French Supreme Court in 1920 held the New York Life Insurance Company bound to the contractual gold value promised in an insurance policy to a Frenchman. The *cours forcé* based on French national interest should not prevent the importation of gold from a foreign debtor into France.⁸⁰ The courts subsequently have elaborated a doctrine of "international payment," which is

⁷⁵ RABEL, 10 Z.ausl.PR. (1936) at 509; for English dicta, see MANN, Money (ed. 2) 266; Vol. II (ed. 2) p. 395.

⁷⁶ Austria: Law of April 4, 1934, 11 Z.ausl.PR. (1937) 267, Clunet 1937, 643, cf. KOESSLER, *id.* 496.

Poland: Law of June 12, 1934, 1 Z.osteurop.R. (1935) 499; 2 *id.* 439.

⁷⁷ Law on Foreign Currency Bonds, of June 26, 1936, RGBl. I 575 and Decree of Dec. 5, 1936, RGBl. I 1010; 10 Z.ausl.PR. (1936) 391, 666. This law is also technically defective.

⁷⁸ RG. (May 28, 1936) JW. 1936, 2058, see *infra* n. 89.

⁷⁹ BG. (Feb. 1, 1938) 64 BGE. II 88.

⁸⁰ Cass. req. (June 7, 1920) D. 1920.I.237, S. 1920.I.193, Clunet 1920, 654, Revue 1921, 452.

two-sided so as to obligate also a French debtor to a foreign creditor, at least in theory. An international payment has been defined as a double transfer of funds between France and a foreign country; the contract must "produce, as a movement of flux and reflux across the frontiers, reciprocal consequences in either country."⁸¹ The Court of Cassation considers "the nature and elements of an operation" rather than the place of payment, or the domicil of the parties, and inquires whether the scope of domestic economy is surpassed.⁸² The currency laws have expressly recognized gold and similar clauses in such cases.⁸³ The validity of the clauses concerning the money of account, thus, does not depend on the law governing the debt.⁸⁴

Law of place of payment. In many foreign courts, among other attempts to bar the application of the Joint Resolution, creditors contended that the question belonged not to the law governing the contract but to the law of the place of payment as governing the mode of performance. In the meaning of the Restatement it would even be categorized as a problem of discharge of the obligation, and therefore be subject to the *lex loci solutionis* (§ 358 d).

The courts, in general, have resisted this theory. Among inconclusive exceptions, the English Court of Appeal has enforced a Canadian mortgage bond, payable in London in sterling gold coin of Great Britain, despite the abrogation of gold clauses by the Canadian Gold Clauses Act, 1937.⁸⁵

⁸¹ Att. Gen. Paul Matter, opinion in Cass. civ. (May 17, 1927) D. 1928.1.25, S. 1927.1.289, Clunet 1931, 6, commonly quoted. Cf. MATTER in *Études de droit civil à la mémoire de Henri Capitant* (1939) 1, 4 ff., also in *Nouv. Revue* 1943, 209.

⁸² Cass. civ. (Feb. 14, 1934) D. 1934.1.73-78, S. 1934.1.297.

⁸³ Monetary Law of June 25, 1928; Monetary Law of Oct. 1, 1936, and Feb. 18, 1937.

⁸⁴ BATIFFOL, *Traité* (ed. 3) 681. For a discussion of recent cases see MEZGER, *supra* n. 16.

⁸⁵ *British and French Trust Corp. v. New Brunswick Ry. Co.* [1937] 4 All E. R. 516, Note in 18 *Brit. Year Book Int. Law* (1937) 220.

Although the justices relied on the *lex loci solutionis* for the "mode" of payment, their opinions were probably more influenced by the text of the clause in the contract at bar, which could be read as entitling the bearer to British, in contrast to Canadian, money, if ever there should be a difference. This would amount to a partial reference of the parties to a special law, a construction occurring also elsewhere;⁸⁶ but it is a forced construction. The House of Lords avoided the problem, but Lord Romer approved the wrong theory.⁸⁷

The judgments of the Permanent Court of International Justice in the cases of the Serbian and Brazilian loans⁸⁸ stressed somewhat the place of payment, but in reality applied the law governing the loans which was identified with that of the borrowing government.⁸⁹ This view follows tradition but does not satisfy modern needs.

Public policy (situs of the bond). In the above-mentioned lawsuit which attracted great attention in Germany, the Reichsgericht decided that the American Joint Resolution did not apply to such American-governed bonds as were in German circulation at the time when the Act came into force.⁹⁰ This decision, if it had remained in effect, would have caused an impracticable discrimination and violated the equality of the holders of bonds belonging to the same issue. The German government's repudiation of the decision was justified, although as noted above the repudiation decree itself was highly objectionable.

⁸⁶ Austria: See decisions in 9 Z.ausl.PR. (1935) 891, 897; 10 *id.* 680; 11 *id.* 269.

⁸⁷ *New Brunswick Ry. Co. v. British and French Trust Corp.* [1939] A. C. 1, 43 f., criticized by CHESHIRE (ed. 6) 266.

⁸⁸ Publications Permanent Court (1929) Series A, Nos. 20/21.

⁸⁹ Correctly so, MANN, Money (ed. 2) 262.

⁹⁰ RG. (May 28, 1936) *Kreissparkasse Aachen v. Deutscher Sparkassen & Giroverband*, JW. 1936, 2058, Clunet 1936, 951; 10 Z.ausl.PR. (1936) 385 (suppressed in the official collection) overruling OLG. Düsseldorf (Sept. 26, 1934) IPRspr. 1934, 300, 302; OLG. Köln (Sept. 13, 1935) JW. 1936, 203, 204. An opinion by EDUARD WAHL which seems to have influenced the decision is published in 9 Z.int.R. (1935) 779.

Public policy (place of collection). The Dutch Supreme Court, too, resorted to public policy when it denied effect to the Joint Resolution with respect to bonds of the Royal Dutch Company which showed a promise "to pay" in New York and the promise of "collectibility" in Amsterdam at the dollar rate of exchange, the suit seeking to recover florins in Amsterdam.⁹¹ The court maintained its view even after the Netherlands had legislated against gold clauses.⁹²

The courts of other countries have rejected specious arguments of such kind.⁹³ Neither the physical presence of a bond instrument in a country nor the mere facility of collection are sufficient contacts for the use of the public policy doctrine, which, moreover, should be excluded when the devaluation is due to a currency reform for assumedly cogent reasons and carried out without discriminating against foreign creditors.⁹⁴ It is inconsistent with the very nature of international loans that any material differences should be made between the holders of identically shaped instruments. No sound public policy is served by disturbing this necessary machinery.

⁹¹ H. R. (March 13, 1936) N. J. and W. 1936 No. 280, 34 Bull. Inst. Int. (1936) 304.

⁹² Cf. Dutch Law of June 24, 1938; H. R. (April 28, 1939) W. 1939, No. 895, French tr., 41 Bull. Inst. Int. (1939) 291 (Canadian law, but Canadian Gold Clauses Act, 1937, criticized as too restricting); H. R. (May 26, 1939) W. 1939 No. 896, German tr., 41 Bull. Inst. Int. (1939) 90 (Osram loan, under German law; but gold clause prohibition, the law of 1936 on foreign currency restriction, and the currency transfer restrictions are against Dutch public order).

⁹³ Austria: OGH. (Nov. 26, 1935) 9 Zausl.PR. (1935) 891, 897; (July 10, 1936) Rspr. 1936, 114.

Belgium: App. Bruxelles (Feb. 4, 1936) S. 1937.4.1; *aff'd*, Cass. (Feb. 24, 1938) 64 Revue Dr. Int. (Bruxelles) (1938) 323.

Sweden: S. Ct. (Jan. 30, 1937) 36 Bull. Inst. Int. (1937) 327, 18 Brit. Year Book Int. Law (1937) 215, 217; cf. the report by MICHAELI 305-311.

Switzerland: BG. (Sept. 26, 1933) 59 BGE. II at 360; BG. (July 7, 1942) 68 BGE. II 203, also in 1 Schweiz. Jahrb. I. R. (1944) 168.

⁹⁴ This is the prevailing opinion of German writers, cf. MANN, Money (ed. 2) 269-270, but see NUSSBAUM, Money in the Law (1939) 393, regarding the Royal Dutch case as "not arbitrary." NUSSBAUM, Money in the Law, National and International (revised ed. of Money in the Law, 1950) 430-431 takes a view more like the one advocated above.

C. SCOPE OF *LEX LOCI SOLUTIONIS*

On the strength of the settled special rule that the law of the place of performance governs the "mode" of performance, that law decides what money is legal tender. It is also reasonable to include the question whether, in the absence of a party agreement, the debtor of foreign money may, at his option, pay in the currency of the place where the obligation is to be discharged. This is a recognized rule in Switzerland⁹⁵ and, with certain doubts, in Germany.⁹⁶ It is included in the numerous, often too broad, French references to "the mode of payment, particularly the money."⁹⁷ It also seems to lie within the theory of the English cases.⁹⁸ Finally, the Restatement with reason refers the question of which of several debts payable in the same state should be deemed discharged by a payment, to the law of that state.⁹⁹

The same, however, cannot be said of the next question, whether the parties may agree on effective payment in

⁹⁵ Switzerland: C. Obl. art. 84, speaking of money not being legal tender at the place of payment.

⁹⁶ Germany: BGB. § 244 par. 2, providing that the debtor can pay in domestic currency if the place of payment is in Germany, contains a concealed conflicts rule, as the literature recognizes. For the literature, see MELCHIOR 287 n. 1. This conflicts rule should be construed as characterizing the question as one of the mode of payment. See NUSSBAUM, D. IPR. 259. But the rule has been said to yield to any foreign law of the contract (ENNECCERUS, *Recht der Schuldverhältnisse* (ed. 1927) § 231 p. 21 n. 4) or to the foreign law of the contract, if the place of payment is outside Germany (M. WOLFF, IPR. (ed. 3) 156) or, on the contrary, to belong to public policy (MELCHIOR 285 § 190). The Reichsgericht, which seemed to adopt the normal rule (Sept. 29, 1919) 96 RGZ. 270, 272, strangely deviated in the Plenary Meeting of the Civil Chambers of Jan. 24, 1921, 101 RGZ. 312, 316, where the place at which the payment is made rather than that in which the payment is due is regarded as decisive, following the isolated view of NEUMEYER, 3 Int. Verwaltungs R. II 318.

⁹⁷ WEISS, 4 *Traité* 397; RADOUANT in *Planiol et Ripert*, 7 *Traité Pratique* (ed. 2) 598 § 1193 and n. 2; 2 ARMINJON § 132; BATIFFOL, *Traité* (ed. 3) 679 n. 46.

⁹⁸ See *infra* n. 101.

⁹⁹ Restatement § 368. This rule has been extended to the apportionment of income as between successive life beneficiaries, in *Safe Deposit and Trust Co. of Baltimore v. Woodbridge* (1945) 184 Md. 560, 42 Atl. (2d) 231, 159 A. L. R. 580, criticized by HENDERSON, J., *ibid.* dissenting.

foreign money, nor of all other questions determining the *quid* rather than the *quo modo* of the obligation. The law of the place of payment should only come in, if at all, on the ground of public policy.

The adequate scope of *lex loci solutionis* has so far been discussed critically by only a few writers.¹⁰⁰ A special point has found more attention. During the long periods when sterling currency indiscriminately obtained in the British Commonwealth and the Latin Monetary Union dominated many countries, contractual obligations of money were often expressed simply in pounds or francs. How to construe stipulations couched in pounds after these had been devaluated to different levels in the various territories, was an issue in several decisions of the House of Lords and the Privy Council. The decisions were of uncertain argument and difficult to reconcile with each other.¹⁰¹ They made it at least certain, however, that on one hand the local money at the place of payment was decisive, but on the other, that this was a special function of the *lex loci solutionis*, the use of which had to serve only a restricted purpose.

Where payment in "francs" and "dollars" becomes an ambiguous indication, courts have often referred to the currency of the place of payment.¹⁰² But equitable considera-

¹⁰⁰ MELCHIOR 277 ff.; WEIGERT, *supra* ns. 1, 2, 20; MANN, Money (ed. 2) 194-204, 287-289.

¹⁰¹ Adelaide Electric Supply Co. v. Prudential Assurance Co. [1934] A. C. 122, 151—H. L. (the law of the place of performance should regulate the discharge of the contract by performance); Auckland Corporation v. Alliance Assurance Co. [1937] A. C. 587—P. C. (bonds made payable by option of the holder in London, English pounds payable); Mount Albert Borough Council v. Australasian Temperance & General Mutual Life Assurance Soc., Ltd. (1937) [1938] A. C. 224—P. C. (bonds considered as governed by New Zealand law; the statute of Victoria reducing interests is inapplicable).

¹⁰² Canada, Saskatchewan: Simms v. Cherrenkoff (1921) 62 D. L. R. 703. Quebec: La Corporation des Obligations Municipales Lim. v. La Ville de Montréal Nord (Super. Ct. 1921) 59 Que. S. C. 550.

France: Cass. req. (Mar. 1, 1926) Clunet 1926, 661; (April 15, 1926) Clunet 1926, 970.

Switzerland: BG. (May 23, 1928) 54 BGE. II 257.

tions have also led to judgments awarding a creditor payment only in his own lower currency,¹⁰³ or a specification was inferred from premium payments in insurance contracts.¹⁰⁴

D. OPTION OF CURRENCY

An *option de change* granting the creditor choice of the currency in which he may recover a sum fixed in the contract, such as one pound sterling or five United States dollars, constitutes a promise independent of the factual relation of the currencies involved at the time of suit. Each alternative right remains unaffected if all other currencies are devaluated or the protective clauses with regard to them are abrogated by the laws of the countries to which the currencies belong. This view rests, of course, on the law governing the contract inasmuch as it sanctions the intention of the parties. This, however, does not answer all doubts.

In the United States, it has been held that on a bond payable in dollars in New York or guilders in Amsterdam a bondholder of any nationality, including that of the United States, is entitled to sue for the full value of guilders payable in Amsterdam, irrespective of the existing prohibition to sue for gold dollars payable at any place.¹⁰⁵ However, subsequently another federal circuit court with reference to the same loan decreed that dollars could not be demanded for the value in guilders.¹⁰⁶ Opinions were divided also on

¹⁰³ Canada, Alberta: Sheppard v. First International Bank of Sweet Grass [1924] 1 D. L. R. 582.

¹⁰⁴ See the list of cases, NUSSEBAUM, Money 379 n. 11.

¹⁰⁵ Anglo-Continentale Treuhand A. G. v. St. Louis Southwestern Ry. Co. (C. C. A. 2d 1936) 81 F. (2d) 11, by Judge Learned Hand, cert. denied, 298 U. S. 655.

Analogous, for restrictive interpretation of the Belgian decree and law on gold clauses as an exorbitant measure, Belgium: Trib. civ. Bruxelles (April 7, 1936) 35 Bull. Inst. Int. (1936) 130; Trib. com. Bruxelles (Dec. 17, 1936) 36 *id.* (1937) 299.

¹⁰⁶ Guaranty Trust Co. of N. Y. v. Henwood (C. C. A. 8th 1938) 98 F. (2d) 160.

the occasion of another loan.¹⁰⁷ The Supreme Court of the United States took the more rigorous stand.¹⁰⁸ In its appraisal, promises in alternate currency were not separate and independent contracts or obligations, but were parts of one and the same monetary obligation of the debtor "which was under American law and fell within the terms of the Joint Resolution: 'obligations payable in money of the United States.'" This decision may be regarded as an unwarranted extension of the Joint Resolution which does not mention foreign currency debts.¹⁰⁹ In any case, the Court ignored the faculty of the parties to stipulate in a contract governed by American law obligations subject to a special law.

In fact, foreign courts have taken a different view of such clauses. The problem, of course, is directly concerned with the amount of the debt. It would be a mistake to include the right in question in the domain of modalities of payment belonging to the law of the place of performance. Nevertheless, the former German Commercial Supreme Court and the Reichsgericht have entertained a theory that the contract with its alternative currency clause submits the obligation conditionally to the law of the place the creditor should select for presenting his bond for payment.¹¹⁰ In the case of the Viennese Investment Loan, the Reichsgericht held Austrian law to govern the debt but Swiss law to govern the payment in Swiss francs in Zürich so as to discard an Austrian legislative act authorizing the city of Vienna to

¹⁰⁷ The judgment of Learned Hand, J., was followed in *Zürich Gen. Acc. & Liability Ins. Co. v. Bethlehem Steel Co.* (1939) 279 N. Y. 495, 18 N. E. (2d) 673; *Anglo-Continentale Treuhand A. G. v. Bethlehem Steel Co.* (1939) 279 N. Y. 790, 19 N. E. (2d) 89; *contra*: *City Bank Farmers Trust Co. v. Bethlehem Steel Co.* (1935) 244 App.Div. 634, 280 N. Y. Supp. 494.

¹⁰⁸ *Guaranty Trust Co. v. Henwood* (1939) 307 U. S. 247; *Bethlehem Steel Co. v. Zürich General Accident & Liability Ins. Co. and Anglo-Continentale Treuhand A. G.* (1939) 307 U. S. 265.

¹⁰⁹ WEIGERT, *supra* n. 1, at 33.

¹¹⁰ 24 ROHGE. 388; RGZ.: 1, 59, 61; 5, 254; 100, 79; 126, 196.

pay exclusively in valueless Austrian crowns.¹¹¹ Similar constructions have been adopted in other countries.¹¹² Some related arguments have also been used by the Permanent Court of International Justice and the English Court of Appeal.¹¹³

This reasoning has been acutely criticized.¹¹⁴ However, all these cases point to the intention of the parties. The problem may demonstrate the opportunity of recognizing an appropriate sphere, not of the law of the place of performance, but of the choice of law by the parties. It seems a sound case for conceding that the parties may agree on the applicable law under condition subsequent. A multi-lateral currency clause constitutes the right to recover a money value despite depreciation of the other currencies and should not be frustrated by subsequent statutes of the states controlling these currencies. Judge Learned Hand's opinion mentioned above¹¹⁵ is entirely agreeable to this construction. We might submit, therefore, that a genuine multiple currency clause includes an implied choice of law under the condition of its exercise. This small corner of refuge in the international field ought to be left to the victims of the governmental money manipulators.

¹¹¹ RG. (Nov. 14, 1929) 126 RGZ. 196; considered representing German law in *Pan-American Securities Corp. v. Fried. Krupp A. G.* (1938) 6 N. Y. Supp. (2d) 993.

¹¹² *Canada, Quebec: La Corporation des Obligations Municipales Limitée v. La Ville de Montréal Nord* (Super. Ct. 1921) 59 Que. S. C. 550.

Switzerland: BG. (May 23, 1928) 54 BGE. II 257, Clunet 1929, 497.

In France, a similar decision was wrongly rendered in a case of option of place, *Trib. civ. Seine* (Nov. 16, 1938) *Mouren et Comité de la Bourse d'Amsterdam v. Soc. des Services Contractuels des Messageries Maritimes*, *Gaz. Pal.* 1938 II 728, 40 Bull. Inst. Int. (1939) 98.

¹¹³ *Publications Permanent Court* (1929) Judgment No. 14, Series A, Nos. 20/21 (see *supra* n. 5 at p. 44, *cf.* Judgment No. 15, *id.* p. 122); *British and French Trust Corp. v. New Brunswick Ry. Co.* [1937] 4 All E. R. 516 (see *supra* n. 85).

¹¹⁴ NUSSBAUM, D. IPR. 261; NUSSBAUM, Money 420: "bad law," citing decisions in his favor. *Contra*: WEIGERT, *supra* n. 1, 37, basing the decision on the "law of the currency," which is also questionable.

¹¹⁵ See *supra* n. 105.

E. MORATORIUM AND EXCHANGE RESTRICTIONS

(a) *Moratorium*.¹¹⁶ Moratorium is a temporary statutory postponement, for all debts, or those of a certain kind, of the date when payment is due. Such exceptional deferment may be so short that its effect can be assimilated to the "terms of grace" of the law merchant, traditionally subjected to the law of the place of payment or of the forum.¹¹⁷ Otherwise, the matter is controversial.¹¹⁸

In England, it has been held that the law of the place of payment as such is decisive,¹¹⁹ because the matter relates to the mode of performance. Beale¹²⁰ advocates this view despite a contrary decision of New York,¹²¹ which applied the law of the place of contracting. M. Wolff supports this opinion by the equitable consideration that a debtor should not be required to pay in a country where he cannot collect his own claims.¹²²

In civil law countries, the French Law of 1870 granting prorogations to the payment of bills of exchange and notes, expressly claimed extraterritorial force.¹²³ This law once gave rise to a widespread but unsuccessful debate and to conflicting decisions in numerous countries. A frequent doctrine limited any statutory moratorium to the territory of the state issuing it, even though it was intended to be applied to debts payable abroad. In a similar view, public policy is

¹¹⁶ GHIRON, "Moratorie e regressi nel diritto internazionale privato," 9 Rivista (1915) 152.

¹¹⁷ DEZAND, 10 Répert. 176 § 25.

¹¹⁸ Cour Paris (June 25, 1931) Clunet 1932, 993 declares inapplicable the French moratorium to a bill of exchange accepted in Switzerland for a payment in Paris. The decision is approved by PRUDHOMME, *ibid.*, but questioned by BATIFFOL, *Traité* (ed. 3) 678 n. 44.

¹¹⁹ Rouquette v. Overman (1875) L. R. 10 Q. B. 525, 535; *In re Francke and Rasch* [1918] 1 Ch. 470, 482.

¹²⁰ 2 BEALE 1270.

¹²¹ Taylor v. Kouchaki (1916) 56 N. Y. L. J. (1916) 813.

¹²² Priv. Int. Law 479 § 455.

¹²³ GHIRON, *supra* n. 116, at 161.

always repugnant to the defense of a foreign moratorium.¹²⁴ But the French statute, in fact, merely prohibited the making of protests, an entirely special matter regarding enforcement of obligations flowing from negotiable instruments.¹²⁵

Recent cases of moratoria, decreed in close connection with exchange restrictions, depend on the treatment of such restrictions. We may say that the character and motivation of the individual statutes relaxing the strict observation of contracts have always influenced consideration of such statutes in other countries.

(b) *Exchange restrictions.*¹²⁶ The main principle, again, must be that the law of the contract decides the force of any restriction. This includes two rules: (a) where the governing law itself sets up an obstacle to the discharge of money obligations, the parties are bound to it, irrespective of where the payment is to be performed and where the suit for payment is brought, and (b) restrictions by a state whose law does not govern the contract are immaterial.

This natural principle seems to have become the accepted basis of the international literature of the 1930's and 1940's. The emphasis, however, has not been on the principle at all but on the possible exceptions. These are varied and the over-all picture is confused.

Procedural theory. One of the arguments supporting the disregard of foreign restrictions has been their allegedly territorial nature. Assets within the forum, it has been said, cannot be exempted from enforcement by virtue of a foreign prohibition. Sometimes it has been added that the German restrictions especially, despite their immense scope and

¹²⁴ GHIRON 176 ff.; *contra*: 2 FRANKENSTEIN 242 n. 27.

¹²⁵ 2 MEILI 351.

¹²⁶ FREUTEL, 56 Harv. L. Rev., *supra* n. 1, 30 (informative on problems); much material is collected by RASHBA, "Foreign Exchange Restrictions and Public Policy in the Conflict of Laws," 41 Mich. L. Rev. (1943) 777, 1089. Frankman v. Anglo-Prague Credit Bank [1948] 2 All E. R. 1025—C. A.

ruthless elaboration, expressly refrained from affecting the substance of the creditor's right, in that they limited themselves to the temporary prevention of payment, either voluntary or enforced. Thus, enforcement in England would only be a procedural matter, dependent on English rules.¹²⁷ German and other compulsory systems, however, if allegedly not cancelling the obligation, in fact vitally impair its substance. On the other hand, it is of cardinal importance that we should not extend jurisdiction, based merely on the local situation of an asset, so as to impregnate a foreign-governed obligation with local policy.¹²⁸

Public policy. Foreign legislation on currency exchange has very often been discarded as "political," as confiscatory, or as penal—a rather vague approach.¹²⁹ Moral indignation repudiating the foreign restrictions has been embarrassing when statutes of the forum resorted to similar methods. The best support of a reaction against such foreign measures is afforded by the argument that they pursue in a unilateral manner economic purposes of a state to the detriment of foreign interests. On this ground, rather than on all others alleged, German, Austrian, and Swiss courts have correctly rejected debtors' excuses based on Hungarian, Yugoslavian, and German currency restrictions, respectively.¹³⁰

¹²⁷ Thus, MANN, *Money* (ed. 2) 366 ff. A new surprising position in recognizing Czechoslovakian restrictions has been taken by the English Court of Appeal in *Kahler v. Midland Bank* [1948] 1 All E. R. 811. Although vigorously criticized, this decision has been affirmed by the House of Lords in *Kahler v. Midland Bank* [1950] A. C. 24, discussed by MANN, "Nazi Spoliation in Czechoslovakia," 13 *Mod. L. Rev.* (1950) 206.

¹²⁸ An unwarranted objection to this proviso has been raised by RASHBA, *supra* n. 126, who warns against exaggeration of the principle that substantial contact with the forum is indispensable for the application of the local law considered as public policy.

¹²⁹ See for details, RASHBA, 41 *Mich. L. Rev.*, *supra* n. 126, at 1089 ff.

¹³⁰ Germany: KG. (Oct. 27, 1932) JW. 1932, 3773, IPRspr. 1932 No. 9; LG. Berlin I (Feb. 19, 1932) JW. 1932, 2306, IPRspr. 1932 No. 10.

Austria: OGH. (Dec. 10, 1935) 10 *Z.ausl.PR.* (1936) 398, *Clunet* 1937, 333; cf. WAHLE, 9 *Z.ausl.PR.* (1935) 779.

This view, advocated in the United States,¹³¹ is better suited than a rigid condemnation of all extraordinary foreign measures for the safeguard of national economy. It is also superior by far to a third view which holds the debtor responsible for not being able to pay, since his own state has caused his inability; he should bear the risk of damage occasioned by such legislation while he enjoys the benefits procured by the national economy of which he is a part.¹³²

Is the law of the place of payment influential? This question carries us back to the pretended importance of illegality under the law of a foreign place of performance. By abandoning this dogma, a court may easily defy a foreign currency restriction imposed in an incompetent state.

On the other hand, no one can reasonably be expected to pay English pounds in Chile while this is prohibited there.¹³³ In the two *Baarn* cases, the court did not resort to the Chilean law of obligations and had no need to do so for the purpose of excusing the debtor.¹³⁴ The law governing the contract, whatever it is, will provide for the effect of nonpayment as well as for the question whether payment in local money is to be accounted for at the exchange rate.

Switzerland: 60 BGE. II 294, 310; 62 *id.* 242, 246; 62 *id.* II 108. The rejection extends to the case where the debt is governed by German law, see BG. (March 2, 1937) 63 BGE. II 42. In its decision of July 7, 1942, 68 BGE. II 203, *supra* n. 93, the court agreed with an American judgment because of analogous policy.

In the Swedish case, S. Ct. (June 10, 1942) *Nytt Jur. Ark.* 1942, 389, 394, as cited in MICHAELI 311 f., Bagge applied the same approach, whereas the majority resorted to Swedish law as the law of the contract.

¹³¹ FREUTEL, 56 *Harv. L. Rev.*, *supra* n. 1, at 58. *Cf.* DOMKE, *The Control of Alien Property* (1947) 206, 313.

¹³² Repeated from "Situs Problems," 11 *Law and Cont. Probl.* (1945) at 123. The International Monetary Fund Agreement art. VIII sect. 2 (b) now expressly provides for the unenforceability in the member countries of certain contracts which violate exchange control regulations of a member. See NUSSBAUM, *Money* 541 ff.; HJERNER, *Främmande Valutalag och Internationell Privaträtt* (1956) 37 ff.; MANN, *Money* (ed. 2) 378 ff.; for further references, see bibliographies in 4 *International Monetary Fund, Staff Papers* (1954-55) 337; 6 *id.* (1957-58) 474.

¹³³ This against MANN (ed. 2) 299 ff.

¹³⁴ *The Baarn* (No. 1) [1933] P. 251; (No. 2) [1934] P. 171.

CHAPTER 36

Sales of Movable¹

I. LAWS AND DRAFTS

1. Inadequate Proposals

(a) *Application of general conflicts rules.* Codes, restatements, and most court decisions as well as the great majority of writers have treated sale of goods as the main example for what they conceive to be the conflicts rule for all, or at

¹ Special treatment has been given to this contract in the following treatises: 8 LAURENT 192-229 §§ 126-158; DIENA, 2 *Dir. Com. Int.* 1 ff.; 2 FRANKENSTEIN 295; NUSSBAUM, *D. IPR.* 269-271; BATIFFOL 161 ff.; 2 SCHNITZER (ed. 4) 683 ff.; 2 RESTREPO HERNÁNDEZ 69-76; RAAPE, *IPR.* (ed. 5) 517; KEGEL, *Kom.* (ed. 9) 572 f.; DICEY (ed. 7) 819 ff.

In addition, see BAGGE, "Les conflits de lois en matière de contrats de vente de biens meubles corporels," *Recueil* 1928 V 127; BOERLIN, "Die örtliche Rechtsanwendung bei Kaufverträgen nach der Rechtprechung des Bundesgerichts," 33 *Z.Schweiz.R. (N. F.)* (1914) 199; HERZFELD, "Kauf und Darlehen im internationalen Privatrecht," 4 *Basler Studien zur Rechtswissenschaft* (1933); GUTZWILLER, "Das Kaufrecht," in Gutzwiller & Niederer, *Beiträge zum Haager Internationalprivatrecht*, 1951 (1951) 3-104; FRÉDÉRICQ, "La vente en droit international privé," *Recueil* 1958 I 7; VON SPRECHER, "Der internationale Kauf," 24 *Zürcher Studien zum Internationalen Recht* (1956); PASCHOD, *Les perspectives d'unification des règles de conflit en matière de vente d'objets mobiliers corporels* (Thesis) (Lausanne 1949). For further publications on the subject, see bibliography in *Conférence de la Haye, Actes et documents de la neuvième session*, vol. 1, pp. 321 ff.

Abbreviations in citing international drafts: Vienna Draft 1926—International Law Association, Draft of an International Convention for the Unification of Certain Rules Relating to Conflict of Laws. Contracts of Sale, Contracts for Work, and Contracts for Services. 34th Report (1927) 509 ff.

Hague Committee Drafts 1928—Three drafts on the conflict of laws concerning sales; see *Actes de la sixième conférence* pp. 310 ff., 344 ff., 375, 395 ff. (discussion), 376 ff. (texts).

Hague Draft 1931—Draft of Convention on the Conflict of Laws in the Matter of Sales of Corporeal Movable, prepared by a Special Committee appointed by the Sixth Hague Conference, in their meeting of May 28 to June 2, 1931, *Documents relatifs à la septième session* pp. 4 f. On this draft, see the report by JULLIOT DE LA MORANDIÈRE, *id.* at 5 ff.

Hague Draft 1951—Draft Convention on the Law Applicable to Inter-

least for bilateral, contracts.² Indeed, not one of the numerous decisions in the United States, dealing with the law applicable to sales of goods, expresses any doubt on this point. In appearance, the court always chooses the law of the place of contracting,³ or that of the place of performance,⁴ following some fixed or casual axiom. The truth, however, is that often the real reasons behind the choice of law, notably as they appear in the more recent cases, are much superior to the pretended schematic rule.

In countries of the Latin group, the law of the nationality common to the parties⁵ or the law of the place of contracting, have been applied mechanically as a matter of course. Innumerable German⁶ and a few old Swiss decisions⁷ have indulged in their weird theory, splitting the problems according to whose obligations should be fulfilled at what place.⁸ The law of the place of performance is automatically applied

national Sales of Goods, adopted by the Seventh Hague Conference, held from Oct. 9 to 31, 1951; see *Actes de la septième session* pp. 382 ff. and the English translation in 1 *Am. J. Comp. Law* (1952) 275.

Hague Convention 1955—Convention on the Law Applicable to International Sales of Goods; see *Tractatenblad van het Koninkrijk der Nederlanden* 1955 No. 83. The text of this Convention is identical with the Hague Draft 1951. For the status of signatures and ratifications of the Convention, as of March 1, 1964, see *Revue Crit.* 1964, at 163.

² For the United States, this has been stated by STUMBERG (ed. 2) 402 f.

³ *Carver-Beaver Yarn Co. v. Wolfson* (1924) 249 Mass. 257, 143 N. E. 919; *Montreal Cotton v. Fidelity Co.* (1927) 261 Mass. 385, 158 N. E. 795; *Youssoupoff v. Widener* (1927) 246 N. Y. 174, 158 N. E. 64; *Willson v. Vlahos* (1929) 266 Mass. 370, 165 N. E. 408; *Hollidge v. Gussow, Kahn and Co.* (C. C. A. 1st 1933) 67 F. (2d) 459; *Northwood Lumber Corp. v. McKean, et al.* (C. C. A. 3d 1946) 153 F. (2d) 753. See lists by 2 BEALE 1215; *BATIFFOL* 171 n. 1, 172 ns. 1-3.

⁴ *BATIFFOL* 174 § 193.

⁵ France: *Trib. Dreux* (July 22, 1925) *Clunet* 1926, 643; French law would have been better justified by the seller's French domicile than by the London buyer's French nationality.

Italy: *App. Torino* (Jan. 11, 1937) 36 *Revue Dor* 335, 4 *Riv. Dir. Mar.* (1938) II 89, 100 (a contract c. i. f.). See now *Disp. Prel.* (1942) art. 25 par. 1.

The Netherlands: *Hof Noordholland* (Oct. 12, 1848) *W.* 1019.

⁶ See the surveys by LEWALD 249 ff. and by STAUB-KOENIGE in 3 *Staub* 765, *Anhang zu § 372, Anmerkung 9.*

⁷ Notably, *BG.* (Nov. 7, 1890) 16 *BGE.* 790.

⁸ See *Vol. II* (ed. 2) pp. 469 ff.

under the Treaty of Montevideo and the codes agreeing with this Treaty.⁹

All these overgeneralized rules do not serve the purpose of locating the great bulk of international and interstate sales of goods with adequate assurance.

(b) *Cases without a problem.* The American cases, in which conclusion and "performance" are centered in the same state,¹⁰ according to the usual standards, offer no conflicts question. This observation may stand as a starting point, although there arise doubts when the various duties of the parties have to be complied with at different places.

What we doubtless may recognize as a settled principle is that the local law governs all sales executed and fulfilled at once in one place by both parties, such as in shops and open markets. This also accounts for the usual invocation of the *lex loci contractus* for market bargains in recent formulations.¹¹ The analogous rule for transactions in fairs¹² has been criticized and was eliminated from the last international drafts and from the Hague Convention 1955,¹³ because in modern industrial fairs delivery or payment is as often postponed as in other business.^{13a}

However, it should be likewise regarded as well settled

⁹ See Vol. II (ed. 2) pp. 465 f.

¹⁰ Northrup v. Foot (N. Y. 1835) 14 Wend. 248; McKee v. Jones (1890) 67 Miss. 405, 7 So. 348; Texarkana Pipe Works v. Caddo Oil and Refining Co. (1921) 228 S. W. 586; Hooker v. McRae (1923) 131 Miss. 809, 95 So. 744; Bird & Son v. Guarantee Const. Co. (C. C. A. 1st 1924) 295 Fed. 451; Midland Linseed Products Co. v. Warren Brothers Co. (C. C. A. 6th 1925) 46 F. (2d) 870; Montreal Cotton etc. Co. v. Fidelity Co. (1927) 261 Mass. 385, 158 N. E. 795; Hollidge v. Gussow, Kahn & Co., Inc. (C. C. A. 1st 1933) 67 F. (2d) 459; Frankel v. Johns-Manville Co. (C. C. A. 3d 1958) 257 F. (2d) 508.

¹¹ Polish Int. Priv. Law, art. 8, 1; Vienna Draft 1926, Int. Law Ass'n, 34th Report (1927) 510; Hague Draft 1931, 7 Z.ausl.PR. (1933) 957; Hague Draft 1951 and Hague Convention 1955, art. 3 (3).

¹² Vienna Draft 1926, *supra* n. 1, art. I, B (c) 1.

¹³ See 2 FRANKENSTEIN 318; SCHOENENBERGER-JAEGGLI, Nos. 264, 265, 268; Hague Draft 1931, art. 4, see 7 Z.ausl.PR. (1933) at 958; Hague Draft 1951 and Hague Convention 1955, art. 3. In addition see VON SPRECHER, *supra* n. 1, at 84 f.

^{13a} KEGEL, Kom. (ed. 9) 564 f.; JULLIOT DE LA MORANDIÈRE, *supra* n. 1, at 27.

that when both parties, seller and buyer, are domiciled in the same state, where they undoubtedly make the contract, no foreign law is called for, unless stipulated for in their agreement.¹⁴

Illustration. Two Swiss firms made a sales contract in Switzerland for delivery f. o. b. Porto or Lisbon and payment by letter of credit on banks in Lisbon. Although the goods were to be imported into Switzerland, the Swiss Federal Tribunal, balancing the "criteria" of the presumable intention of the parties, pronounced that Portuguese law should prevail. Neither the parties nor the lower court had thought for a moment of such a possibility, and the federal court itself ended up without reversing the decision because the lower court would nevertheless apply Swiss law as the "presumable Portuguese law."¹⁵

This conception is consistent with the idea slowly emerging from the international drafts¹⁶ that in doubtful cases the choice of law is restricted to the two domicils of the parties to the sale. Nationality, of course, has no claim in this matter.

The main problem, hence, is presented by executory sales contracts, where the domicils of the parties are situated in different countries, especially when other local connections are established by the acts necessary for the fulfillment of the contract.

(c) *Special considerations.* Certain American cases, ap-

¹⁴ See, for instance, the sales contract in *Handelsg. Zürich* (Sept. 3, 1943) 2 *Schweiz. Jahrb. I. R.* (1945) 161, made in Switzerland by two Swiss firms, dealing with goods stored in Cadiz, Spain, and to be delivered there. That the price was payable in Switzerland was mentionable under the theory of presumable intention. See, moreover, *Pound v. Hardy* [1956] A. C. 588—H. L., a case of a sales contract between two English firms which was decided under English law, although the contract dealt with Portuguese turpentine to be delivered f. a. s. the buyer's ship at Lisbon. The same result would be reached under the rule in § 346g (2) *Restatement (Second)*, Tent. Draft No. 6 (1960); see comment *id.* at 106.

¹⁵ BG. (June 22, 1944) 2 *Schweiz. Jahrb. I. R.* (1945) 163; GUTZWILLER, *ibid.*, notes his doubt on the right "balance."

¹⁶ See n. 1 *supra*.

plying the *lex loci contractus*, are dominated by the particular lines of thought to be found in the treatment of the statute of frauds,¹⁷ liquor prohibitions,¹⁸ Sunday contracts,¹⁹ and other exceptional subject matters.

2. The Important Contacts

In view of the nature of ordinary sales contracts, three local connections have been advanced: the seller's domicile, the buyer's domicile, and the place of the most significant performance. The place of contracting has lost favor.

(a) *The law of the seller.* The most recent and best prepared proposals, although not yet many enacted laws, subsidiarily subject obligatory sales contracts concerned with goods to the law of the seller's domicile.²⁰ The Hague Convention 1955, in accordance with the Hague Draft 1951, provides in article 3 (1):

In default of a law declared applicable by the parties, under the conditions contemplated in the preceding article, a sale is governed by the internal law of the country where the

¹⁷ *DaCosta and Davis v. Davis and Hatch* (1854) 24 N. J. Law 319; *Perry v. Mount Hope Iron Co.* (1886) 15 R. I. 380, 5 Atl. 632; *D. Canale & Co. v. Pauly and Pauly Cheese Co.* (1914) 155 Wis. 541, 145 N. W. 372. Cf. Vol. II (ed. 2) p. 503 n. 65.

¹⁸ *Smith v. Godfrey* (1854) 28 N. H. 379, 61 Am. Dec. 617; *Bliss v. Brainard* (1860) 41 N. H. 256; *Keiwert v. Meyer* (1878) 62 Ind. 587, 30 Am. Rep. 206; *Anheuser-Busch Brewing Ass'n v. Bond* (C. C. A. 8th 1895) 66 Fed. 653.

¹⁹ See Vol. II (ed. 2) pp. 565 ff.

²⁰ Polish Int. Priv. Law, art. 8 No. 3: contracts concluded in retail business are subject to the law of the place where the seller is established. The Polish Draft 1961, art. 15 § 2 No. 1 subjects all sales of movables to the law of the vendor's residence.

Czechoslovakia: Int. Priv. Law, § 46 No. 1: sales in carrying on trade or manufacture . . . are subject to the law of the place where the seller's trade or manufacture is established.

Treaty of Montevideo on Int. Civ. Law (1889) art. 34, (1940) art. 38: domicil of the promisor of unascertained or fungible goods.

Institute of Int. Law, 22 *Annuaire* (1908) 290 art. 2 (d); Draft *Nolde, B* (f), 33 *Annuaire* (1927) III 198; *Vienna Draft 1926, Int. Law Ass'n, 34th Report* (1927) 509 B (a); *Hague Drafts at the Sixth Conference, Actes* p. 376, and *Hague Draft 1951*.

vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale is governed by the internal law of the country where this establishment is located.²¹

In a considered argument, the Swiss Federal Tribunal, too, has found the seller's law to be suitable to the entire sales contract, neither the place of payment²² nor that of destination and receipt of the goods being regarded as having any substantial importance.²³ This view finds its main justification in the dominant nature of the seller's promise to provide the buyer with the specific goods needed, while the buyer's obligation to pay the price has nothing distinctive among all the manifold money obligations.

Less impressive is the argument that the seller is in a considerably more insecure legal and factual situation than the buyer, since he bears the risk inherent in the supply and storage of the goods and in the capital investment involved and he carries extensive legal responsibilities, among other things for unknown defects of title and quality. Common law goes even further in extending his liability for damages. The laws cumulate an amplitude of remedies and options for the buyer. However, they do so because the economic power and organization of the seller make him prevailingly the stronger party. Moreover, the present laws do not help buyers to escape stipulations that nullify their legal advantages. Hence, the conclusion that the seller should at least be sure of the applicable law and not find himself open to some

²¹ See English translation of the Convention in 1 Am. J. Comp. Law (1952) 275, from which the above translation differs in only one respect; see *infra* p. 72.

²² Swiss BG. (Dec. 13, 1932) 58 BGE. II 433, 435, *cf.* NIEDERER, 60 Z.Schweiz.R. (N. F.) 257a.

²³ Swiss BGE., 32 II 297, 39 II 167; *cf.* HOMBERGER, Obl. Verträge 50; SCHOENENBERGER-JAEGGI No. 266. More recent decisions confirm the principle that in the absence of a choice of law by the parties the seller's law shall govern: BG. (March 22, 1951) 77 BGE. II 83, (Feb. 12, 1952) 78 BGE. II 74, (July 4, 1953) 79 BGE. II 165.

surprising foreign severity,²⁴ is unconvincing. Besides, such argument is open to the general objection that a party is not necessarily better off with his domiciliary law and should not enjoy domestic privileges in international deals.

Emphasis on the seller's establishment is sufficiently justified by his complicated and characteristic duties in the normal development of interstate or international business. It is at the same time consistent with the need of any firm exporting goods to various countries, to be able to fix sales conditions on the basis of one central law. Where sellers deal in mass sales, as mail-order houses, automobile manufacturers, fruit growers, textile dealers, and many others, the central law cannot conveniently be other than that of the domicil.

(b) *The law of the buyer.* Suggestions that the domicil of the buyer should be taken as the decisive contact, are infrequent. Certain of these proposals were manifestly unfounded.²⁵ But a new effort in this direction has been made for a particular purpose. The international committees working on conflicts rules for sales made several successive attempts to complement the primary rule calling for the seller's law by elaborate exceptions for the benefit of the buyer. In the drafts of the International Law Association and of the Hague Conference, the law of the buyer has

²⁴ HERZFELD, Kauf und Darlehen 85-96.

²⁵ The most surprising contention was expressed by CLAUGHTON SCOTT, British delegate at the Sixth Hague Conference, who asserted that the British government would preferably agree to the application of the buyer's law if to rigid rules at all. He was moved mainly, however, by the idea that the bank of the buyer must examine the documents sent by the seller and should be able to do it according to the buyer's law. Due objections were made to this muddled argument by ALTEN, JULLIOT DE LA MORANDIÈRE and USSING. But the argument is wrong in the first place because the legal points to be examined by any bank are regulated by general conditions and customs rather than national laws. See moreover *infra* Ch. 37 p. 100.

Another advocate of the buyer's law, KRONSTEIN, 2 Bl. IPR. (1927) 126, 133, argues that the seller has sufficient opportunity to ask the buyer to submit himself to the seller's law, and if he does not use it, he should be judged according to the law of the other party!

been declared applicable to the entire contract under certain circumstances :

Vienna Draft, 1926, B (b) :

The law of the buyer . . . shall, however, apply in the following cases :

1. Where the seller or his agent or representative concludes the contract during a visit in the country of the buyer.

2. Where the agent or representative of the seller has his office, whether principal or branch, which concludes the contract, in the country of the buyer and the agent or representative concludes the contract in his own name.

3. Where the agent or representative of the seller has his office, whether principal or branch, which concludes the contract, in the country of the buyer, and the movables at the date when the contract is concluded are situate in the country of the buyer.

This drafting is superlatively careless.²⁶ If an agent sells in his own name, there is no sales contract other than his; if the contract of a casual visiting agent is subject to the local law, it is incomprehensible that contracting by a permanently established representative should not have the same effect; the mere presence of a supply for the seller has no relevant influence on the treatment of a sale of unascertained goods, at least not if delivery is to be made in another country, et cetera.

The eminent lawyers working at The Hague finally reached the following formulation :

Hague Convention 1955, article 3 (2) :

Nevertheless, a sale is governed by the internal law of the country where the purchaser has his habitual residence, or where he has the establishment that has given the order, if the order has been received in such country, whether by

²⁶ See the criticism in Int. Law Ass'n 34th Report (1927) 498 (ERNST WOLFF, MITTELSTEIN, BARRATT).

the vendor or by his representative, agent, or travelling salesman.

What idea inspired the formulation of this exception? During the Sixth Hague Conference some delegates found the ground in a recourse to the *lex loci contractus* as identified with the *lex domicilii* of the buyer.²⁷ Others rejected the *lex loci contractus* on principle, but explained that the exceptional rule was due to the situation of small buyers contracting with travelling agents and unable to ascertain the foreign seller's law.²⁸ It was generally emphasized that the result should not depend on the extent of an agent's authority to sell, but a practical test should be preferred: when the seller or his agent of any kind, including one who may only solicit orders or merely accept an order as a messenger, is present at a place in the country of the buyer and the latter addresses his order to him, the domestic law governs.

The resulting requirements combine the buyer's domicile with one condition of the conclusion of the contract, viz., the arrival of the buyer's contractual declaration at an address in the same country. This is a rather strange rule. If the place where the contract is made is immaterial for the choice of law, as has been rightly assumed, why should a fragment of the making suffice to localize the contract?^{28a} How can we hold that a contract be subject to the law of

²⁷ BASDEVANT, Actes de la sixième session 315, followed by a Belgian and a Polish orator.

²⁸ BAGGE and ALTEN, *id.* 291 ff., 312, 317 n. 2, 318.

^{28a} This view is shared by DÖLLE, "Die 7. Haager Konferenz," 17 *RabelsZ.* (1952) 161, 175. *Contra*: VON SPRECHER, *supra* n. 1, at 82, who takes the position that art. 3 of the Hague Convention 1955 as a whole is based on the principle of *lex loci contractus* (with only two exceptions) and that this is especially true of art. 3 (2). But VON SPRECHER overlooks that art. 3 (2) even applies to the case where only the offer is declared in the buyer's country, whereas the acceptance is made in the seller's country. In this case it is very doubtful where the place of contracting is situated; see Vol. II (ed. 2) pp. 455 ff. Therefore art. 3 (2) cannot be justified as a plain consequence of the *lex loci contractus* rule, not to speak of the objections to this rule itself.

one party, although the contract is made and entirely to be performed in another country? However, if it is only intended by this simple device to avoid the difficulties of searching for the legendary place of contracting, the most essential objection to the *lex loci contractus* remains; the external circumstances of concluding the contract have no necessary relation to the character of the contract.^{28b}

Again, why should the mere presence of a selling agent in the country of the buyer influence the choice of law, if the order itself, for instance, specifies that the goods are deliverable at the principal's factory or at a vessel in a distant port? The problem of agency is not so simple. As explained in another chapter, we must distinguish (1) the authorization of the agent—the extent of which is, in fact, governed by the law of the place where he acts on the authority; (2) the contract between the principal and the agent, which follows its independent conflicts rule; and (3) the contract of the agent with the third party, in our case the sales contract. We cannot always subject this sales contract to the local law of the place where the agent happens to act. Much less is the same tendency justified when a mere messenger intervenes or an agent simply receives an order.

(c) *The law of the shipping place.* The experts at the Sixth Hague Conference took no account of the well-known fundamentals of international trade. Very probably, this happened intentionally.²⁹ But in contrast it should be noted that English and American courts have given consideration

^{28b} The exception in art. 3 (2) of the Hague Convention 1955 has also been criticized in a well-grounded opinion expressed by the German Council for Private International Law, of Feb. 29, 1956; see 24 *RabelsZ.* (1959) 151, 156, and for a French translation: *Conférence de la Haye, Documents relatifs à la huitième session* pp. 234 ff. This opinion aiming at a modification of the Hague Convention 1955 was submitted to the Eighth Hague Conference (1956) by the German Federal Government. However, the majority of delegations to the conference refused to discuss the German objections because the Convention had already been signed by five countries. See *Actes de la huitième session* 37-43, and PETERSEN, "Die 8. Haager Konferenz," 24 *RabelsZ.* (1959) 1, 8 f.

²⁹ See *infra* n. 48.

to mercantile habits, and, as a matter of course, have applied the law of the place at which the seller is bound to make shipment of the goods.³⁰

F. o. b. contract. Thus, it is the practice of English³¹ and American courts to apply the law of the seller's state to the entirety of rights and duties flowing from the contract, whenever the seller, under the contract, has to deliver f. o. b. at his factory,³² or to a carrier,³³ cars,³⁴ railway express,³⁵ or at a shipping point.³⁶ Correspondingly, the law of the buyer's place applies when delivery is due at the buyer's place.³⁷

A perfectly justified exception is made when, contrary to the prevailing usage, in an inexact, though not rare, language, the clause f. o. b. is meant only to fix the price. When, for instance, two lumber dealers in Pittsburgh contracted for a car of lumber "f. o. b. Montreal," but the seller fulfilled his obligation by shipping the goods in Ohio, the court correctly applied not Quebec but Ohio law.³⁸

³⁰ *Shohfi v. Rice* (1922) 241 Mass. 211, 135 N. E. 141. More cases to the same effect will be cited in the following notes and on various occasions in Ch. 37.

Likewise, e.g., Switzerland: Trib. Genève (March 4, 1932) Sem. Jud. 1932, 523 (place of loading and furnishing of a letter of credit). In addition, see the cases cited in Restatement (Second), Tent. Draft No. 6 (1960) 107.

³¹ *Benaim & Co. v. Debono* [1924] A. C. 514.

³² *Kansas City Wholesale Grocery Co. v. Weber Packing Corp.* (1937) 93 Utah 414, 73 Pac. (2d) 1272; *In re Pittsburgh Industrial Iron Works* (D. C. W. D. Pa. 1910) 179 Fed. 151.

³³ *Johnson County Savings Bank v. Walker* (1908) 80 Conn. 509, 69 Atl. 15; *Denio Milling Co. v. Malin* (1917) 25 Wyo. 143, 165 Pac. 1113.

³⁴ *Northwestern Terra Cotta Co. v. Caldwell* (C. C. A. 8th 1916) 234 Fed. 491; *State of Delaware, for Use of General Crushed Stone Co. v. Massachusetts Bonding & Ins. Co.* (D. C. Del. 1943) 49 F. Supp. 467: moratory interests on the price are due according to Pennsylvania law, not because the "entire contract" was to be performed in Pennsylvania as headnote 13 asserts, but because seller has "accepted" the contract in his place in Pennsylvania and his responsibility ceased with delivery f. o. b. Harrington, Pa.

³⁵ *Willson v. Vlahos* (1929) 266 Mass. 370, 165 N. E. 408.

³⁶ *Griffin v. Metal Product Co.* (1919) 264 Pa. 254, 107 Atl. 713.

³⁷ *Price v. Burns* (1902) 101 Ill. App. 418; *York Metal & Alloys Co. v. Cyclops Steel Co.* (1924) 280 Pa. 585, 124 Atl. 752.

³⁸ *Ward Lumber Co. v. American L. & M. Co.* (1915) 247 Pa. 267, 93 Atl. 470. The contract was made in Ohio, *cf. infra* Ch. 37 p. 83 n. 17.

A recent decision of the highest Swiss court applies the law of the place of f. o. b. delivery as a matter of course.³⁹

In Germany, this question has been neglected, although there is a distinguishable controversy regarding jurisdiction. In commercial forms and regulations, the f. o. b. place has frequently been indicated to be the "place of performance," and this has sometimes been understood to include a stipulation for submission to the jurisdiction of the courts of this place.⁴⁰ According to a contrary view, such clauses are merely concerned with the passing of the risk of loss.⁴¹

C. i. f. contract. As the clause of "cost, insurance, freight" is essentially a modified f. o. b. clause, we may consider the importance of the shipping places in both instances to be analogous. The tendency of business is equally strong to regard the place of shipping, at the f. o. b. place or to the c. i. f. place, as the "place of performance." The courts have known this for a long time. It is true that former Illinois decisions declared that in a sale c. i. f. Antwerp with shipment in New York, the seller's damages for non-performance were to be measured according to Belgian law as that of the place of "delivery."⁴² But these decisions were "in violent contrast with the general rule in other jurisdictions."⁴³ A much-noted English decision concluded from this phenomenon that English jurisdiction over a contract,

³⁹ BG. (Dec. 3, 1946) 72 BGE. II 405, 411: sale "wagon Tanger"; in this case, it is true, the goods were also to be examined and accepted in Tangier, but the court treats this acceptance as merely provisional. In another case the Federal Tribunal applied Swiss law in spite of an "f. a. s. Antwerp" clause, finding that this clause in the case at bar only meant to fix the price and did not designate the place of delivery, which was found to be Switzerland; BG. (July 4, 1953) 79 BGE. II 165. Thus the Federal Tribunal followed the same principle as the court in the above mentioned Pennsylvania case, *supra* n. 38.

⁴⁰ See HEUER, "Von der Fob-Klausel," Leipz. Z. 1925, 26; DÜRINGER-HACHENBURG (ed. 2) Anhang zu §§ 355, 358.

⁴¹ GROSSMANN-DOERTH, *Überseekauf* 181-190.

⁴² Staackman, Horschitz & Co. v. Cary (1916) 197 Ill. App. 601.

⁴³ L. O. VAN DOREN, *The Law of Shipment* (1932) 498, citing *Seaver v. Lindsay Light Co.* (1922) 233 N. Y. 273, 135 N. E. 329, disapproving the Staackman case.

based under Order XI r. 1 (e) on the place of performance, was to be denied where goods were shipped from Hamburg c. i. f. Tyne on the Thames.⁴⁴ German trade forms and general conditions of mercantile organizations have widely identified the shipping place in c. i. f. contracts with the "place of performance."⁴⁵ Again, this usually implies that risk of loss passes to the buyer when the goods are shipped at the port of dispatch. But it means also, in my opinion, that where the shipping place is in the seller's country, the parties intend that the courts of his country should have jurisdiction.⁴⁶

II. THE SIGNIFICANCE OF SHIPMENT AND ANALOGOUS ACTS

I. The Concept of Delivery to the Carrier

In the most usual types of international commerce, shipment is included among the obligations of the seller, although he is not obligated to bear the risk of loss during the travel of the merchandise. The English and Uniform Sales Acts have accepted this old and universal conception, stating that where, in pursuance of a contract, the seller delivers the goods to a carrier for the purpose of transmission to the buyer, property and risks presumably pass to

⁴⁴ Crozier, *Stephens & Co. v. Auerbach* (1908) 2 K. B. 161—C. A., correctly criticizing *Barrow v. Myers and Co.* (1888) 4 T. L. R. 441.

Another, definitely wrong, view was again taken in an obiter dictum by Lord Phillimore, in *N. V. Kwik Hoo Tong Handel Maatschappij v. Finlay & Co.* [1927] A. C. 604, 609—H. L., where the goods had to be shipped from Java to Bombay c. i. f. and the learned Judge asserted that normally *lex loci solutionis* would dictate the application of the law of the place of delivery, i.e., of Bombay.

⁴⁵ GROSSMANN-DOERTH, *Überseekauf* 245: "outright official formula" (in business).

⁴⁶ As to risk, see GROSSMANN-DOERTH, *id.* 247, 361 ff. As to jurisdiction, the same author, *id.* 245 ff., 362-364 construes the German clauses determining the "place of performance" to the effect that a seller in Hamburg stipulating for "f. o. b. Amsterdam" does not want to submit himself to the Dutch courts, and therefore any clauses fixing "the place of performance" should not be referred to jurisdiction, unless they say so, or the case is exceptional. Similarly BRÄNDLE 119. But the conclusion is wrong in the case where the shipping place is in Germany.

the buyer.⁴⁷ In traditional and widespread commercial thinking, much emphasis is laid on this act of the seller, because it forms the pointed end to all the multiple activities of the seller and indicates the time and place at which the goods, although not yet in the physical power of the buyer and very often not yet in his ownership, leave the custody and risk of the seller.

The types of commercial sale contracts are very diverse, however. They differ according to the peculiarities of various kinds of goods and according to the habits of the various trading centers and commodity exchanges. It has often been contended that the variety is too great to allow legal rules, or even uniform proposals for drafting individual sales conditions, to comprehend commercial sales in general. This objection, despite its annoying repetition by some lawyers, has not prevented the Scandinavian Sales of Goods Act of 1906, the Warsaw-Oxford C. I. F. Rules (1932) and the various drafts of an International Sales Act from establishing comprehensive regulations for sales in general, as a basis which may be modified for the various types of contracts. These generalizations, however, were only possible on the ground that the entire distribution of rights and duties in sales contracts rests on the determination of the place where the goods are expected to arrive at a certain time and to leave the seller's orbit. Manufacturers most often sell their products, within the country and in export trade, to be taken at the factory yard or at the station of the factory. The many cases, in themselves somewhat different, where the seller's obligation of active dealing with the goods extends to the dispatching of the goods from a seaport, as in most overseas transactions, form a group together with the others where the seller has to bring the

⁴⁷ Sale of Goods Act, s. 18 rule 5 (2); Uniform Sales Act, § 19 rule 4 (2); Uniform Commercial Code, § 2-509 rule (1) (a).

thing sold to a river port, to barges, or to cars at a point on the way. On the other hand, the contract may promise to have the goods at the disposition of the buyer at his own place or station. The act of providing the goods at the seller's place of shipment, at an intermediate place, or of rendering them at the buyer's place or at any other place, has been technically termed *délivrance* (delivery) in the drafts of an International Sales Act. But since the American Uniform Commercial Code does not accept this technical meaning of delivery, we have to speak of shipment and tender of delivery. A possible name would be "*surrender*" of the goods by the seller.^{47a}

Delivery or surrender in this sense is doubtless the center of the relationship created by sale between parties of different countries. In a c. i. f. contract, for example, the seller procures the contracts of freight and insurance up to the port of destination, but he bears responsibility and risk of loss only until shipment. This means that, if he sends goods conforming to the contract from his place to the port of shipment and the goods perish or deteriorate on the way with or without his fault, he has to substitute other goods in time or be in default. So soon, however, as he delivers the goods to the carrier and they are loaded or possibly when they merely reach the custody of the carrier, events beyond the control of the parties are at the risk of the buyer. According to the American draft of a sales law, such delivery would include transfer of title, which, in the prevailing opinion, rather, occurs when the documents, such as the invoice,

^{47a} This term had been adopted by the Restatement (Second), Tent. Draft No. 6 (1960) 101, 108, with explicit reference to the first edition of this book; but "delivery" was substituted for "surrender" at the 37th Annual Meeting of the American Law Institute on May 18-21, 1960, by a vote of 30 to 25; see Proceedings 548. On the possible differences between the concept of "*délivrance*" in the drafts of an International Sales Act and the meaning of "delivery" see HONNOLD, "A Uniform Law for International Sales," 107 U. of Pa. L. Rev. (1959) 299, 317 ff.

bill of lading, bill of exchange, and insurance policy, are received by the buyer or his bank. But delivery includes the extremely important act of specification (identification, specialization) by which specified goods take the place of the unascertained goods described in the contract. In the correct solution, warranty of quality is directly dependent on the conditions existing at the time of surrender.

This concept of surrender has a variable element, since according to the different basic types used in commerce, the seller may tender the goods in any one of the places to be touched by the goods. In every case, it indicates the salient point in the course of any individual transfer. The activities of concluding the contract and preparing delivery, as well as the subsequent happenings when the goods travel, are unloaded, tendered, examined, accepted or refused, and stored, and when the documents are sent and received, are none of these so significant and distinctive of the contract in the estimate of average parties, as delivery to the carrier.

2. Shipment and Conflicts Law

Curiously enough, very rarely has the possibility been envisaged of connecting sales contracts with the law of the place of delivery to the carrier, except under the heading of *lex loci solutionis*, which, however, could refer to any act and in particular the physical reception of the goods.^{47b} Even the writers especially devoted to the study of the commercial facts have neglected, if not definitely argued against, employment of this contract.

In the first place, it has been emphasized that the parties

^{47b} The significance of the place of delivery is emphasized by DICEY (ed. 7) 821 and by BATIFFOL, *Traité* (ed. 3) 653. Following these authors and the first edition of the present book, the Restatement (Second), Tent. Draft No. 6 (1960) § 346g (1) subjects sales of movables to "the local law of the state where under the terms of the contract the seller is to surrender the chattel." Apart from the substitution of "to deliver" for "to surrender" (see *supra* n. 47a), the American Law Institute at its 37th Annual Meeting (1960) has approved of this rule; see Proceedings 545-548.

select the f. o. b. point within the travel of the goods according to such facts as the tariffs of carriers, timetable of vessels, suitability of ports to the kind of merchandise sold, rates of transshipment, and business connections with transportation and insurance personnel.⁴⁸ However true this may be, when the parties agree on such point, they do connect the contract with this place more than with any other. That the intention of the parties is not really directed toward any determined law, is no valid objection, so long as they have not specifically agreed on a different law.

Furthermore, it has been stressed that separate important local connections exist at the places where the documents are endorsed, or dispatched, or received.⁴⁹ But if any rule of conflicts is needed to take care of these accompanying relations, it must be a special rule.⁵⁰

Shipment in a third country. Much more weight is attributable to the obvious consideration that the shipping point may be situated elsewhere than in countries of the parties. Neither the hypothetical intention of the parties, nor an objective evaluation of such cases can refer the determination of the applicable law merely to the place of shipment.

We have seen how instinctively the American courts have applied the law of the seller or of the buyer according to the situation of the f. o. b. point in the state of either. Again, there are American cases concerning an f. o. b. point in a third jurisdiction, that may help to find our way, although these decisions are objectionable on other grounds.

In a recent case, a firm in New York, dealing in malt and hops, through its commission broker in New Jersey, received an order of a New Jersey company for Polish hops, to be imported f. o. b. Philadelphia docks. The New Jersey court ascertained the acceptance of the order in New York and for this customary flimsy reason applied the law of

⁴⁸ BRÄNDLE 120.

⁴⁹ BRÄNDLE 119.

⁵⁰ See *infra* Ch. 37 pp. 100-101.

New York as the *lex loci contractus*.⁵¹ Despite the formalistic approach, it was correct to disregard the f. o. b. place in another state, which resulted incidentally from the importation.

Where a conditional sale was made in Massachusetts, the domicile of the buyer, and the seller was a Pennsylvania corporation, the shovel sold was to be delivered "f. o. b. Manchester, New Hampshire." The decision of the Massachusetts court has often been criticized because of its failure to satisfy the law of the situs, New Hampshire, with regard to the retaking of possession.⁵² The court, however, was right in holding the delivery in New Hampshire immaterial for determining the law of the obligatory contract, even if no doubt had existed about the length of time during which the shovel should stay there. That the law of the forum was chosen could be justified by the domicile of the buyer in addition to the circumstance that delivery f. o. b. Manchester was stipulated at the buyer's request and for his convenience. He wanted the shovel there and used it there, though not for long.

The English courts, too, are correct in applying English law to a contract made between English firms for delivery c. i. f. London, although the goods are to be shipped from New York.⁵³ The real justification is that the shipping point in a foreign country appears immaterial for the legal relationship between the parties. *Lex loci contractus*, resulting in the application of English law, was incidentally harmless in one case,⁵⁴ where hops were to be sent from the Pacific

⁵¹ *Manhattan Overseas Co. v. Camden County Beverage Co.* (1940) 125 N. J. Law 239, 15 Atl. (2d) 217, *aff'd* (1941) 126 N. J. Law 421, 19 Atl. (2d) 828.

⁵² *Thomas G. Jewett v. Keystone Driller Co.* (1933) 282 Mass. 469, 185 N. E. 369, 87 A. L. R. 1298. See Ch. 37 p. 86 n. 25.

⁵³ *Manbre Saccharine Co., Ltd. v. Corn Products Co., Ltd.* [1919] 1 K. B. 198.

⁵⁴ *Biddell Bros. v. E. Clemens Horst Co.* [1911] 1 K. B. 214; [1911] 1 K. B. 934—A. C.; reversed [1912] A. C. 18—H. L.

Coast to England, since the selling corporation was established in London as well as in San Francisco and the buyer in Sunderland, England. Had the seller been domiciled only in San Francisco, the courts would have inconveniently subjected him to English law, as also the Hague Convention 1955 does, merely because the order was given in England.

On the other hand, where a machine is to be installed at the place of the buyer, it follows that the buyer's place is the only decisive connection.⁵⁵

III. CONCLUSION

The international drafts have achieved a great progress in supplanting the *lex loci contractus* and the *lex loci solutionis*, the two mechanical and ill-fitted rules, by the law of the seller's domicile. Most decisions are really sustained by actual circumstances including this fact of domicile. But it is erroneous to formulate exceptions for the law of the buyer either on the basis, again, of the *lex loci contractus* or of a fragment of the process of contracting. International sales in which the goods move from one country into another, gravitate toward the side of the buyer only if "delivery" is due at a place in his orbit.

There can be no doubt of this when delivery, always in the meaning explained before, has to be effected at the buyer's residence, factory, station, or pier. A buyer expecting the goods to be brought and offered to him in his own country quite as if they came from a domestic seller, can reasonably expect to have his domestic law applied. Nor would any other solution suit the situation of the seller. He may have his own storehouse in the country from which he intends to take the merchandise, or his agent may win him customers by promising local delivery. He also may

⁵⁵ Canada, Ontario: Linderme Machine Works Co. v. Kuntz Brewery, Ltd. (1921) 21 O. W. N. 51 (right to reject).

send his wares to his correspondent on a bill of lading to his own order, retaining full title until subsequent delivery by the agent against cash. These are cases clearly requiring the application of the local law. To implement the vague ideas of the parties or the general conditions annexed to a sale, as respects primary obligations, default, excesses, substitute goods, and warranty, the law at the place of delivery has real advantages that have been too generally attributed to the law of the place of performance.

Between the extreme cases where delivery is to be made either at the seller's or the buyer's place, the intermediate points usually emphasized in trade can most often be counted within the sphere of one or the other. When an American or Canadian merchant ships goods on a through bill of lading by rail with subsequent transshipment to an ocean vessel, the transfer to the initial carrier, of course, points to his state's law even though the first stage of the carriage may end beyond the state line. It should not make any difference that in other countries no such genuine through bills are in use. Generally, whether the goods are shipped at a point in the seller's state or, in an overseas transaction, in a foreign state on his side of the ocean—as a Canadian seller f. o. b. New York, or a Swiss exporter c. i. f. New York with shipment in Amsterdam—the contract is still centered nearer to the seller. Nor is there a valid reason to abandon the seller's law if the Rotterdam agent of an Argentine exporter in the latter's name sells grains c. i. f. Rotterdam, shipment Buenos Aires, to a Swiss importer. Such persons domiciled and contracting in Europe know that the most important part of the transaction must occur overseas.

Illustration. In a case decided by the Swiss Federal Tribunal (July 20, 1920) 46 BGE. 260, a London firm through a Swiss agent sold to a Swiss firm in Switzerland Orange Pekoe tea from Ceylon c. i. f. Marseille. Swiss law was

applied because both parties invoked it. That the foreign firm "had to expect that the acts of its representative would be determined under Swiss law," should have bearing only on his authority. If the court had not been bound by stipulations of the parties on the applicable law, English rather than Swiss law ought to have determined the issue.

On the other hand, the situation is substantially different when the goods travel overseas at the risk of the seller and must be presented to the buyer at some place on the continent where the buyer's domicil is located. Where a Japanese trader sells silk to a manufacturer in Lyons according to the standard conditions of Lyons, in which the chapter on "shipwreck and other risks of transportation" annuls the contract in case of loss—one of the "avoidance" clauses usual in sales for arrival—the parties concentrate the effect of the contract in the port of arrival in Europe. As the natural contact therefore is not at the seller's place, it is at the buyer's place.

It deserves consideration whether the division of the countries into legal systems does not offer an analogous contrast. Suppose a United States seller ships goods from New York to Panama for a Colombian buyer, with the clause "to arrive" in Panama, would the buyer not expect to have his law applied rather than that of the United States? Without a profound difference in legal systems, where, for instance, goods are to be sent from a seller in Michigan *f. o. b.* Duluth, Minnesota, to a buyer in Chicago, no such importance can be attributed to the *f. o. b.* clause.

Apart from these uncertain enlargements, we may summarize as follows. The seller's law should be resorted to in all doubtful cases, with the exception that the internal law of the buyer governs the contract where the goods are to be surrendered at a place situated within the buyer's country. In other words, we may say that the law of the buyer's place should govern only if the parties have agreed on it, or if the contract is for surrender in the country of the

buyer or at a place fixed at his request outside the seller's orbit.

What is a party's place. The Vienna Draft defined "the law of the seller" by the following provision: "If the sale is effected by an individual in the course of commerce carried on by him, or by a firm, association, or corporation, the law of the seller shall be the territorial law of the country where, at the date when the contract is concluded, the office, whether principal or branch, which concludes the contract, is situate."⁵⁶

As already pointed out, the Hague Convention 1955 declares applicable "the internal law of the country where the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale is governed by the internal law of the country where this establishment is located."⁵⁷

The Convention refers to the place where the "order" is received so as to eliminate the vexatious question of where the contract is made.^{57a} Moreover, the Convention uses the word *établissement*, which is meant to include headquarters as well as branch offices and even offices without commercial character.^{57b} In this regard the translation of the Convention in 1 *American Journal of Comparative Law* (1952) 275 is not quite correct, since it translates *établissement* by "branch office."

Illustration: *A* has his habitual residence in country *X* without doing business there, and has a place of business in country *Y*. He enters into a sales contract with *B*, who has

⁵⁶ Int. Law Ass'n, Report 34th Conference (1927) 509, B (a) (1). Cf. Poland, Int. Priv. Law, art. 9 No. 4: domicile of a merchant with respect to the course of his business is the seat of his enterprise; if he has several enterprises, the seat of that enterprise with which the transaction has been concluded, is decisive.

⁵⁷ See *supra* n. 21 and accompanying text.

^{57a} See JULLIOT DE LA MORANDIÈRE, *supra* n. 1, at 26; VON SPRECHER, *supra* n. 1, at 78; DÖLLE, *supra* n. 1, at 175 n. 3.

^{57b} See JULLIOT DE LA MORANDIÈRE, *supra* n. 1, at 26.

his habitual residence and is doing business in country Z. The order is received by A at his office in Y. According to the French text of article 3 (1), second sentence, Hague Convention 1955, it is clear that the law of Y governs the contract.

Therefore the term "establishment," uncommon though it be in this context, should be preferred in order to cover the broad meaning of the rule in question. In other cases also the French text may raise doubts.

Illustration: Assume the same facts as in the preceding illustration except that A does not receive the order at his office but rather at a hotel in another city of country Y. Thus the order is not received "*par un établissement*" though it is received in the "*pays où est situé cet établissement,*" and not in the "*pays où le vendeur a sa résidence habituelle.*" Considering that there is less contact with the country of the vendor's habitual residence than with the country of his establishment, it seems to be more appropriate to apply the latter's law.

IV. SPECIAL KINDS OF MOVABLES

1. Sales on Exchange

Sales of commodities in the course of transactions in an authorized exchange, like sales on a stock exchange,⁵⁸ are subject to the usages of the institution. They are, moreover, subject to many administrative provisions and are executed in forms not used in ordinary business. From all these reasons, it has been concluded that such contracts are tacitly submitted by the parties to the local law,⁵⁹ or objectively expressed, that this is the only adequate law.⁶⁰

⁵⁸ BATIFFOL 182 § 199.

⁵⁹ See Vol. II (ed. 2) p. 387.

⁶⁰ Czechoslovakia: Int. Priv. Law, § 45.

Poland: Int. Priv. Law, art. 8 No. 1, and Draft 1961, art. 14.

Hague Convention 1955, art. 3 (3).

BRÄNDL, Int. Börsenprivatrecht 59; NIBOYET in Recueil 1927 I 101 ff., 33 Annuaire (1927) III 213; FRÉDÉRICQ, *supra* n. 1, at 57 f.; VON SPRECHER, *supra* n. 1, at 82 f.

2. Other Sales under Administrative Control

For similar reasons, sales are considered localized when they are made "by auction, by judicial process, by order of the court, or under an execution."⁶¹

Registered chattels—ships. In view of the significance of registration, in a widespread opinion, the sale of registered vessels is governed by the law of the place of registration or of the flag. Thus, the Vienna Draft states:

As regards contracts of sale of ships, vessels and aircraft which are registered, the law applicable shall be the territorial law of the country where the ship, vessel, or aircraft is registered.⁶²

This rule has been likewise suggested by Judge Hough in a dissenting opinion of 1921, where the court followed the *lex loci contractus*, on the ground that registration only gives advantages to the purchaser and is not essential for the passing of the title between the parties.⁶³ The register publicizes the legal situation of the vessel for the information of presumptive buyers, whose rights relating to third persons are more or less strongly influenced by the entry in the register.⁶⁴

In many countries, this situation is complicated by prohibiting sales of registered vessels to aliens⁶⁵ and prescribing

⁶¹ Text of Vienna Draft, art. I, B (c) (1), following an American proposal, Int. Law Ass'n, 34th Report (1927) 506.

⁶² Art. I, B (c) (2): a simplification of a proposal of the Int. Chamber of Commerce (34th Report 1927, p. 506). Similarly most writers, see NIBOYER, Recueil 1927 I 102; NIBOYER, 4 Traité 496 § 1228.

⁶³ Gaston, Williams & Wigmore of Canada, Ltd. v. Warner (C. C. A. 2d 1921) 272 Fed. 56, 66.

In the old case, Lynch v. Postlethwaite (1819) 7 Mart. (La.) 69, 12 Am. Dec. 495, the *lex loci contractus* (Mississippi) was applied, to satisfy La. C. C. art. 10.

⁶⁴ This is admitted by BATIFFOL 173 § 192 who nevertheless insists on *lex loci solutionis*.

SCERNI, 77, cf. 195 recognizes the ordinary test of *lex loci contractus*.

⁶⁵ E.g., England: Merchant Shipping Act, 1894, s. 1.

that sales be concluded before their consuls for the purpose of registration.⁶⁶ The parties, of course, may disregard a registration existing at the time of sale, if the buyer is not interested in maintaining the previous nationality of the vessel.⁶⁷ They can agree on any other law of the contract. But the seller would be responsible to his home authorities, and possibly the contract would be considered invalid in other countries as well.

3. Patent Rights⁶⁸

The relation of a patent right to the territory of the country where it has been created, and the registration required for transfer of such rights, have also sometimes been taken as suggesting a choice of law for sales promising such transfer.⁶⁹ But as very often inventors acquire patents in fifty states and may dispose of many of them in one contract, this would imply the application of dozens of private laws.

Little authority is to be found on the sale of patent rights, and this only if we include contracts for the granting of licenses. But there is no obstacle to extending the conflicts rules whatever they may be, to such contracts, whether they are construed as sales or otherwise. The few cases in point apply the common tests rather than localizing the sale at the patent roll.

Illustrations: (i) In an English case, a German firm, evidently under German law, granted a license under an

⁶⁶ E.g., Peru: C. Com. art. 591; certain privileged debts must be paid before the sale, *id.* art. 863.

Cuba: C. Com. art. 578.

⁶⁷ This suffices to render justice to BATIFFOL's desire, 174 n. 1, to recognize the sale of a Norwegian vessel in Japan to be brought into Japanese ownership.

⁶⁸ It may be remembered that the assignment of a patent right is coordinated to a sales contract quite as a transfer of title to a sale of a tangible thing. Exclusive licenses are also bought, although agreements on nonexclusive licenses may be better compared with leases.

⁶⁹ Thus recently, BATIFFOL 183 § 200.

English patent to another German firm, but subsequently infringed this agreement by giving another license to a third person in an English contract. The court recognized the application of German law to the obligations of the grantor of the license.⁷⁰ The case, of course, did not lend itself to a different choice of law.

(ii) Where two patented machines were sold in St. Louis with the option to purchase the patent rights for several countries and the right to have the machines patented in any European country, in an action for breach of contract the court considered the statute of frauds of the place of contracting and of the forum, but did not even mention the states in which the objects had been or might be patented.⁷¹

The German practice, a little richer,⁷² brings out the same point somewhat more clearly. In addition to various cases where two domestic parties contracted with respect to foreign patents,⁷³ the Reichsgericht also applied German law to the assignment of the exclusive exploitation of an Austrian patent, by a German chemist to a Viennese firm.⁷⁴ The German seller of an invention to be patented by him in Italy is, of course, obligated under German law to take all the steps prescribed by Italian patent law.⁷⁵

4. Copyright

The modern right of authors to their literary or artistic products is not fixed in the territory for which protection is granted. It is distinguishable from the physical thing—manu-

⁷⁰ *Actien Gesellschaft für Cartonnagen Ind. v. Temler and Seeman* (1900) 18 R. P. C. 6.

⁷¹ *Obear-Nester Glass Co. v. Lax and Shaw, Ltd.* (C. C. A. 8th 1926) 11 F. (2d) 240.

⁷² See NUSSBAUM, D. IPR. 338 n. 2.

⁷³ E.g., RG. (Oct. 11, 1911) 11 *Markenschutz und Wettbewerb* 254; (July 1, 1931) 31 *Markenschutz und Wettbewerb* 534, IPRspr. 1931, 197.

⁷⁴ RG. (June 10, 1933) *Leipz. Z.* 1933, 1325; IPRspr. 1933, 44. It was also stressed that the price was fixed in marks and the parties invoked German law.

⁷⁵ RG. (July 5, 1911) 11 *Markenschutz und Wettbewerb* 142.

script, painting, blueprint, film, etc. But it is not a mere part of the right of personality as one influential theory construed it.⁷⁶ It is a privilege accorded by law as an absolute right to the ideal content embodied in the work. Hence, when transfer of a copyright is promised, there is no fixed local connection necessitating conflicts rules different from those referring to tangible objects. The agreement for transfer can be distinguished from the transfer itself quite as well as in the case of chattels. In fact, there are many formalities prescribed for the assignment of an author's right,⁷⁷ but they do not, as a rule, affect promises to assign it.

In this light, the German Supreme Court analyzed a contract of publication concluded between Viennese authors of an operetta with a publisher of Stuttgart, Germany, according to the presumable intention of the parties, as in any other contract for work. The interpretation in favor of the place of the publisher, however, is doubtful.⁷⁸ My own suggestion, in the absence of agreement by the parties on the applicable law, is that the ordinary rules advocated above for chattels should apply.

Indeed, when a writer or artist himself promises to transfer—totally or partially—his right in the work to the extent that he has the power to do so,⁷⁹ his own domicile is a fair point of connection. And where licenses are issued in mass, as to movie theatres, the place of the vendor again is an appropriate contact.

⁷⁶ Theory of OTTO GIERKE, abandoned by most writers.

⁷⁷ See P. OLAGNIER, 2 *Le droit d'auteur* (1934) 292.

⁷⁸ RG. (Oct. 29, 1927) 118 RGZ. 282, see Vol. II (ed. 2), pp. 436, 437.

⁷⁹ Cf. RABEL, 27 *N. F. Grünhut's Zschr.* (1899); MICHAELIDES-NOUAROS, *Le droit moral de l'auteur* (Lyon 1935); Inter-American Convention on the Rights of the Author in Literary, Scientific, and Artistic Works, of July 22, 1946, art. XI.

Sales of Goods: Scope of Rule

I. CONTRACT AND PROPERTY

1. Translative Effect of Contract

CLEAVAGE of municipal systems.¹ As is well known, in the group of laws following the Roman model the sales contract creates obligations only. Title is transferred by a distinguishable act of conveyance, which, in its more refined form, is also considered a "contract," but one restricted to the declarations of giving and accepting ownership. If the Roman pattern is strictly observed, such transfer needs, in addition to this specific consent, the surrender and acquisition of physical possession (*traditio*), or at least a substitute therefor, such as *brevi manu traditio* (the buyer, tenant of possession for the seller, becomes possessor), *constitutum possessorium* (the seller makes himself the buyer's tenant of possession), *cessio vindicationis* (the seller assigns his claim to possession). When a chattel is bought

¹ See RABEL, *1* *Recht des Warenkaufs* 28 ff.; VAUTHIER, "Le transport de la propriété en cas de vente internationale d'objets mobiliers corporels," 29 *Revue Dr. Int. Comp.* (1952) 143; USSING, "Le transfert de la propriété en droit danois," 4 *Revue international de droit comparé* (1952) 5; GOTTHEINER, "Zum Eigentumsübergang beim Kauf beweglicher Sachen," 18 *RabelsZ.* (1953) 356; LAGERGREN, *Delivery of Goods and Transfer of Property and Risk in the Law on Sale* (1954); SOVILLA, *Eigentumsübergang an beweglichen körperlichen Gegenständen bei internationalen Käufen* (1954); LALIVE, *The Transfer of Chattels in the Conflict of Laws* (1955); J. C. SCHULTZ, *Eigendomsverkrijging bij koop van roerende goederen in het Westeuropes internationaal privaatrecht* (1955); ZAPHIRIOU, *The Transfer of Chattels in Private International Law* (1956); PASCHOUD, "Le projet de Convention de la Haye sur la loi applicable au transfert de la propriété en cas de vente à caractère international d'objets mobiliers corporels," 4 *Nederl. Tijds. Int. R.* (1957) 254; FRÉDÉRICQ, "La vente en droit international privé," *Recueil* 1958 I 7, 68 ff.; KRUSE, "What Does 'Transfer of Property' Mean with Regard to Chattels? A Study in Comparative Law," 7 *Am. J. Comp. Law* (1958) 500.

in a shop and taken home, the two contracts, obligatory and translatory, are simultaneous.

The last-mentioned type of transaction is called "sale" in the still-maintained terminology of the common law, recalling ancient Germanic law (*sala*). In the Anglo-American sales acts as well as in many codes of the Latin group, this appears as the basic kind of sales contract. The sales acts and many civil codes even continue to make it appear as though in principle any sales contract concerning a movable, would transfer ownership to the buyer. Within this group of conservative formulas, there is, however, a certain division. The American Uniform Sales Act, section 19, rule 1, presumes that the parties intend the property to pass to the buyer when the contract is made. The *Code Napoléon*, article 1138, makes the buyer of the chattel the owner "at the moment when it ought to have been delivered," which was commonly, against occasional protest, construed as meaning only the time of contracting; the text has been taken more seriously in recent comment. Yet, *en fait de meubles, la possession vaut titre*, Civil Code, article 2279; the prevailing doctrine, therefore, restricts the translative effect of a sale without transfer of possession so as to give the buyer title only as between the parties. Some modern French scholars seem inclined to recognize that such property, not effective against third parties, is no property at all.²

In daily application to modern life, all these contrasts are not nearly so acute as they seem in theory. There is no difficulty in dividing, whether in common law³ or French-Italian law,⁴ an executed sale into an executory contract and its performance by transfer of money and property.

² This was the view of HENRI CAPITANT, as orally told to the writer. He preferred the Roman system. The interpretation of C. C. arts. 1138 and 1583 with respect to the transfer of property will be discussed in more detail in Vol. IV, Ch. 54.

³ Cf., for instance, BENJAMIN, *On Sale* 315.

⁴ See GORLA, *La Compravendita* 5-10. A practical argument sometimes used in civil law for distinguishing the sale of movables from an executory con-

Even the cash-and-carry transactions, with which the over-aged concept of "sale" continues to agree and which are of course still frequent in daily retail commerce, can thus be analyzed as double acts. In all important commercial dealings, the dualistic approach is indispensable. In fact, it has been followed in this country with slowly increasing awareness through the Uniform Sales Act to the most recent American Uniform Commercial Code. The French doctrine has cumulated exceptions to article 1138, until the principle that the sales contract passes title has been hollowed out. And for the great majority of commercial sales, business practice has largely overcome the differences in the legal systems.

Classification. Therefore the municipal divergencies mentioned above really cause only limited conflicts. Nevertheless, the question remains what law should determine whether the contract transfers title. Some answers suffer from the traditional undue influence of the municipal systems themselves. Under the one-sided impulse of the French and Italian codes, the law governing the contract, which is by another mistake usually identified with the law of the place of contracting, decides also whether title passes by contracting.⁵ Others have restricted the application of the law of the contract to the so-called passing of title between the parties; effects in relation to third persons would depend on the law governing title.⁶ Fortunately, on the Continent a third view has come into ascendance, namely, that obligation and title are to be thoroughly segregated with the

tract is that the buyer having paid cash in a shop should not be forced to prove his payment. But why should there not be a presumption of payment where contract and delivery are proved to have occurred in the shop and the buyer has no charge account?

⁵ VELLA, *Obbligazioni* 1095, cited by FEDOZZI-CERETI 741 n. 1.

⁶ 7 LAURENT §§ 222 ff., 283, 8 *id.* § 130; ROLIN, 2 *Principes* §§ 912 ff., 3 *id.* §§ 1167 ff.; DESPAGNET 1136 § 395. *Contra*: DESBOIS, *Clunet* 1931, 281, 290; BATIFFOL 395 § 475 and *cit.*; FEDOZZI-CERETI 740 ff.; DIENA, 2 *Dir. Com. Int.* 36 § 106.

understanding that the law of the situs also covers the relationship of the parties with each other respecting the title.⁷ The same view prevails in England.⁸ The *lex situs* remains predominant whether the transfer of property is to be accomplished by contract or "*traditio*." This proposition has been confirmed by the Institute of International Law⁹ and by the Hague Convention 1955, which by virtue of article 5, number 3, does not apply to the transfer of ownership.^{9a}

In the United States, the bewildering confusion of contract and title doctrines in the sales acts for a long time obscured the problem, and still seems to create great uncertainty. Prevaillingly, courts have erred in the direction of extending the law of the place of contracting to the transfer of title.¹⁰ Minor even approved the theory that a conveyance, assignment, or sale, if valid where made, should be upheld in every jurisdiction as between the parties.¹¹ Beale disputed this approach. He explained the fact that most cases apply the law of the place of contracting to the

⁷ For instance, VALÉRY § 395; RAAPE, IPR. (ed. 5) 590 f.; 2 ARMINJON 63 § 28; NIBOYET 633 § 506; KEGEL, IPR. 229.

⁸ FALCONBRIDGE (ed. 2) 440 ff., DICEY (ed. 7) 539 ff., and M. WOLFF, Priv. Int. Law (ed. 2) 532 f., who should be consulted against the recent theories of SCHMITTHOFF (ed. 3) 198 and CHESHIRE (ed. 6) 474 ff. These theories have also met with profound criticism in the books of LALIVE, *supra* n. 1, at 74-83, 133 ff., and of ZAPHIRIOU, *supra* n. 1, at 31-38.

⁹ Art. 2 par. 3 of the decisions of Madrid, 24 *Annuaire* (1911) 368, 394, *cf.* the article by the reporter, DIENA, in *Revue* 1911, 561-586, at 564.

^{9a} The Eighth Hague Conference, held from Oct. 3 to 24, 1956, adopted a Draft Convention on the Law Applicable to the Transfer of Ownership in International Sales of Goods; see *Actes de la huitième session* pp. 340 ff. and the English translation in 5 *Am. J. Comp. Law* (1956) 650 ff. To date this Convention has been signed by Greece and ratified by Italy; see *Revue Crit.* 1964, 164. For comments, see PASCHOUD, *supra* n. 1, FRÉDÉRICQ, *supra* n. 1, and PETERSEN, "Die 8. Haager Konferenz," 24 *RabelsZ.* (1959) 1, 12 ff. as well as the other reports on the Eighth Hague Conference which are mentioned in the bibliography in *Conférence de la Haye, Actes et documents de la neuvième session*, Vol. 1, pp. 321 ff.

¹⁰ See PARMELE in 1 *Wharton* 681 § 311 a; STUMBERG (ed. 2) 400, *cf. infra* n. 22.

¹¹ MINOR 293 § 128 and n. 1.

title question, by the coincidence that in the particular cases the movables were situated in the state of contracting and in this state "the transfer of the title depended on the validity of the contract."¹² To the same effect, Goodrich describes as typical a case where "the court stressed the law of the place of contract, quoted approvingly a statement that the domiciliary law governed, and rendered a decision which applied in fact the law of the situs of the property."¹³ At present, the Restatement has made it clear, and the point seems undisputed that in sales no less than in other contracts, the validity of the transfer of title and the nature of the interests created by the "contract" are exclusively governed by the law of the place where the chattel is at the time of contracting. (§§ 257, 258)^{13a}

Consequences. This universally and rightly accepted opinion needs comment where the obligatory contract is governed by a law other than that of the situs. Attention is drawn in this respect to a paragraph in Beale's treatise:

"The question whether a sale can be avoided because of the insolvency of the buyer depends on the law of the state of situs at the time of sale, though the goods have been taken into another state. By that law must be determined the validity of the consideration, whether a parol sale passes title, and whether a sale is voidable for fraud."¹⁴

Since § 257 of the Restatement, on which this paragraph is based, exclusively deals with the validity of conveyances, including legality of the transfer and transfer in fraud of third persons, a reader might think that rescission on the

¹² 2 BEALE 978 § 255.1.

¹³ GOODRICH 408 § 150 n. 84.

^{13a} Furthermore, the Restatement (Second), Tent. Draft No. 5 (1959) § 254a submits "the effect of the occurrence upon interests" in chattels to the law of the situs.

¹⁴ 2 BEALE 982 § 257.1.

In Continental law, the complications in case of insolvency and bankruptcy were discussed as early as 1913 by DE BOECK, *Revue* 1913, 289 ff., 793 ff.

ground of insolvency of the buyer, invalidity of consideration and voidability for fraud are always considered incidents of the conveyance rather than of the contract. However, this cannot be the meaning, since it would not be borne out by the cases alleged in support. Apart from some decisions cited but which are not in point,¹⁵ the cases concern the rescission of the sales contract on the ground of initial insolvency of the buyer,¹⁶ and are prompted by the particular statute of Pennsylvania allowing rescission by seller only when a trick, artifice, or deception has been practiced by the buyer, whereas other laws are more favorable to the seller. The decisions are clearly based on the ordinary contractual tests and not on the situs of the chattel.¹⁷ The courts, thus, do not disregard the contractual element but, on the contrary, neglect the possible significance of property law.

¹⁵ *Bulkley v. Honold* (1856) 19 How. 390, deals with breach of warranty in the sale of a vessel the situation of which is only one of several elements, see *infra* Ch. 37 p. 95 n. 68. *Arnold v. Shade* (1858) 3 Phila. 82, applies the law indicated by contracting, performance, and seller's domicile to the transfer of title to an insolvent buyer. *Madry v. Young* (1831) 3 La. 160, applies Mississippi law as *lex situs* to the title in a slave, but the same law to the contract, because not only were the slaves there but also the contract was made there.

¹⁶ This is also true of the case cited by BEALE, *supra* n. 14, for validity of consideration.

¹⁷ In the order of BEALE's citation: *Parker v. Byrnes* (D. C. Mass. 1871) 18 Fed. Cas. No. 10,728 (1 Lowell 539): *lex contractus*, based on place of contracting, seller's domicile and delivery, all in Boston. *Mann v. Salsberg* (1901) 17 Pa. Super. Ct. 280: *lex loci solutionis*, as the contract (before the Uniform Sales Act was adopted in Pennsylvania in 1915) is presumed to be a contract for arrival (in Pennsylvania). *Perlman v. Sartorius* (1894) 162 Pa. 320, 29 Atl. 852: the Pennsylvania court applies Maryland law to which *locus contractus*, *locus solutionis*, and seller's domicile point. *Lowrey & Co. v. Ulmer* (1896) 1 Pa. Super. Ct. 425: the Pennsylvania court applies the law of New York where the goods were shipped f. o. b. *Whiting Mfg. Co. v. Bank* (1900) 15 Pa. Super. Ct. 419: exactly like the *Perlman* case. *W. G. Ward Lumber Co. v. American Lumber & Mfg. Co.* (1915) 247 Pa. 267, 93 Atl. 470: the Pennsylvania court applies the law of Ohio, because the contract was made and, by delivery to carrier, was performed there. *Kline v. Baker* (1868) 99 Mass. 253: applies Pennsylvania law indicated by the places of contracting and performance (through delivery to the carrier) and domicile of the seller.

The difference in the systems was sensed in the Mixed Arbitral Tribunals when they had to decide which party was affected by the seizure or loss of goods that had been sold before World War I and were in transportation between countries having different rules for the transfer of title. Thus, goods sold by a German to a Belgian buyer and requisitioned by the German government while still on German soil, were in the seller's ownership, according to the principle of *traditio* (BGB. § 929); therefore, it was not the Belgian buyer who was expropriated by the war measure.¹⁸ In other instances, these tribunals shared in the confusion so frequent in English and Latin doctrines, by applying to the transfer of ownership the law intended by the parties as though title questions were included in party autonomy.¹⁹ Section 18 of the English Sales Act and section 19 of the Uniform Sales Act^{19a} allow the intention of the parties to determine at what time the title shall pass, but this is only a municipal law governing goods in its own territory.^{19b} The parties have no power to choose this law of situs, although they may choose the law for the obligatory contract. In case of goods sold and sent from Germany to England and which arrived in English territory, the Tribunal correctly stated that property had not passed in Germany under the German law of property, but held that the goods although in England were not transferred because a German seller accustomed to his own law was not sup-

¹⁸ Germano-Belgian Mixed Arb. Trib. (April 30, 1923) 3 Recueil trib. arb. mixtes 274. The Anglo-German Mixed Arb. Trib. (June 11, 1926) Charles Semon & Co. v. German Government, 6 Recueil trib. arb. mixtes 75, Clunet 1926, 1033, may also have applied the English Sales Act, s. 17, as *lex situs* in shipping the goods to the claimants' agents in Germany.

¹⁹ Germano-Rumanian Mixed Arb. Trib. (June 16, 1925) 5 Recueil trib. arb. mixtes 200, Revue 1927, 97; *contra*: NIBOYET, *ibid.* at 108. But see EHRENZWEIG, Conflict 620 § 236 n. 1, who advocates party autonomy even with regard to transfer of title; *contra*: KEGEL, IPR, 228, 232.

^{19a} Under the Uniform Commercial Code, § 2-401, the parties' intention is less significant in this respect.

^{19b} Cf. DICEY (ed. 7) 820.

posed to have intended to transfer until the buyer acquired possession.²⁰ This fiction amounted to an extension of the German property law to England; it was also out of place because the question of risk was in issue and should have been solved irrespective of all these problems.

2. "Conditional Sales" (Sales with Transfer of Title on Condition of Payment)^{20a}

The difficulty of distinguishing transfer of title and promise of transfer again has been felt in common law and Latin countries in sales retaining full title in the seller until payment. In Germany, under romanistic legislation, the statement is obvious that in a sale with reservation of title the contract is absolute, and merely the title is conditional.²¹

In conflicts cases, American courts, treating conditional sales as a unit, have applied the *lex loci contractus* to the questions affecting the title (at least as between the parties)²² or, sometimes, the *lex situs* to certain obligations, instead of separating obligation from the domain of *lex situs*. The result, however, has been harmless to the extent that in many cases where the *lex loci contractus* was applied, the chattel was in the state of contracting, and that the *lex loci solutionis* was resorted to when the seller promised to deliver the chattel in a certain state. In both cases, the law applied was identical with the law of the situs, either at

²⁰ Anglo-German Mixed Arb. Trib. (April 7, 1927) 7 Recueil trib. arb. mixtes 345, criticized by RABEL and RAISER, 3 Zausl.PR. (1929) 62, 67.

^{20a} For a detailed discussion, see LALIVE, *supra* n. 1, at 150 ff. and ZAPHIRIOU, *supra* n. 1, at 186 ff.

²¹ BGB. § 455, and commentaries, for instance, KUHN in 2 RGR. Kom. (ed. 10) § 455 II; PALANDT (ed. 20) § 455, 3.

²² STUMBERG (ed. 2) 399; 2 BEALE 1001 § 272.3; LEE, "Conflict of Laws Relating to Installment Sales," 41 Mich. L. Rev. (1943) 445; Restatement §§ 273, 277, and WILLISTON, 2 Sales § 339 only refer to "transfer of title."

In Louisiana, where the seller's privilege takes the place of conditional sale, *lex loci contractus* is applied to foreign-concluded conditional sales, excepting evasion. Overland Texarkana Co. v. Bickley (1922) 152 La. 622, 94 So. 138.

the time of the contract, or at the critical time of delivery into the power of the buyer.²³

More recently, a vivid discussion has been devoted to the treatment of the seller's right to repossess and the buyer's right of redemption. Again, the courts have qualified these rights either as contractual or as interests subject to the law of the situs.²⁴ In the Massachusetts case arousing most of the debate,²⁵ the question whether the buyer had a right of redemption when the seller failed to give him notice of foreclosure, was regarded by the majority of the court as an incident of the contract and subjected to the law of the place of contracting (Massachusetts). The dissenting vote, on the contrary, emphasized the buyer's interest in the chattel, created at the situs and governed by the *lex situs* (New Hampshire). The latter view has been widely indorsed²⁶ and adopted in the Restatement, § 281. It needs a sounder motivating force. Although the right to retake and the right to redeem are fair matters of property, there are corresponding rights and duties within the "contract." Yet, since it would be unsound to recognize two laws for the two sides of the same matter, the *lex situs* must be estab-

²³ 25 A. L. R. at 1162; WHARTON § 416 f.; 87 A. L. R. 1309 at 1314; LORENZEN, 31 Yale L. J. (1921) 60-62; 2 BEALE 1002 § 272.4; WILLISTON, 2 Sales § 339 n. 11; 13 A. L. R. (2d) 1312 ff.; A. L. R. (2d) Supplement Service (1960) 944 ff.

²⁴ See Note, "Determination of Law Governing Power of Redemption in Conditional Sales of Chattels," 43 Yale L. J. (1934) 323.

²⁵ Thomas G. Jewett v. Keystone Driller Co. (1933) 282 Mass. 469, 185 N. E. 369; critical Notes, 47 Harv. L. Rev. (1934) 128; 33 Col. L. Rev. (1933) 1061; 11 N. Y. U. L. Q. Rev. (1934) 281; 18 Minn. L. Rev. (1934) 431, 474; 43 Yale L. J. (1934) 323.

²⁶ Thus in all Notes cited *supra* n. 25; LORENZEN, Cases 643; 2 BEALE 1001 n. 6; GOODRICH 418 § 153 and n. 120. However, in Shanahan v. George B. Landers Construction Co. [(C. C. A. 1st 1959) 266 F. (2d) 400] the court accepted the contract characterization of a conditional buyer's right to redemption; but unlike the court in the Jewett case it applied the law of the buyer's state rather than the *lex loci contractus*; the fact that the chattel sold had been delivered in a third state was considered "immaterial." For an analysis, see CAVERS, "The Conditional Seller's Remedies and the Choice-of-Law Process—Some Notes on *Shanahan*," 35 N. Y. U. L. Rev. (1960) 1126.

lished as a special subsidiary law to cover the problems of repossession.²⁷

This suggestion extends to a series of problems not included in the current American discussion. For instance, the municipal laws vary with respect to the relation of repossession by the vendor to rescission. In the United States, despite some peculiar doctrines,²⁸ the tendency is to allow the conditional seller in case of nonpayment to retake possession in order either to collect the price from the proceeds or to rescind the contract; apart from statute and agreement, reclaiming the goods is deemed to be an election to rescind the contract, which frees the buyer.²⁹ German prevailing opinion assumes that retaking without attaching the chattel does not necessarily mean rescission, although it may, and some writers have stressed the unfairness of repossession without cancelling the contract.³⁰ The Austrian Supreme Court, in fact, has rejected this right.³¹ The Swiss Code eliminates both remedies involved in conditional sales, if not stipulated.³² It would be entirely impractical to decide this question under any other law than that of the situs, which determines the right of retaking.

Therefore, although the questions concerning rescission and the effect of conditions upon the existence of the contract are legal incidents of the contract, those obligatory problems closely connected with the property in the chattel,

²⁷ I understand GOODRICH *ibid.* to the same effect.

²⁸ The Supreme Court of Michigan, in a series of cases, has assumed that it is "inconsistent" for a seller to stipulate in the agreement reservation of title and recovery of the price; he may base his claim of price only on an absolute sale with reservation of a mere security interest which amounts to a mortgage or a lien. See *Atkinson v. Japink* (1915) 186 Mich. 335, 152 N. W. 1079; *Peter Schuttler Co. v. Gunther* (1923) 222 Mich. 430, 192 N. W. 661. For a more exact expression, see GEORGE BOGERT, 2A U. L. A. 8 § 8, 169 § 124, 172 § 126.

²⁹ Uniform Conditional Sales Act, §§ 21, 23; WILLISTON, 3 Sales § 579b.

³⁰ See GÜNTER STULZ, *Der Eigentumsvorbehalt im in- und ausländischen Recht* (ed. 3), and *Law on Installment Contracts*, of May 16, 1894, § 5.

³¹ Austria: OGH., GIU. N. F. Nos. 2656, 2801 (installment payments).

³² C. Obl. arts. 226, 227 par. 2, *cf.* 214 par. 3.

in the absence of a party agreement, are decidedly influenced by this connection, and thus indirectly governed by the law of the particular situs. In the prevailing view, this law is that of the state in which the property was delivered rather than that in which the vendor retakes the chattel or which regulates procedure and subsequent events.³³ It seems confusing that many conditional sales contracts include the vague clause that "the terms shall be in conformity with the laws of any state wherein it may be sought to be enforced."³⁴

3. Unpaid Seller's Privilege

The existence and extent of a lien or security title for the vendor's claims as regards price and damages are determined in the Restatement by the law of the place "where the chattel is at the time when the pledge or lien is created."³⁵ Since, however, the nature of a lien as a pure right in rem is not settled in all instances, the law of the contract has not been generally excluded.³⁶

In particular, does the French *privilège du vendeur* really depend only on the *lex situs*? Beale seems inclined to favor this view.³⁷ In a comparable gesture, the authors of the Hague Convention 1955, article 6, excluded from its scope

³³ See particularly, GOODRICH 418 § 153 n. 119 and Auffenberg *Lincoln-Mercury, Inc. v. Wallace* (1958) 318 S. W. (2d) 528. If the buyer removes the chattel to another state, and resells it there, the new *lex situs* has to determine whether the second buyer acquires title; see *Traders Finance Corp. Ltd. v. Dawson Implements Ltd.* [1958] 26 W. W. R. 561 and Note, "Conditional Sales and the Conflict of Laws," 1 U. B. C. L. Rev. (1960) 297; whereas the *lex situs* at the time of the first transaction governs insofar as the requirements of a valid reservation of title are concerned; see *Hannah v. Pearlman* [1954] 1 D. L. R. 282, criticized in Note, 32 Can. Bar Rev. (1954) 900. In addition, see Note, "Conditional Sales, Chattel Mortgages, and the Conflict of Laws," 1956 U. Ill. L. F. 633; and *infra* Vol. IV Ch. 56.

³⁴ See, for instance, *Stevenson v. Lima Locomotive Works* (1943) 180 Tenn. 137, 172 S. W. (2d) 812, 148 A. L. R. 370, 375.

³⁵ Restatement § 279, practically unchanged in Restatement (Second), Tent. Draft No. 5 (1959) 137.

³⁶ FALCONBRIDGE, *Conflict of Laws* (ed. 2) 470 and n. (i) citing Note, 64 L. R. A. (1904) 831 f.

³⁷ 2 BEALE 1008 § 279.3; definitely so, NIBOYET, 4 *Traité* 463.

not only rights in rem and creditor actions for fraudulent alienation but also the seller's privilege.^{37a} The nature of this legal prerogative accompanying the sales contract is very controversial in France, and the problems have been inherited by Louisiana.³⁸ Rights of third persons protected by the law of the place where the goods are at a given time, of course restrict the effect of the privilege, if this law so decides.³⁹ But which law creates the privilege?

The Supreme Court of Louisiana has developed a doctrine in which it restricts the privilege granted in the Civil Code to sales contracts executed in the state.⁴⁰ But some local "completion" of a foreign-negotiated contract has been held a sufficient basis for applying the domestic law including the privilege.⁴¹ The gist of the doctrine⁴² seems to be that the privilege attaches to contracts governed by Louisiana law, the test being fixed by the *lex loci contractus*. "A common law contract cannot claim the vendor's privilege given by the Civil Code of Louisiana."⁴³ The drawbacks of this theory are climaxed by the curious application of Louisiana law even though the goods may be in a foreign state at the time of contracting. A Dutch court has recognized the unlimited application of the law of the contract so as to recognize the Belgian court's refusal of priority for the seller's claim in Dutch bankruptcy proceedings.⁴⁴

^{37a} The supplementary Hague Convention on the Law Applicable to the Transfer of Ownership, *supra* n. 9a, provides in art. 4 (1) that the applicable law is the internal law of the country where the goods sold were situated at the time of the first claim or attachment concerning such goods.

³⁸ Louisiana C. C. (1870) art. 3227 par. 1; B. MARGOLIN, "Vendor's Privilege," 4 Tul. L. Rev. (1930) 239. In Quebec the institution has been refused adoption, C. C. art. 1012.

³⁹ 7 LAURENT 267 § 212; ROLIN, 3 Principes 477 § 1446, 490 § 1457.

⁴⁰ H. B. Claflin & Co. v. D. A. Mayer (1889) 41 La. Ann. 1048, 7 So. 139.

⁴¹ McIlvaine and Speigel v. Legaré (1884) 36 La. Ann. 359.

⁴² See the cases cited by 2 BEALE 1008 § 279.3.

⁴³ G. A. Gray Co. v. Taylor Bros. Iron-Works Co., Ltd. (C. C. A. 5th 1894) 66 Fed. 686, 689.

⁴⁴ App. Hertogenbusch (June 22, 1909) Heijmans v. Bolsius, Clunet 1912, 601.

However, neither the *lex situs* alone nor the law of the contract alone can be decisive. The correct view was laid down by the Institute of International Law in 1910: the *lex situs* has the power "to limit or exclude . . . the effects of privileges established by the law governing the legal relationship to which the privilege is attached."⁴⁵

There is a third law to be considered in an analogous manner: the law governing bankruptcy proceedings involving assets of the buyer. It is neither to be ignored nor exclusively to be observed. Conflicts have been caused in the three neighboring states, France, Belgium, and the Netherlands, through different rules on the treatment of the prerogative in bankruptcy.⁴⁶ Public policy has been unnecessarily invoked,⁴⁷ and the Dutch Supreme Court has rendered a most erroneous decision by resorting to the exclusive use of the *lex fori*.⁴⁸ The court went so far as to grant the vendor a preference under Dutch law which he would not have enjoyed under the Belgian laws of the contract.

The effect of rescission on third persons and their status in bankruptcy proceedings are questions which require reference to very different connections.⁴⁹

⁴⁵ Madrid 1910, 24 *Annuaire* (1911) 394 art. 3.

⁴⁶ Effect in bankruptcy is denied in France, C. Com. art. 550 par. 6, allowed in the case of certain machines in Belgium, C. Com. art. 546 and Law of Dec. 16, 1857, art. 20, and generally granted in the Netherlands, BW. arts. 1180, 1185(3), 1190.

⁴⁷ In a case of a bankrupt buyer where the apparatus sold was in Belgium, Trib. com. Seine (Sept. 6, 1906) *Clunet* 1907, 366, *Revue* 1909, 582 applied French law as that of the place of contracting and at the same time as prescribed by public order. The Belgian Trib. civ. Liège (Nov. 14, 1907) *Revue* 1909, 961 denied exequatur to this French judgment on the theory of *lex situs* and on the ground of Belgian public order. *Cf.* Note, LACHAU, *Revue* 1909, 588; 2 FRANKENSTEIN 91 n. 187; 8 LYON-CAEN et RENAULT § 1287.

⁴⁸ Rb. Amsterdam (Oct. 29, 1915) W. 9935 applied the Belgian law of the contract but was reversed, Hof Amsterdam (Nov. 3, 1916) W. 10069, and H. R. (June 15, 1917) W. 10139, 1 VAN HASSELT 137. See the criticism by TRAVERS, 7 *Droit Com. Int.* I 423 § 11432.

⁴⁹ See for such a discussion, TRAVERS, *id.* §§ 11435, 11438 ff. and FÉBLOT & MEZGER, "Eigentumsvorbehalt und Rücktrittsklausel bei Lieferungen nach Frankreich," 20 *RabelsZ.* (1955) 662.

4. Risk of Loss

The buyer bears the "risk of loss," when he has to pay the price despite destruction, seizure, theft, or deterioration of the goods occurring without the fault of either party. In the old doctrine, which still appears in the English and American sales acts as a principle, though susceptible of exceptions, risk of loss passes with the title.^{49a} Many writers still naïvely repeat the slogan of the doctrine of liability for tort, *casum sentit dominus*, as if it indicated the doctrine of risk.

Based on this tradition, reputed French writers have thought that since in French municipal law risk is bound together with property, its transfer must be governed in French courts by the statute real, whereas German courts, according to their different characterization, would have to apply the law governing the contract.⁵⁰ Such characterization, in this case, would not be determined by the law of the forum but by the law governing the contract.⁵¹ However, the premise is wrong in all respects. Neither in France nor anywhere else, despite traditional pronouncements, is it true that risk passes necessarily with the title. In the case where the seller has to ship the goods and his obligation ends with the shipment (sale for shipment), which is the great rule of all sales not confined to one town, risk passes with the shipment in all laws and systems. In overseas commerce, the risk is regularly shifted to the buyer through delivery to the vessel, although ownership is, with the exception of the United States, ordinarily transferred through the arrival of the documents of title. The distribution of risk of loss

^{49a} The Uniform Commercial Code fortunately abandons this title concept of the sales acts; cf. §§ 2-509 and 2-401. For comment, see VOLD, Sales (ed. 2) 225 ff.; LATTY, "Sales and Title and the Proposed Code," 16 Law and Cont. Probl. (1951) 3.

⁵⁰ DESBOIS, Clunet 1931, 281, 295 approved by BATIFFOL 399 § 479; cf. ESMEIN in Planiol et Ripert, 6 Traité Pratique §§ 412 ff.

⁵¹ DESBOIS, *id.* 296 n. 17 par. 2.

is felt to be an essential part of the contract; it is the most conspicuous item in commercial offers and forms. Property, on the other hand, is a legal matter, practically always left by the parties to subsequent consideration by the lawyers in cases of divergence.

There was unanimity in the Committee on the International Sales Act that risk and title can and must be separated;^{51a} the same view was held by all but three governments answering the Dutch questionnaire for the Sixth Hague Conference⁵² and by the Committee of 1931 which established the draft that with only a few changes became the Convention of 1955 on the conflicts rules for sales. Scarcely worth mentioning are other suggestions of special laws for the problem of risk.⁵³

If we neatly isolate the question of who bears the risk of casual events after the seller surrenders the goods, or what casual events burden the buyer, we have no doubt that the question belongs to the law governing the contract.⁵⁴ This solution has been expressly adopted by the Hague Convention 1955,⁵⁵ and appears indispensable, because the passage

^{51a} See RABEL, 2 *Recht des Warenkaufs* (1958) 292 ff. § 111; RIESE, "Der Entwurf zur Internationalen Vereinheitlichung des Kaufrechts," 22 *RabelsZ.* (1957) 16, 109; HONNOLD, "A Uniform Law for International Sales," 107 *U. of Pa. L. Rev.* (1959) 299, 317. The last Draft of a Uniform Law on International Sales (1956) contains provisions concerning the transfer of risk (art. 108 ff.) completely independent of the property question which the Draft, as explicitly stated in art. 12, does not regulate; see text in 22 *RabelsZ.* (1957) 124 (French and German) and in 7 *Int. Comp. Law Q.* (1958) 3 (English).

⁵² Only Hungary, Japan, and Spain wanted to have risk of loss excluded from the convention because of its connection with property. Inclusion was approved by Austria, Belgium, Denmark, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Poland, Rumania, Sweden, and Switzerland. Cf. JULLIOT DE LA MORANDIÈRE, *supra* Ch. 36 n. 1.

⁵³ For the application of the law of the defendant party, 2 *BAR* 16, 107; ALMÉN, 1 *Skandinav. Kaufrecht* 55. *Contra*: DIENA, 2 *Dir. Com. Int.* 42 § 107. Another strange proposal by 2 *FRANKENSTEIN* 299 has had no appeal.

⁵⁴ To the same effect, e.g., BAGGE, *Recueil* 1928 V 201; FEDOZZI-CERETI 741; LALIVE, *supra* n. 1, at 97 ff.

⁵⁵ Art. 5 No. 3 provides: "The present Convention does not apply . . . to the transfer of ownership, it being understood nevertheless that the various obligations of the parties, and especially those which relate to risks, are subject to the law applicable to the sale pursuant to the present convention."

of risk, the duties of delivery, the duty of taking delivery, and certain collateral duties⁵⁶ are essentially interwoven.

The unhappy German method of attributing the duties of either party to the law of his domicile requires determination of the question whose obligation is concerned in the passing of the risk. One decision declared it an obligation of an English merchant who had sold f. o. b. Hamburg to bear the risk so long as it did not pass to the buyer under his own, viz. English, law.⁵⁷ But other cases have shifted the emphasis to the question whether the buyer owes the price, so as to call for the buyer's law.⁵⁸ The first argument is evidently wrong, although the result is desirable. The second produces strange results, when the law of the buyer's domicile has more exigent conditions for the passage of risk than the law of the seller.⁵⁹ If, for instance, a Frenchman by correspondence sells a specific lot of silk to a German who is to take delivery in Lyons, risk passes in France at the time of contracting, whereas under German law it would not yet pass. If the silk is burned in the meantime by accidental fire, should the buyer be liberated from his debt, although French law entitles the seller to the price? This is a queer solution in view of the fact that German law is not considered to govern the entire contract.⁶⁰ Only one law can conveniently govern both parties.

Again, the variety of substantive rules concerning the transfer of risk is by far less conspicuous in international

⁵⁶ *Infra* II, 2, p. 100.

⁵⁷ OLG. Hamburg (Oct. 24, 1907) 21 Z.int.R. 68, Clunet 1909, 217.

⁵⁸ OLG. Kiel (July 2, 1918) Schleswig-Holsteinische Anzeigen 1919, 27, cited by LEWALD, 10 Répert. 31 No. 47.

⁵⁹ Such a case was construed as between Germany and England, RABEL-RAISER, 3 Z.ausl.PR. (1929) 77, 78; I should consider it, however, certain that present English courts ought to recognize the passing of the risk by shipping (as suggested at p. 80 n. 1 *ibid.*) irrespective of reception or proof of arrival of the goods.

⁶⁰ See RABEL-RAISER, *id.* 80; approved by RAAPE, IPR. (ed. 5) 521 against HAUDEK 84. Cf. NEUNER, 2 Z.ausl.P.R. (1928) 123 ff.

trade than in the civil codes. There is an impressive bulk of uniform usages and rules beyond any national law. In addition, modern insurance largely diminishes the burden of risk. Yet some differences remain. An example is presented by the English principle that, if goods, shipped in the time prescribed by the contract, perish on the voyage overseas, the seller may nevertheless tender the bill of lading to the buyer with full effect.⁶¹ The seller may do this even knowing that the goods are lost.⁶² French courts do not allow such tender except when the seller is "in good faith."⁶³ German courts require transmission of the documents or notice of shipment of the goods appropriated to the contract, before risk can pass, thus excluding retroactive effect of the tender of documents upon the risk.⁶⁴ It would seem self-evident that the choice of law among these solutions can only be made for any individual type of contract, irrespective of the passing of the title which depends on valid tender and acceptance of the documents or is accomplished by shipment, according to the theory adopted.

II. VARIOUS INCIDENTS

I. Warranty of Quality

(a) *American decisions.* Stumberg⁶⁵ has reviewed the cases which for the most part antedate the time when the Uniform Sales Act unified the law of warranty. He finds that the courts applied the law of the state where the contract was made, or made and performed. But he wisely

⁶¹ *Atkin, J., in C. Groom, Ltd. v. Barber* [1915] 1 K. B. 316, 324.

⁶² *Manbre Saccharine Co. v. Corn Products Co., Ltd.* [1919] 1 K. B. 198: S. S. Algonquin, carrying starch and syrup c. i. f. London, was sunk by submarine or mine. Cf. *KENNEDY, C. I. F. Contracts* (ed. 3) 117. *WILLISTON, 2 Sales* 106 n. 13; *VOLD, Sales* (ed. 2) 245 f.

⁶³ See Note, *AUBRUN, to App. Paris* (Jan. 21, 1920) D. 1921.2.101 and *HEENEN, Vente et commerce maritime* (1952) 149 ff.

⁶⁴ 88 RGZ. 389; 92 *id.* 128; 93 *id.* 166.

⁶⁵ *STUMBERG* (ed. 2) 404-408.

warns against such "metaphysical arguments" and recommends referring all questions concerning the undertaking of the vendor to the state into which the goods are sent.

The real impulses behind the decisions collected by Stumberg, however, seem exactly to follow the recognition of the place of "delivery" usual in commerce and emphasized here. Thus, the standard of quality was determined for branded potatoes, delivered by the seller who was in Maryland to the carrier f. o. b. Maryland, according to the standard of that state.⁶⁶ The trade terms and usages of South Carolina were held to control a shipment of sheep manure from Chicago to South Carolina, because delivery had to be made at arrival against payment of the draft accompanying the bill of lading.⁶⁷ The option between rescission and price reduction, adopted in Louisiana from the civil law model, was accorded to a buyer of New Orleans when a New York vendor sold a ship, then in port at New Orleans, and delivered it there to a buyer there residing.⁶⁸ Merchantable quality of two pianos was required under the law of Pennsylvania where the selling manufacturer resided and where he delivered the objects, as Stumberg adds, apparently to a carrier.⁶⁹ Finally, in the case of strawberries shipped from Arkansas to Massachusetts, Arkansas law was applied to the effect that acceptance of the goods by the buyer was not a bar to an action for breach of an express warranty,⁷⁰ which was correct if the sale was for shipment in the ordinary manner.

However, these decisions, applying the law of the contract and determining correctly this law, all deal with problems certainly belonging to its general scope. No special

⁶⁶ *Miles v. Vermont Fruit Co.* (1924) 98 Vt. 1, 124 Atl. 559.

⁶⁷ *Markey v. Brunson* (C. C. A. 4th 1923) 286 Fed. 893.

⁶⁸ *Bulkley v. Honold* (1856) 19 How. 390.

⁶⁹ *Snow v. The Shomacker Mfg. Co.* (1881) 69 Ala. 111, 44 Am. Rep. 509.

⁷⁰ *Willson v. Vlahos* (1929) 266 Mass. 370, 165 N. E. 408.

conflicts rule, hence, is noticeable.^{70a} But some rule of such kind may be suggested by the European discussion to which we now turn.

(b) *Civil law doctrines.* Agreement has been reached that the law of the contract determines, on one hand, the extent of the buyer's examination of the goods as to quantity, weight, and quality, and on the other hand, the remedies for breach of warranty of quality, such as rescission, recoupment, damages, and substitute delivery. Considerable doubts, however, have been caused by certain particulars of the law of warranty. What law should decide on the activity necessary for the buyer to avail himself of the remedies for breach of warranty? This concerns in the first place the form and time of an examination of the goods, the duty of giving notice of defects, and the period in which action must be brought. In the second place, the discussion involves the effects of omissions in these regards as well as the duty of the buyer to take care of goods rejected by him.

The buyer has no duty of examining the goods, but only a "burden": his failure of examination leaves him ignorant of defects discoverable and therefore subject to notice. For this activity the agreement of the parties or the usages look to a certain place according to the circumstances, such as consignment to the buyer, to his agent or subpurchaser, or to the buyer for immediate transshipment to a purchaser without inspection, et cetera.

The Hague Convention of 1955, article 4, answers the question in the most satisfactory manner as follows:

^{70a} The Restatement (Second), Tent. Draft No. 6 (1960) § 346, comment at 67 f. therefore subjects the question of whether there is a warranty by a vendor of movables to the law which governs the contract, i.e., in the case of a sales contract, to the law of the place of delivery (§ 346g, as amended at the 37th Annual Meeting of the American Law Institute; see *supra* Ch. 36 n. 47a). *Contra*: EHRENZWEIG, Conflict 497, 587 ff., who takes the view that breaches of implied warranties should be treated in analogy to tort claims for negligence.

In the absence of an express clause to the contrary, the internal law of the country where inspection of goods delivered pursuant to a sale is to take place, applies as respects the form and the periods within which inspection must take place and the notifications concerning the inspection, as well as the measures to be taken in case of refusal of the goods.⁷¹

(c) *Duty of giving notice.* The imposition on the buyer placed by § 49 of the Uniform Sales Act that he should give notice of a breach of promise or warranty within a reasonable time after the buyer's knowledge of breach has unified the once greatly varying state laws. Correspondingly, no cases affecting the problem seem to exist.

The situation abroad is very different.⁷² In most countries having separate codes for civil and commercial laws, non-mercantile buyers have generally been under no duty of giving notice but must only observe the period of limitation of actions for breach of warranty, commonly six months after delivery.⁷³ In the United States, a somewhat related discrimination against merchant buyers has recently been included in the Uniform Commercial Code.⁷⁴

Three opinions have been advanced, suggesting (1) the law of the contract;⁷⁵ (2) the law of the place where the buyer has to perform his duty of taking delivery against payment;⁷⁶ and (3) the law of the place where he has to

⁷¹ See 1 Am. J. Comp. Law (1952) 276; for a comment see VON SPRECHER, *supra* Ch. 36 n. 1, at 86 ff. To the same effect, Benelux Draft art. 19 (2).

⁷² The assertion by HERZFELD, Kauf und Darlehen 98, that this duty is known in all countries in the same manner, is very wrong. See FIKENTSCHER, Die Mängelrüge im deutschen, ausländischen und internationalen Recht (1956) and RABEL, 2 Recht des Warenkaufs (1958) 206 § 94.

⁷³ See, e.g., German BGB. §§ 459 ff. in contrast to HGB. § 377.

⁷⁴ Uniform Commercial Code §§ 2-603 and 2-605 (1) (b).

⁷⁵ Former German decisions cited by LEWALD 254, also HERZFELD, Kauf und Darlehen 98 ff.; the German government wanted this rule, contrary to the views of all other Notes of governments at the Sixth Hague Conference.

Switzerland: BG. (Mar. 5, 1923) 49 BGE. II 70 (buyer's domicile as *locus solutionis*); BG. (Dec. 3, 1946) 72 BGE. II 405, 411 (*lex loci solutionis* for delivery, examination, and acceptance).

⁷⁶ Germany: 46 RGZ. 193; 73 *id.* 379 (rescission); 81 *id.* 273 (damages);

provide for examination of the goods.⁷⁷ The second test was adopted by the German Supreme Court in abandoning former attempts to enforce its theory of splitting the contract.⁷⁸ The court felt that a unified and special approach was needed.⁷⁹ But its stand is too much influenced by the doctrine of *locus solutionis*. The place where the goods are tendered to the buyer is not necessarily the place where he is supposed to inspect them. Therefore, the third opinion, which has been literally accepted by the Hague Convention 1955, quoted above, is preferable.^{79a}

Fairness, in fact, seems to demand that a buyer should not be compelled to study the rules of a distant country for his own proceeding, provided that the contract does not explicitly prescribe the conditions of his claim, which it does very frequently.

(d) *Method of examination*. If goods are to be examined in France, obviously the judicial *expertise* prescribed there must be carried out. In Eastern Asia, where certain practices of "survey" are usual for certain kinds of goods, expert merchants or a consulate officer intervening, these forms are contemplated by the parties, or by the usages binding them, even though they are in Europe. Generally, it is considered that if different formalities are prescribed at the various places, the law of the place where the goods

see also LEWALD 254, 255 (aa) and (bb); BGH. (Jan. 10, 1958) Lind.-Möhring Nr. 2 zu § 480 BGB.; BGH. (Feb. 14, 1958) Lind.-Möhring Nr. 3 zu Art. 27 EG. BGB.; FIKENTSCHER, *supra* n. 72, at 29.

Switzerland: BG. (Dec. 3, 1946) 72 BGE. II 405, 413 (form and time for examination and notice of defects; place where the goods are at the time of examination). To the same effect: BG. (March 22, 1951) 77 BGE. II 83, 85; BG. (Feb. 12, 1952) 78 BGE. II 74, 80.

⁷⁷ BAGGE, Recueil 1928 V at 167; FEDOZZI-CERETI 741 n. 3; ALTEN in Sixth Hague Conference, Actes 327.

Switzerland: BG. (Jan. 16, 1930) 56 BGE. II 38, Clunet 1930, 1168.

⁷⁸ RG. (Feb. 4, 1913) 81 RGZ. 273; dictum (April 21, 1925) 17 Warn. Rspr. (1925) 240; HEINICHEN in 3 Staub (ed. 14) 551, Anhang zu § 372 n. 9.

⁷⁹ See LEWALD 254 f.

^{79a} To the same effect: VON CAEMMERER, Note, JZ. 1959, 362, 363, and RAAPE, IPR. (ed. 5) 519. The drafts of an International Sales Act also have adopted this solution; cf. RABEL, 2 Recht des Warenkaufs (1958) 206.

are to be inspected is preferable to the law of the contract; this is recommended in the interest of the buyer, but sometimes also that of the seller, for instance, where he turns to a lawyer of the place prescribed for examination, who knows only the local law. It is, hence, a settled rule that the methods and proceedings of the place in which the examination is to occur must be observed. This might be expected to be recognized under any law, but the above provision of the Hague Convention, which assures the same result through a special conflicts rule, may be advisable.

(e) *Time for notice of defects.* An attempt to have the law of the forum determine the time in which the seller must be notified of a defect in quality or quantity,⁸⁰ has been commonly rejected. Another controversy concerns the question whether such provisions pertain to the form or the substance of the matter. But whatever the answer, provisions regarding notice are so closely connected with those requiring examination that it has been declared impracticable to choose them from different laws.⁸¹ This seems justified, if we have in mind an agent of the buyer at a remote place (but, of course, a place within the contemplation of the parties). The law of this place should determine for all practical purposes the diligence that the buyer owes to the seller.

(f) *Custody of rejected goods.* To the described scope of the local law the Hague Convention of 1955 has added only the buyer's duty to preserve goods that he has rejected.

The Convention has not extended the local law to the legal consequences of the buyer's failure to give notice, not even insofar as such omission is deemed to deprive the buyer of certain or all remedies, by presumed waiver or by force of law. The silence of the Convention is too prudent;

⁸⁰ App. Amiens (Feb. 11, 1905) Revue 1907, 216, approved by VALÉRY 991 § 687.

⁸¹ ROLIN, 3 Principes 200 § 1186, referring to numerous Belgian decisions.

it is intended to empower a judge to resort to the local law, should he find a necessary tie between the legal effects of omitting the notice and the prescribed time of notice.⁸² An express conflicts rule would be preferable.

2. Collateral Duties

Although most collateral duties are, as a matter of course, controlled by the law of the contract,⁸³ doubt may arise about the classification of the seller's obligation to tender the documents and of the buyer's obligation to furnish a letter of credit.

(a) *Tender of documents.* The vendor's liability with respect to the dispatch and arrival of the bill of lading, invoice, insurance policy, and other documents required by custom or the terms of the contract has been neglected. Of course, what documents are required, is in the last resort answered under the law of the contract.

Is the same true, for instance, with respect to the question mentioned before,⁸⁴ whether the seller may tender the documents after destruction of the goods, or even when he knows of their loss, and yet fulfill thereby his obligation, so as to transfer the risk retroactively? And if the documents are regularly dispatched, may they reach the buyer after the arrival of the vessel in the port of destination and after unloading is commenced, as agreed in common law,⁸⁵ or not, as in France?⁸⁶ An English writer has presumed that the documents ought to be tendered at the buyer's place of business or residence.⁸⁷ Another English lawyer has, indeed,

⁸² Report of JULLIOT DE LA MORANDIÈRE, *supra* Ch. 36 n. 1, at 28.

⁸³ Swiss BG. (March 8, 1913) 39 BGE. II 161, 166.

⁸⁴ See *supra* p. 94.

⁸⁵ Brett, M. R., in *Sanders Brothers v. Maclean* (1883) 11 Q. B. D. 327, 337—C. A.; BENJAMIN, *On Sale* 776 ff.

⁸⁶ France: GEORGES SCHWOB, *Les contrats de la London Corn Trade Association* (1928) 251.

⁸⁷ KENNEDY, C. I. F. *Contracts* (ed. 3) 110 f., against the authoritative doubt of Atkin, J., in *Stein, Forbes & Co. v. County Tailoring Co.* (1916) 115 L. T. R. 215.

postulated that the law of the buyer's domicile should apply to the entire sales contract because of the duty of getting the documents to the buyer.⁸⁸

It does not appear in the English cases applying English law as a matter of course, that the buyer must presumably receive the documents at his domicile; still less is that a universal rule. At any rate, the choice of law is better directed toward the law of the contract, which is usually the seller's law and which must consider the usage at the port of arrival.

(b) *Furnishing letter of credit.* The problem is illustrated by a case decided by a court in Geneva. The contract was made in Calcutta where the seller was domiciled, and where the bags of jute sold were to be delivered c. i. f. Piraeus, Greece. The buyer, seemingly in Athens, had to furnish a letter of credit, and offered a credit letter issued by a London city bank. The court held in effect that the seller could expect exchange of the documents against payment in Calcutta without the delay required by transmitting the documents to London, and that by application of Indian law, as law of conclusion and performance, the buyer was in default.⁸⁹ The holding is right but the argument is wrong. In this case, Calcutta, in addition to being the place for the buyer's performance, was the place of the seller's domicile and of shipment. Hence, the contract was fully centered there. On the other hand, if the contract had been satisfied with a credit by the London bank not made payable at a bank in Calcutta, there would nevertheless be no reason why English law should enter into the picture.

The *lex contractus* suffices in all these cases.

The Warsaw-Oxford Rules, Rule 16, in an otherwise complete statement, fails to indicate the place at which the documents should be "presented" (présentés) to the buyer. Int. Law Ass'n, 37th Report (1933) 429.

⁸⁸ CLAUGHTON SCOTT in Sixth Hague Conference, Actes 288. See *supra* Ch. 36 p. 57 n. 25.

⁸⁹ App. Genève (March 4, 1932) Sem. Jud. 1932, 523, 527. An arbitration clause for the Bengal Chamber of Commerce was found ineffective.

3. Measure of Damages

Excluding the law of the forum, the law of the contract governs damages. This is the present view of the American courts,⁹⁰ and the Restatement confirms it, although it identifies this law with the law of the place of performance.⁹¹

The same is true with respect to the right and duty of a party to ascertain the measure of general damages through resale or repurchase, and with respect to analogous transactions for the purpose of minimizing the damage. Only the forms of procedure and the intervention of officials in such cases depend on the law of the place where the transactions occur.⁹²

4. Specific Performance

In an old decision the German Supreme Court argued that the disability of a seller of goods at common law and under the English Sale of Goods Act to sue the buyer for payment of the price before the passage of the title was a

⁹⁰ Vol. II (ed. 2) p. 544. See recently, *State of Delaware, for Use of General Crushed Stone Co. v. Massachusetts Bonding & Ins. Co.* (D. C. Del. 1943) 49 F. Supp. 467 (interest); Pennsylvania law was correctly applied not because the entire contract was performed in that state, as the headline (13) falsely asserts, but because the responsibility of the selling company ceased with the delivery of stone to the carrier in Pennsylvania.

⁹¹ Restatement § 413, adopted by a few decisions and WILLISTON, 3 Sales 275 § 589d. Restatement (Second), Tent. Draft No. 6 (1960) §§ 346c, 346d, declares applicable "the law selected by application of the rules of §§ 332-332b"; in the case of a sales contract, the law referred to is the law of the place of delivery (§§ 332b (a), 346g, as amended at the 37th Annual Meeting of the American Law Institute, see *supra* Ch. 36 n. 47a). For criticism, see EHRENZWEIG, Conflict 504-511 §§ 192-195.

⁹² Italy: Cass. civ. (June 20, 1938) Foro Ital. Rep. 1938, 2080 No. 457, Giur. Ital. Rep. 1938, 789 No. 130: as it seems, the Italian buyer bought goods in Germany, then sued in Italy for rescission and damages for breach, which were allowed in principle. In a separate suit he demanded the balance after resale by him of the defective goods; in accordance with German law. Held that Italian law applied for competence and forms of the resale.

Switzerland: BG. (March 8, 1913) 39 BGE. II 161, 167; Cologne was the place of performance for delivery and payment, expressly stipulated. Hence, German law governed the resale made in Cologne.

part of English procedural law and therefore not applicable in a German court.⁹³

This result may be questioned, insofar as English law, if applicable to a sales contract, in principle should be applied as a whole, including the so-called "remedies." But since judicial discretion under the equitable jurisdiction of specific performance, not to mention the sanction of imprisonment for contempt, can scarcely be reproduced in a civil law court, the procedural part of the English institution may be considered important by a foreign court. This is the more acceptable, because in the inverse case an English or American court can not help but resort to its customary practice, although it may be inclined to favor specific performance when an applicable foreign law grants an action for satisfaction in kind.⁹⁴

5. Special Kinds of Sales

A painting was sold in England and delivered there. Therefore English law applied to the contract. As the seller reserved his right to repurchase under certain circumstances and the painting was brought to Pennsylvania, he would have had to pay the repurchase price in that state. The New York Court of Appeals, however, declared that the law governing the main contract also applied to the repurchase agreement.⁹⁵ This decision is obviously correct and a memento against the splitting of contract stipulations. The same may be said, for instance, of a sale on approval and of a sale with a condition for return or approval, distinguished in civil law as sales under suspensive condition of approval and under resolute condition of disapproval.

⁹³ RG. (April 28, 1900) 46 RGZ. 193, 199; cf. OLG. Hamburg (Oct. 31, 1924) 34 Z.int.R. (1925) at 450 f.

⁹⁴ M. WOLFF, *Priv. Int. Law* (ed. 2) 238. Comparative aspects of specific performance are discussed by SZLADITS, "The Concept of Specific Performance in Civil Law," 4 *Am. J. Comp. Law* (1955) 208, and by DAWSON, "Specific Performance in France and Germany," 57 *Mich. L. Rev.* (1959) 495.

⁹⁵ *Youssouppoff v. Widener* (1927) 246 N. Y. 174, 158 N. E. 64.

There is no reason why the ordinary tests should not extend to the accessory agreement.⁹⁶

III. PARTY AUTONOMY AND PUBLIC POLICY

In the discussions of the international committees working on the conflicts rules concerning sales of goods, the problem of public policy has had a very big place. Finally, the many objections raised against party agreements on the applicable law, violating the various "imperative" rules, were overcome with the result that clauses designating the applicable law, either express or undoubtedly implied, are valid, and this law includes the conditions of the consent of the parties.⁹⁷ It is, then, left to each participant state to deny "for reason of public order" application of the law determined by the Convention, that is, either that agreed upon or in the absence of agreement, that directly prescribed by the Convention.⁹⁸

If the courts would accept these simple rules and restrict the public policy of the forum to the limits earlier advocated,⁹⁹ all desires would be fulfilled.

An illustration of fundamental conceptions of the forum justifiably intervening is afforded by a German case of a conditional sale on the installment plan, supposedly governed by Dutch law. A stipulation for the forfeiture of the paid installments in case of default, allegedly valid under Dutch law, was refused enforcement as offending the purpose of a German provision prohibiting such clauses.¹⁰⁰

⁹⁶ Otherwise, HERZFELD, Kauf und Darlehen 99 and n. 118 who stresses the precarious situation of the seller.

⁹⁷ Cf. Hague Convention 1955, art. 2. The requirement that the choice of law must "unambiguously result from the provisions of the contract" is awkward. See the above mentioned observations of the German Council for Private International Law, *supra* Ch. 36 n. 28b, at 152-155.

⁹⁸ Hague Convention 1955, art. 6.

⁹⁹ Vol. II (ed. 2) Ch. 33 pp. 582-585.

¹⁰⁰ RG. (March 28, 1931) 85 Seuff. Arch. 200, Clunet 1933, 162. Cf. German Law of May 16, 1894, §§ 1, 6, concerning sales on installment payments. This decision has been approved in Italy by FEDOZZI-CERETTI 740 n. 1 and in Brazil by ESPINOLA, 8 Tratado 613.

Sale of Immovables

I. WHAT LAW GOVERNS THE CONTRACT

CONCERNING the characterization as immovable, the old traditional rule that *lex situs* determines what rights are immovable, continues universally despite the doctrinal objections of a few followers of the "qualification according to *lex fori*."¹ This auxiliary conflicts rule on characterization promotes uniformity in the domain of property as well as in that of contract.

In other respects, the picture is not so bright, and especially not in the United States. Here, the inconsistency apparent in choice of law for contracts in general, repeats itself in the special field of contractual promises to transfer land or an interest in land. After many vain efforts to extract a coherent law from the decisions,² the best way is to recommend the rule approved by the majority of modern legislation and literature.

¹ Restatement § 208; Montevideo Treaty on Int. Civ. Law (1889) art. 26, (1940) art. 32 (*verbis* "as to their quality"); Código Bustamante, art. 112. See SCHOENENBERGER-JAEGGI No. 261; NEUNER, *Der Sinn* 130. For the adversaries, see Vol I (ed. 2) p. 58 n. 30 and Vol. IV Ch. 54.

² "When we look behind the decisions in relation to specific questions for the formulation of a general and comprehensive criterion which will satisfactorily and consistently account for the results actually reached . . . disappointment generally ensues," Note, "Governing Law of Real Property Contracts," L. R. A. 1916A, 1011 at 1015. "There is confusion in the authorities upon the subject," GOODRICH, "Two States and Real Estate," 89 U. of Pa. L. Rev. (1941) 417 at 420 n. 15. To the same effect HERZOG, "The Conflict of Laws in Land Transactions: The Borderland Between Contract and Property Matters—A Comparative View," 8 Syracuse L. Rev. (1957) 191, 202, who, on the basis of a comparison between American, French, and Austrian law, reaches the conclusion "(1) that there is a considerable degree of uncertainty as to the law applicable in the case of land transactions, and (2) that this uncertainty exists in various countries, regardless of the method used to transfer title to land."

1. *Lex Situs* Compulsory

In the old doctrine, the law of the place where the land is located, extended to all parts of the transaction by which two parties sold and purchased any interest in land.^{2a} Story shared in this tradition³ and his close follower, Foelix, wrote that the *lex rei sitae* governs "the obligations flowing from the sale of an immovable, the causes operating its nullity and its cancellation or rescission."⁴

This clearly was the starting point of English and American conflicts law. Although its influence in the individual cases is difficult to evaluate, the principle is certainly applied when a court construes the contract, termed with characteristic vagueness "relating to land," as a single undivided entity, subject to the *lex situs*. The Iowa court followed this view in a decision discussed in the second volume,⁵ as it applied the statute of frauds of the situs without further investigation.

In this country, however, the simplicity of the old doctrine was efficiently shaken by the famous judgment of Holmes, then a Massachusetts judge, in *Polson v. Stewart*.⁶ The court recognized as valid a contract made by a married woman in North Carolina, although she promised to convey land in Massachusetts where she lacked capacity. In other words, the state of the situs recognized the obligatory contract of North Carolina as it stood. Theoretically at least, it would seem that at present the ancient doctrine has

^{2a} A Turkish court even took the position that it had no jurisdiction in a contract case concerning the cancellation of a sale of immovables in Syria, although the agreement had been made in Turkey; the Court of Cassation (Oct. 28, 1950) *Clunet* 1957, 1047 rightly rejected this view emphasizing that the contract to sell property must be distinguished from the conveyance.

³ STORY §§ 372 ff.

⁴ FOELIX (ed. 3) 110 § 60. Similarly, FIORE §§ 215, 224, often criticized in the literature, see as to Italy, FEDOZZI 251.

⁵ Vol. II (ed. 2) pp. 491 f.

⁶ (1897) 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771; LORENZEN, Cases 593.

been abandoned in the United States,⁷ as well as in most countries. The Restatement fully recognizes the distinction between conveyance or transfer of land and contract to transfer or to convey land, and submits the validity of the latter promises to the law of the place of contracting.⁸

Remainders exist in Spain⁹ and some other jurisdictions¹⁰ to the extent that the domestic law is prescribed with respect to domestic immovables, in a one-sided public policy.

Again, the Treaty of Montevideo reaches the same result as the old doctrine under the theory of *lex loci solutionis*, forcibly applied to all contracts promising interests in any property.¹¹

2. *Lex Loci Contractus*

Beale and the Restatement postulate the law of the place of contracting with respect to the validity of the contract,

⁷ See, for instance, 11 Am. Jur. (1937) 335 § 38 n. 2; 2 BEALE §§ 340.1, 346.6.

⁸ Restatement § 340 and comment.

⁹ See the Note of the Spanish Government to the Sixth Hague Conference, Document 143; cf. also ECHÁVARRI, 3 Cód. Com. 465.

¹⁰ Brazil: (Requiring writing and registration, App. Alagôas (March 3, 1944) 27 Direito 404.) Former Introd. C. C. art. 13 § ún. III, cf. 2 PONTES DE MIRANDA 243, criticized by ESPINOLA, 8 Tratado 547 § 157 citing BEVILAQUA, 1 C. C. Com. (ed. 6, 1940) 136. The new art. 9 § 1, however, seems to refer only to formalities, cf. ESPINOLA, 8-C Tratado 1813 § 156.

Poland: Int. Priv. Law, art. 6 No. 3. The Polish Draft 1961, art. 13, subjects all transactions relating to immovables, not only those concerning domestic immovables, to the law of the situs, thus completely excluding party autonomy. To the same effect: Czechoslovakian Law of 1948 on private international law, § 44.

Switzerland: SCHOENENBERGER-JAEGGI No. 189 and cited authors; 2 SCHNITZER (ed. 4) 689 f.; Swiss law is the presumable law of contract, but if another law applies to the contract, Swiss public policy governs the obligatory promise to convey Swiss immovables.

Uruguay: C. C. art. 6; GUILLOT, 1 C. C. 123.

In Italy, some authors believed that a "vendita immobiliare" as a whole had to be solemn. See Vol. II (ed. 2) p. 492 n. 19, and for an application to the sale of aircraft, LOMONACO 86 § 14. The contrary and correct view has been confirmed by the wording of C. C. (1942) art. 1350, corresponding with old art. 1314 (1865).

¹¹ Montevideo Treaty on Int. Civ. Law (1889) art. 34 par. ún., (1940) art. 38 par. 1 (note the words "En consecuencia").

whereas the *lex situs* operates in matters of performance.¹² Others have undertaken to harmonize the cases to the same effect by the distinction that "executory contracts" to transfer real property are under the *lex loci contractus*, while executed contracts follow the *lex loci solutionis*.¹³

Misled by the theory of the last act in completing a contract, a few decisions have applied the law of the place where the deed of conveyance was delivered, determining thereby such problems as the measure of damages for breach of contract.¹⁴ This seems to mean that the entire obligatory portion of the contract is under this law. It is uncertain whether the same scope was intended in a decision determining the measure of damages for nondelivery of a deed.¹⁵ The land was in South Dakota but the deed was promised and to be delivered in Iowa. The court applied Iowa law. This could mean a special conflicts rule for the isolated duty of delivering the instrument, but probably does not mean it. According to the Restatement, § 341 (1), the law of the place where a deed of conveyance of an interest in land is delivered determines "the contractual duties of the grantor," which proposition seems to clash with every other rule respecting contracts recognized in the Restatement. Delivery of the deed is a condition of conveyance. That the place where it is actually made, or for that matter, where it is to occur, should determine the legal effects of a conveyance, partly dislodging the significance of the situs of the land, is a possible idea. But that the place of that delivery should also localize the duty of the seller, to make good a defective title to the land, cannot be reasonably explained. This is a mere product of an obsolete concept of breach of warranty.

¹² Restatement § 340; 2 BEALE 1190, 1216.

¹³ MINOR 31 § 11; L. R. A. 1916A, 1027; this formulation seems to stem from the wording of STORY § 363, first sent.

¹⁴ Atwood v. Walker (1902) 179 Mass. 514, 61 N. E. 58.

¹⁵ Clark v. Belt (C. C. A. 8th 1915) 223 Fed. 573.

These theories share in general the defects of emphasizing accidental localities, and some of them add the disadvantage of splitting title and obligation where no separation is required by the nature of the transaction.

3. Subsidiary Rule of *Lex Situs*

In the opinion prevailing in the world, obligations to transfer land or interests in land are governed by *lex situs*, where no other connection appears definitely required. This law is regarded as presumably intended by the parties or as the law most naturally competent. This is the undoubted English doctrine,¹⁶ it is taught in France,¹⁷ Italy,¹⁸ and most countries,¹⁹ shared in Germany in consequence of the predominance of the *lex loci solutionis*,²⁰ and has been adopted by international proposals.²¹ There is also American authority for complying with the intention of the parties, for which the location of the land may be important,²² but classification of the individual cases is difficult.²³

¹⁶ England: *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 122; *Rex v. International Trustee* [1937] A. C. 500, 529; WESTLAKE 269 § 216; DICEY (ed. 7) 814 ff.; CHESHIRE (ed. 6) 598 ff.; FALCONBRIDGE (ed. 2) 609; M. WOLFF, *Priv. Int. Law* (ed. 2) 434, 533.

¹⁷ France: NIROYET in 2 *Répert.* 251 § 63; LEREBOURS-PIGEONNIÈRE, D. 1931.2.33; LEREBOURS-PIGEONNIÈRE, *Précis* (ed. 7) 584 f.; BATIFFOL 108 §§ 122 ff., 393 §§ 471 ff.; BATIFFOL, *Traité* (ed. 3) 645 § 593. *Contra*: BARTIN, 2 *Principes* 65 n. 5 without argument.

¹⁸ FEDOZZI-CERETTI 741.

¹⁹ The Netherlands: KOSTERS 756; MULDER (ed. 2) 170.

Poland: *Int. Priv. Law*, art. 8 No. 2.

Switzerland: SCHOENENBERGER-JAEGGI No. 261; BECKER in 6 *Gmür Vorbemerkungen zu arts. 184-186 No. 27.*

Austria: OGH. (Jan. 16, 1952) *Clunet* 1955, 180.

Contra: ROLIN, *Revue Dr. Int.* (Bruxelles) (1908) 602 (in contrast to leases of immovables).

²⁰ RG. (Oct. 14, 1897) JW. 1897, 581; (Dec. 7, 1920) 101 RGZ. 64; NUSSBAUM, D. IPR. 232.

²¹ *Inst. of Int. Law* (Florence), 22 *Annuaire* (1908) 290 art. 2 (b); *Int. Law Ass'n*, Vienna Draft 1926, art. 1, A, in 34th Report (1927) 509.

²² STORY § 363; GOODRICH 394 § 145; 11 *Am. Jur.* 335 § 38; STUMBERG (ed. 2) 377 ff. and the *Restatement* (Second), Tent. Draft No. 6 (1960) § 346e.

²³ See, to the same effect, Note, L. R. A. 1916A at 1021 ff. The decisions referred to by 2 BEALE 1190 § 340, 1 at n. 4 for the *lex situs* mostly concern capacity, although *Hamilton v. Glassell* (C. C. A. 5th 1932) 57 F. (2d) 1032,

Exceptions to the subsidiary rule of the situs have been claimed, apart from a contrary agreement of the parties,²⁴ for land situated on a border,²⁵ and land that is only a small part of an estate.²⁶ Certainly an exception must also be admitted when both parties are domiciled in the same country and there contract with respect to foreign land.

Illustrations. (i) An English decision applied English law to the purchase of a share in a decedent's estate, including real and personal property in Chile, where the parties were three brothers, all of them domiciled in England, and the purchaser residing in Chile.²⁷ Presuming that the court correctly found Chilean law unsuitable to the contract, the *lex loci contractus* had so many relations to the case including the domicile and residence of the vendors, that its application was justified.^{27a}

1033 is based on presumed party intention. LORENZEN, 6 Répert. 307 Nos. 129, 130 does not regard *lex situs* as governing all phases of the contract, as BATIFFOL 110 § 123 has understood; LORENZEN discusses the problem on p. 324 No. 206.

The often cited decision in the New York case, *Hotel Woodward Co. v. Ford Motor Co.* (C. C. A. 2d 1919) 258 Fed. 322 belongs to the several cases where *lex fori* coincides with *lex loci solutionis*; in addition both parties were domiciled in New York. The judge would personally have preferred the law of Georgia where the deed was executed.

The decision of the Supreme Court of the United States in *Selover etc. v. Walsh* (1912) 226 U. S. 112 only confirms the constitutional power of a state to apply the law of the place of contracting without deciding whether it should do so under a sound conflicts rule.

For an analysis of the American cases under the aspect of the so-called Rule of Validation, see EHRENZWEIG, *Conflict* 612 ff. § 233 (c) and WILLIAMS, "Land Contracts in the Conflict of Laws—*Lex Situs*: Rule or Exception?" 11 *Hast. L. J.* (1960) 159.

²⁴ England: *British Controlled Oilfields v. Stagg* (1921) 127 L. T. R. 209.

United States: Restatement (Second), Tent. Draft No. 6 (1960) § 346e (1) declares the *lex rei sitae* only applicable "in the absence of an effective choice of law by the parties."

²⁵ *British South Africa Co. v. De Beers Consol. Mines* [1910] 1 Ch. 354; 2 Ch. 502, C. A.; [1912] A. C. 52. As to problems of land situated on a border, see 37th Annual Meeting of the American Law Institute (1960), Proceedings, pp. 544 ff.

²⁶ M. WOLFF, *Priv. Int. Law* (ed. 2) 434 § 415.

²⁷ *Cood v. Cood* (1863) 33 L. J. Ch. (N. S.) 273, 278, criticized by M. WOLFF, *supra* n. 26.

^{27a} In a case where two Swiss citizens with domicile in Switzerland entered into a contract relating to land in France, the agreement being made with the assistance of a French notary public but the price being fixed in Swiss

(ii) When a contract on the installment plan for the purchase of Colorado land was made in Minnesota and the Minnesota court applied its domestic statute prescribing a certain notice to be given before forfeiture of the paid installment sums, the court invoked the principle that the *lex loci contractus* applies when the price is to be paid in the state.²⁸ But not only was the seller a corporation chartered and domiciled in Minnesota but the buyer was a citizen of that state. For this reason it was a domestic contract.

(iii) Other cases are more doubtful.²⁹ Where a contract was made in California for the purchase of mining property in Mexico with the price secured by notes and mortgages in California,³⁰ the court failed to state that the California connections were strong enough to sustain a tacit agreement for California law. It should, then, not have applied this law to the question of rescission.

Such subsidiary localization of the contract at the situs is preferable to the artificial method of identifying the place of contracting with the situs. An offer for the purchase of land in Maryland was mailed from England and the acceptance mailed back; the deed should have been delivered in England, but was not. The Maryland court invoked the settled method of applying its own law *qua lex situs*, but conceived this as an extension of the real property rule and thought it should corroborate the result by an auxiliary construction in the course of which the place of delivery of the deed was discarded because no English town had been named.³¹ Neither approach was correct; the law of

currency, the Federal Tribunal held French law applicable; BG. (Nov. 12, 1956) 82 BGE. II 550, criticized by GUTZWILLER, Schweiz. Jahrb. I. R. 1957, 280. If the court had followed a rule similar to that of the new Restatement, Swiss law would probably have applied; see Restatement (Second), Tent. Draft No. 6 (1960) 93, and REESE in 37th Annual Meeting of the American Law Institute (1960), Proceedings, pp. 542 f.

²⁸ Finnes v. Selover (1907) 102 Minn. 334, 113 N. W. 883.

²⁹ See BATIFFOL 111 ff. on American cases; NUSSBAUM, D. IPR. 232 on certain decisions of lower German courts.

³⁰ Loaiza v. Superior Ct. (1890) 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376. The parties were English and Mexican nonresidents.

³¹ Latrobe v. Winans (1899) 89 Md. 636, 43 Atl. 829.

the forum could simply be assumed to be the most closely connected law.

In this prevailing view, obligatory and real property transactions are distinguished, not only when they appear in separate agreements or instruments as happens in many countries, but also when they are closely knit together in a deed of conveyance. The obligatory part of the entire transaction depends on the real property law of the situs only insofar as no effect on the title or interests is possible without the consent of the state of situs. The situs prescribes the kind and conditions of the transferable interest, the formalities of the transfer and capacity to alienate and acquire such interest.

Equitable remedies. On the other hand, the subject has become slightly complicated in common law because of the intervention of equity jurisdiction.³² The Court of Chancery, by assuming a constructive trust and in other ways, undertook to right wrongs done by an English defendant with regard to foreign land. In particular, the practice has been settled that on a contract for selling or charging land, where the land is outside the jurisdiction of English courts, an action *in personam* is allowed to enforce the execution of a correct sales instrument sufficient under the *lex situs*.³³ The *lex situs* is thereby respected to the extent that no interest in the land is deemed to be validly promised that does not conform to the law of the situs. The promise to convey a recognized interest, however, is effective irrespective of the validity of the contract under the law of the situs. No Anglo-American peculiarity of international bearing is noticeable in this practice, as confined to the problems of taking jurisdiction and of administering the local equity procedure. Only when the domestic law is applied despite the closer

³² BEALE, "Equitable Interests in Foreign Property," 20 Harv. L. Rev. (1907) 382; 2 BEALE 953 ff.; GOODRICH, *supra* n. 2, 425 ff.; GOODRICH 398 § 147.

³³ Lord Cottenham in *Ex parte Pollard* (1840) Mont. & Ch. 239.

connection of the contract with the situs, as has occurred in some cases just for the purpose of taking jurisdiction otherwise not obtainable, do these courts deviate from normal jurisprudence.

II. FORM AND CAPACITY

I. Form

Whether a contract promising to transfer an interest in land must be written, authenticated, registered, or in the form of a deed, is usually determined under the general conflicts rules concerning formality.³⁴ In the doctrine prevailing throughout the world, this means that the contract may comply either with the law of the place of contracting or with the law governing the substance.³⁵ In this special application, this optional variant of *locus regii actum* is also recognized in England, if not clearly by judicial authority, at least by the writers.³⁶ The American approach, uncertain between *lex loci contractus* and *lex situs*, would seem to suggest a correction toward the same view.³⁷ The Treaty of Montevideo, however, applies the *lex situs* under the guise of *lex loci solutionis*.³⁸

In some countries, the *lex situs* is applied, either openly or as a matter of public policy, to formalities when domestic immovables are involved.³⁹

It will be discussed separately whether these rules extend to the manifold provisions prescribing formalities for

³⁴ France: *Lex loci contractus* is emphasized by Cour Paris (June 6, 1889) Clunet 1889, 826; NIBOYET 634 § 507, 2, but this can scarcely be meant as a compulsory rule.

Germany: EG. BGB. art. 11; cf. WALKER 332 n. 12; see Vol. II (ed. 2) p. 492.

The Netherlands: OFFERHAUS, 30 Yale L. J. (1921) 117.

Rumania: PLASTARA, 7 Répert. 77 No. 253.

1 BAR 620; GIERKE, 1 D. Privatrecht 231 n. 61; 2 MEILI 67.

³⁵ Vol. II (ed. 2) p. 489.

³⁶ CHESHIRE (ed. 6) 600, referring to *In re Smith*, Lawrence v. Kitson [1916] 2 Ch. 206; M. WOLFF, Priv. Int. Law (2 ed.) 524; DICEY (ed. 7) 817.

³⁷ GOODRICH 272 § 106; BATIFFOL 111 § 125.

³⁸ *Supra* n. 11.

³⁹ Poland: Int. Priv. Law, art. 6 (3); and others, *supra* n. 10.

authorizing agents to make a contract for the transfer of land.⁴⁰

2. Capacity

Although capacity to transfer an immovable, of course, depends on the conflicts law of the country where it is situated, capacity to promise such transfer is distinguishable. It was a question of the capacity of a married woman on which Mr. Justice Holmes formulated the contrast between personal covenants and the incidents of the *lex situs*.⁴¹

In conformity with their general attitude, common law courts will prefer the law governing the contract,⁴² whereas at civil law the personal law governs.⁴³ The latter is also sporadically applied in the United States.⁴⁴

If the promise is valid under the law of the contract, but the promisor is unable to fulfill it because of incapacity under the law of the situs, he at least owes damages for not conveying the interest,⁴⁵ except in the state where the land lies and in other states where he is regarded as incompetent.

III. COVENANTS FOR TITLE

At common law, agreements in deeds of conveyance are distinguished as those "running with the land" and those

⁴⁰ *Infra* Ch. 40 p. 175.

⁴¹ *Polson v. Stewart* (1897) 167 Mass. 211, 45 N. E. 737; see Vol. II (ed. 2) p. 492 n. 17.

⁴² England: *Bank of Africa, Ltd. v. Cohen* [1909] 2 Ch. 129 (*lex situs*); *CHESHIRE* (ed. 6) 600 f.; M. WOLFF, *Priv. Int. Law* (ed. 2) 523 § 499; *DICKY* (ed. 7) 769, 817.

United States: 2 *BEALE* 1177; *GOODRICH* 383 § 145; *STUMBERG* (ed. 2) 241 f.; *Restatement (Second)*, Tent. Draft No. 6 (1960) § 333.

⁴³ Germany: EG. BGB. art. 7. For the authority of guardians, see OLG. München (Sept. 8, 1938) H. R. R. 1939, No. 81.

The exceptions for transactions by foreigners who would have capacity under the domestic law, are applicable, whereas they do not apply usually to capacity for disposing of foreign real property by act within the forum. See Vol. I (ed. 2) p. 202; German EG. BGB. art. 7 par. 3; Ital. C. C. Disp. Prel. (1942) art. 17 par. 2, etc.

⁴⁴ Vol. I (ed. 2) pp. 111 n. 7, 198 n. 19.

⁴⁵ *CHESHIRE* (ed. 6) 601.

not running. The former category includes promises creating under certain conditions a benefit for, or a burden on, the successors of the purchaser without, however, establishing encumbrances that would benefit or burden any owner of the land in the manner of a *jus in re*. (It is misleading, therefore, to call these agreements "real covenants.") Also the grantee may promise, for instance, restrictions on building binding his successors in title.

Interstate conflicts exist mainly with respect to covenants deemed to be implied in some states but not in others. For instance, some states, by statutory or judicial construction, interpret the words "grant and bargain" used by the grantor as implying promises of good title, quiet enjoyment, and freedom of encumbrances, in favor of the purchaser and all persons acquiring from him through similar conveyances.

In the traditional view, covenants running with the land are governed by the *lex situs*.⁴⁶ Consequently, it is assumed in the Restatement that this law decides whether and under what conditions a covenant runs with the land.

For the agreements not running with the land, opinions are divided. In one view, the *lex situs* again applies.⁴⁷ In another, followed in a series of cases, these agreements being "merely contractual" and without connection with the land, are declared to be governed by the law of the contract, that is, commonly the *lex loci contractus*.⁴⁸ The Restatement places them under the law of the place where the deed of conveyance is delivered.⁴⁹ There is considerable

⁴⁶ Restatement § 341 (2) and comment; *Platner v. Vincent* (1921) 187 Cal. 443, 202 Pac. 655; *LORENZEN*, Cases 587; for other cases, see *GOODRICH* § 146 ns. 28, 29, 30; *MINOR* 457 § 185; *LEFLAR*, Conflict of Laws 278; 17 L. R. A. (N. S.) 1094; L. R. A. 1916A, 1027 n. 49, and for the municipal doctrine in question, *WM. RAWLE*, Covenants for Title (ed. 5, 1887) 301 § 205.

⁴⁷ *Lyndon Lumber Co. v. Sawyer* (1908) 135 Wis. 525, 116 N. W. 255; *Alcorn v. Epler* (1917) 206 Ill. App. 140.

⁴⁸ *Bethell v. Bethell* (1876) 54 Ind. 428, *LORENZEN*, Cases 585; other Indiana cases, see *GOODRICH* § 146 n. 33; other cases, Note, L. R. A. 1916A, 1027 n. 48; *WHARTON* § 276 (d).

⁴⁹ Restatement § 341 (1).

opposition to this treatment, though termed logical, on the ground that the distinction is questionable or difficult, or too technical for the purpose of conflicts law. In this view, covenants should fall under one law, the *lex situs*, avoiding the confusion caused by the distinction of groups and division of opinions.⁵⁰

There is much force in this proposition but more precision is needed as to the ground and scope of the *lex situs*. Legal history may help. The cases extending *lex situs* to all covenants evidently have been influenced by the old broad scope of that law which comprehended the entire contract by force of sovereignty. If the choice of law resorts to *lex situs* only for convenience, it has to consider any contrary agreement of the parties as well as the special situations in which the contract is centered elsewhere. Do these considerations not apply to covenants running with the land? On the other hand, what is the relationship in nature between covenants for title and veritable *iura in re*, the proper field of *lex situs*?

That so much is unstable and controversial in the matter of covenants for title in common law, in contrast with the romanistic systems which sharply distinguish obligation from right in a thing, must be a residue of legal history. Traditionally, in England, as almost everywhere except in classical Rome and derivative systems, real rights were rights to possession and consisted in the better claim between two persons. The abstract and absolute character inherent in the developed Roman *dominium* and *jus in re aliena* was absent or less marked. Moreover, until the nineteenth century, formal certainty, as assured by public land registers in Central Europe, did not exist, and surrogates were needed, quite as in ancient times. Covenants and title records

⁵⁰ Note, 9 Cal. L. Rev. (1921) at 35; 10 *id.* (1922) 174; LORENZEN, 20 Yale L. J. (1911) 427, and in 6 Répert. 308, 131; HEILMAN, "Conflict of Laws Treatment of Interpretation and Construction of Deeds in Reference to Covenants," 29 Mich. L. Rev. (1931) 277; GOODRICH 397.

are derived in the last instance from the universal custom of *instrumenta antiqua*—so termed by the Roman jurists contemplating the Eastern usages, and by the Italian lawyers in considering the Lombard practice,—a chain of conveyances transmitted from each vendor to his purchaser, together with the deed embodying the actual sale. Each document contained a comprehensive stipulation of warranty against the vendor, his family, and successors infringing the alienation, and promising protection or penalties in case of attacks by strangers.

The usage in England was almost exactly the same, although with great legal elaboration. The extended conveyance clauses beginning to appear in the thirteenth century regularly expressed the promise of warranty to the feoffee, his heirs and "assigns," which granted a remote successor direct claim against the original feoffor.⁵¹ These warranties of title formed the transition from a merely relative concept of a claim to possession to the absolute right in real property. Where a legal system is ready to accord the buyer independent possession and full ownership by derivation from the former owner, there is no necessity for promises of the vendor that he himself or persons on his behalf shall not disturb the buyer's right, although the French Civil Code (article 1628) still contains the doctrine of *fait du vendeur*, and a certain usefulness may be found in it.⁵² Clauses covering eviction by third parties on the ground of the vendor's defective title lose importance with the introduction of means providing public knowledge of the true legal situation of the land.

⁵¹ See the excellent article by S. J. BAILEY, "Warranties of Land in the Thirteenth Century," 8 *Cambr. L. J.* (1944) 274; 9 *id.* 82.

⁵² The present writer has repeatedly dealt with the subject and refers in particular to his book, 1 *Haftung des Verkäufers wegen Mangels im Recht* (1902) 33 ff. (Roman Law and papyri), 169 ff. (Germanic laws); and various articles, esp. KATAGRAPHE, 54 *Zeitschrift der Savigny Stiftung, Rom. Abt.* (1934) 189, 198; "Die eigene Handlung des Schuldners und des Verkäufers (Fait du débiteur; fait personnel du vendeur)," 1 *Rheinische Z. f. Zivil- und Prozessrecht* (1909) 187.

In the light of these short observations, it is instructive to comment on two outstanding judicial statements.

Geiszler v. De Graaf.⁵³ This New York decision describes the nineteenth century distinction between two types of covenants for title. Covenants in which the grantor of land promises quiet enjoyment to the purchaser or declares warranty of title, were distinguished from those in which he declares that he has lawful seisin or the right to convey or that the land is free of encumbrances.

In the former type of covenant, the breach was construed to occur only on eviction, actual or constructive.⁵⁴ The benefit of this covenant runs with the land and any subsequent purchaser in an uninterrupted chain of conveyances containing such a covenant ("privity of estate") may sue any predecessor for the breach of warranty. A breach of the latter type of covenant occurred, if at all, upon delivery of the deed and therefore the right of the grantee became a chose in action which did not run with the land. This rule, probably based on the ancient impossibility of assigning choses in action was abandoned by the New York court.

With respect to the first group it seems never to have been doubted, either in New York or elsewhere in America, that the traditional stipulations of warranty were within the scope of the *lex situs*, although in Europe this has only been assumed by Foelix and one other writer.⁵⁵ But this treatment is only convenient, not necessary. Of course, the contractual bond between the parties to each of the successive contracts is insufficient to justify the "running"; there must be an agreement "touching and concerning the land" and "privity of estate."⁵⁶ Nevertheless, the warranty of

⁵³ Dictum by Brien, J., (1901) 166 N. Y. 339, 59 N. E. 993.

⁵⁴ WM. RAWLE, *Covenants for Title* (ed. 5, 1887) § 202.

⁵⁵ 1 FOELIX (ed. 3) 110 § 60; MASSÉ, 1 *Droit Comm.* (ed. 2) 546 § 637, as cited by 8 LAURENT 222. *Contra*: the editor of FOELIX (ed. Demangeat) *loc. cit.*; LAURENT *loc. cit.*

⁵⁶ CLARK, *Covenants* 150.

good title or the promise to indemnify the purchaser and his successors, creates a contractual obligation, necessary and significant for the situation. The unconscious reason why this institution is attributed to the law of the situation is the same which once suggested the so-called "jumping recourse."⁵⁷ The succession of *auctores* of old and the series of written documents since the Middle Ages form the mechanism to secure the legal position of the possessor; they furnish the only practical evidence of title, until prescription is realized. Since conflicts law has only to ponder the social importance of local connections, it may reasonably connect the complex of such warranty relations with the situs of the land, which is where the records of title are held and the only fixed contact of the entire chain.

As to covenants of lawful seisin, or right to convey the land, and against encumbrances, since they were said to be broken upon delivery of the deed, they were subjected to the law of the place of this delivery. The modern construction, followed in an English statute of 1881,⁵⁸ is now shared by most American courts. In the absence of contrary agreement, the grantor is presumed to give his promise to every successor in the chain so that the right is assigned with the land to the subsequent purchaser. This assignment is independent of any "nominal" breach said to be committed by delivery of the deed with the false statement. Hence, all the mentioned types of covenants run with the land. Presumably they are under the *lex situs*.

We may, then, finally appreciate the desirability of treating all covenants under the same law, and therefore of determining the nature and effects of the promises by the law of the state where the land is.

But there can be a difference in conflicts law between

⁵⁷ Haftung des Verkäufers, *supra* n. 52, 244-249.

⁵⁸ 44 & 45 Vict., c. 41, s. 7.

covenants for title and veritable encumbrances. In the field of obligation, and only in it, the parties enjoy autonomy in the true sense, so that they may at their pleasure vary the qualification of the rights created by their stipulations. They must as well be able to choose the applicable law. Likewise, in a case such as *Cood v. Cood*,⁵⁹ where the contract relating to foreign land is made at the common domicile of the parties, the contract is centered there and covers all obligations of warranty.

Smith v. Ingram. Another point is illustrated by the doctrine neatly presented in *Smith v. Ingram* and often repeated since.⁶⁰ Two effects of covenants of warranty were distinguished. One is that the vendor is estopped from claiming the land against any purchaser in the proper chain of transfers. This effect, subject to the law of the situs, was denied in the instant case under the law of North Carolina where the land was, the seller being a married woman, whose contract was valid under the law of her domicile in South Carolina. The other effect is that an action on the covenant arises for breach of warranty, as a purely personal contract, sounding in damages only, and this would be determined by whatever law governs the obligatory contract.

To a comparatist this reasoning appears very attractive. A parallel may support it and suggest its adoption in civil law courts. In fact, the doctrine of estoppel has produced a perfect analogy to the Roman *exceptio rei venditae et traditae*—not noted thus far by historians, as it seems.⁶¹ In the just-mentioned ancient stipulations, and in later periods by the legal force of sales contracts, the vendor

⁵⁹ *Supra* n. 27.

⁶⁰ (1903) 132 N. C. 959, 44 S. E. 643, 61 L. R. A. 878; WHARTON 630 and n. 15 § 276 (d); 17 L. R. A. (N. S.) 1094. The decision in the particular case of *Smith v. Ingram* had an odious result, pointed out in the dissenting vote by Walker, J., but this phase was due to the old doctrine concerning the capacity of married women.

⁶¹ I do not mean to say that the Romans knew covenants running with the land; see BUCKLAND and McNAIR, *Roman Law and Common Law* (1936) 91.

promised that both he and his successors should not disturb the purchaser and the successors of the latter. Under Roman law, however, where the vendor sold and delivered land (or a slave) to the buyer but either failed to proceed to the formal act (*mancipatio*) required for transferring the ownership at law (*dominium ex jure Quiritium*) or had only subsequently acquired the title, the seller was entitled at law to enforce his "Quiritarian" ownership by *vindicatio*. But because he was obligated to transfer title to the buyer, he encountered the praetorian defense that he had sold and delivered. This exception was a part of the mechanism by which the praetor recognized an interest of the buyer, which under the name of "*in bonis habere*" closely approached ownership and by the Greek interpreters was called bonitarian ownership. Thus, the purchaser and his successors in title were protected against the owner or one from whom he derived title, on the ground of an obligatory right transformed into a kind of property. This defense against the nominal owner pertains to the law of the situation.

Apart from estoppel, the law of the contract, generally but not necessarily the law of the situs, covers the creation and effect of all covenants.⁶² This result is simple and satisfactory.^{62a}

Our discussion has no bearing on such agreements as a

⁶² Just for the historical interest connected with warranty for title, we may note the controversy in the old French doctrine regarding the law determining the vendor's duty to furnish security against possible eviction. Certain post-glossators, reading GAUUS' *Lex si fundus*, Dig. 21, 2, 6, interpreted the *consuetudo eius regionis in qua negotium gestum est*, as the law of the vendor's domicile rather than the *lex situs*, and BOULLENOIS, 2 *Traité de la personnalité et de la réalité des lois* (1766) 461 explained the former as presumably intended by the parties. In the nineteenth century, this warranty was not distinguished from the other incidents of a sale of immovables, see 8 LAURENT 223 § 153.

^{62a} The Restatement (Second), Tent. Draft No. 6 (1960) § 346f submits "the contractual duties imposed upon the grantor by a deed of transfer of an interest in land" to the *lex rei sitae* except if otherwise provided by the parties, and except as to minute details of performance. This rule, which is intended to take the place of original § 341, is said (*id.* at 100) to have the express support of the first edition of the present book (RABEL, 3 *Conflict of Laws*

promise to convey,⁶³ or a promise by the vendor of a manufacturing plant not to enter into competition with the purchaser.⁶⁴

IV. *LAESIO ENORMIS* (INADEQUACY OF CONSIDERATION)

In conformity with French law,⁶⁵ the Civil Code of Louisiana⁶⁶ allows a vendor of an immovable estate sold for less than half the value, to demand rescission, unless the purchaser chooses to make up the just price and keep the thing sold. This remedy, abolished in Quebec,⁶⁷ and most other countries, developed out of an institution going back to the legislation of the early Byzantine Empire.⁶⁸ In common law, a shocking insufficiency of valuable consideration in a bilateral agreement is likely to be treated as a presumptive fraud⁶⁹ and as such has been paralleled with the *laesio enormis* of civil law.

In conflicts law, the subject has been interestingly discussed, notably by French writers. A number of authors have construed, from a purely French point of view, every *lésion* as a defect of consent and therefore subject to the national law of the damaged party.⁷⁰ In another theory, the

110-17 (1950)). But according to Restatement (Second), Tent. Draft No. 5 (1959) § 222, Comment b, the *lex rei sitae* forcibly determines "whether a covenant runs with the land, and what the effect of its running may have on other interests in the land." Consequently, the scope of § 346f is narrower than that of the rule advocated here.

⁶³ MINOR 458 § 185.

⁶⁴ Robinson v. Suburban Brick Co. (C. C. A. 4th 1904) 127 Fed. 804.

⁶⁵ France: C. C. arts. 1674-1685, "of rescission of the sale on the ground of lesion."

Austria: Allg. BGB. § 934 has preserved the general remedy of lesion.

⁶⁶ Louisiana: C. C. (1825) arts. 2567-2578; (1870) arts. 2589-2600.

⁶⁷ Quebec: C. C. arts. 650, 1012. But it still exists in Italy: C. C. (1865) arts. 1529-1537; (1942) art. 1448. On South Africa, see *infra* ns. 78, 79.

⁶⁸ Cod. Just. 4, 44, 2, proved to be interpolated by GRADENWITZ, 2 *Bulletino dell'istituto di diritto romano* (1889) 14; see JOLOWICZ, "L'origine de la *laesio enormis*," in 1 *Introduction à l'étude du droit comparé* (Études Lambert 1938) 185. For the connections between Justinian's compilation and the modern doctrines, see DAWSON, "Economic Duress etc.," 11 *Tul. L. Rev.* (1937) 345, 364 ff.

⁶⁹ Coles v. Perry. (1851) 7 *Tex.* 109, 134.

⁷⁰ 8 LAURENT 212-216; BARTIN, 2 *Principes* 66 § 243; AUDINET in S. 1931.2.145; LAPRADELLE in *Revue* 1932, 295.

lex situs applies directly or as intended by the parties.⁷¹ But the *lex situs* has also been supported on another ground. Maury,⁷² after an elaborate historical study, states separate legislative motives for the six different cases of genuine lesion at present founding rescission in French law. With respect to the vendor's lesion, he discards the idea of deficient assent or moral coercion and he doubts whether the purpose of protecting vendors or owners has been decisive. Finally, accepting the latter idea, he restricts the French provision to French immovables. This places the problem under the *lex situs*. Batiffol⁷³ objects that the true thought of the French legislator is not so much to care for an American owner of a villa in Cannes on the Riviera, but to favor a French family owning immovables wheresoever. His conclusion is to apply the law of the contract. But Capitant has authoritatively stated that it is impossible to say which among the mingled ideas from the Byzantines to the present can be termed the true foundation of this institution. When Maury replied that "Certainly it is very difficult to choose, but since we place ourselves in the point of view of private international law, we are forced to do it," Capitant answered: "But this is arbitrary."⁷⁴

For the law of the vendor as the party possibly obligated, 2 BAR 43; 2 FRANKENSTEIN 302.

The personal law of the vendor in combination with other laws has been advocated by ROLIN, 3 Principes 210.

⁷¹ Cour Paris (Feb. 9, 1931) D. 1931.2.33, S. 1931.2.145, Clunet 1932, 109, Revue 1931, 348 (*lex rei sitae* for lesion of a contract in Paris for sale of a German immovable, notwithstanding *lex loci contractus* applied to the contract in general); Cass. req. (June 29, 1931) S. 1932.1.289, Revue 1932, 295 (on the ground of a Morocco law); see attempts to harmonize at least the second decision with the theory of *lex loci solutionis* by BATIFFOL 343 n. 5, 351 n. 1. Código Bustamante, art. 182: "territorial law" for rescission in general also seems to mean the *lex situs*. 2 BROCHER § 185; CHAMPCOMMUNAL, Revue 1932, 508.

⁷² MAURY, "La lésion dans les contrats," Revue Crit. 1936, 344, 352 ff., and in 3 Travaux du comité français de droit int. privé (1936) 70-104.

⁷³ BATIFFOL, Revue 1934, 630 and BATIFFOL 351 § 405 n. 4.

⁷⁴ 3 Travaux du comité français, *supra* n. 72, 100, 102.

It is not exact that conflicts law should depend on a doubtful intention in the legislative background of the domestic and still less of a foreign legislation. Nor are Maury's results good enough. He himself notes a "crying injustice" in deducing that when a sale is made under French law with respect to German immovables, French law would not be applicable because it refers to French immovables only, whereas the general remedy of German law against usury, the nullity of a contract violating good morals (BGB. § 138), would not apply because it refers only to contracts governed by German law.⁷⁵ Why should a remedy be severed from the contract? The problem is not one of real property although it has been claimed as such most recently by Niboyet.⁷⁶ On the other hand, the *lex loci contractus* as such⁷⁷ has no more justification than usual. The law of the contract must govern, and this is ordinarily, but not always, the law of the place where the land is.⁷⁸

Illustration. A contract was entered into in the Transvaal Republic for the sale of land situated in the Cape Province. Lesion was a valid defense under Transvaal law,⁷⁹ although such defense has been repealed by the law in the Cape Province.⁸⁰ The court applied the law of the place of contracting, which was also the law of the forum, on the argument that lesion like fraud must be judged in considering the place where the vendor committed it.⁸¹ In our view the situs of the immovable is not "an immaterial incident," as the court assumed, but (in the absence of closer connections in particular cases) it is the center of the entire transaction, as it also furnishes the data for appraising the "just price."

⁷⁵ MAURY, *Revue Crit.* 1936 at 382.

⁷⁶ NIBOYET, 4 *Traité* 243 § 1158.

⁷⁷ FEDOZZI-CERETI 732; 2 *RESTREPO HERNÁNDEZ* 72 § 1112.

⁷⁸ LEREBOURS-PIGEONNIÈRE, *Note, D.* 1931.2.33; *BATIFFOL* 350 § 404.

⁷⁹ Transvaal: See R. W. LEE, *An Introduction to Roman-Dutch Law* (ed. 4, 1946) 234 n. 3.

⁸⁰ Cape of Good Hope Prov.: Act No. 8 of 1879, § 8.

⁸¹ *De Wet v. Browning* [1930] S. A. L. R. Transvaal Prov. Div. 409; *BATIFFOL*, *Traité* (ed. 3) 668 § 615.

Representation

I. DEPENDENCE ON MUNICIPAL DOCTRINES

1. Three Main Doctrines

IN SURVEYING the present laws of representation in the world it is unfortunately still necessary to insert a few historical notes. The stages of evolution have left too many marks on this doctrine in numerous countries.

Originally, nowhere was it imagined that one person (Agent, A), by making a contract with a third party (Tertius, T), could create obligatory rights and duties between the third party and a principal (P). The official law of the Roman Empire, the classical Greek law, the Germanic laws, and the English law during the whole Middle Ages, were no exceptions. Needs of daily life, of course, required makeshift arrangements to approach the purposes of representation, surrogates sometimes coming very near to the legally barred result. In the seventeenth century, representation was finally recognized. Yet, as late as the nineteenth century some notable writers asserted that representation in creating obligations was logically impossible.¹ To make the strange phenomenon conceivable to the reluctant mind of the lawyers, various awkward attempts were made of which some shadows may be detected in the doctrines of conflicts law. Only at the cost of much pain was the simple truth learned that conclusion of a contract through an agent produces a threefold relationship, corresponding with the three persons involved. What happened to conflicts law

¹ THÖL, I Handelsrecht (ed. 6, 1879) 234.

when uncouth doctrines insisted on seeing the three-dimensional phenomenon in two dimensions, may be seen in the two theories dominating French and American laws, respectively, which are briefly described as follows.

(a) *Doctrine of mandate.* An old doctrine, widely maintained in Latin countries, is that of the two-sided "mandate." On one hand, article 1984 of the French Code states that:

"Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en son nom."²

On the other hand, "mandate" is at the same time characterized as a contract (art. 1984 par. 2) creating obligations between principal and agent (arts. 1991, 1998). Broadly speaking, this is the same method of dealing with the problems of representation as that originally used in common law; the contract of "agency" between principal and agent at the same time includes the grant of powers to represent the principal. Speaking only of the case where the agent is to perform a legal transaction, "mandate" or "agency" and "representation" are conceived as one sole legal institution producing two relationships: one internal between the principal and the agent, the other external between the principal and the third party. The internal relationship extends to the conditions under which A, by contracting with T, causes legal effects for and against P. Consequently, these conditions are included in the law governing the contract of "mandate," which again is most frequently identified with the law of the place where the contract of "mandate" is completed.

(b) *Incident of main contract.* In an American decision

² In Louisiana, the Supreme Court, in one of its most drastic moves, has declared the words "in his name" of the analogous art. 2985 C. C. "not essential," so as to abandon the civil law definition and to adopt the common law concept of power of attorney. See *Sentell v. Richardson* (1947) 211 La. 288, 29 So. (2d) 852; JONES, Note, 7 La. L. Rev. (1948) 409; YIANNPOULOS, "Brokerage, Mandate, and Agency in Louisiana: Civilian Tradition and Modern Practice," 19 La. L. Rev. (1959) 777, 778 n. 8, 795.

of 1841, in order to find what law governs the effect of an authority, an elaborate attempt was made to answer the question, "what law determines whether the act (of the agent) constitutes a contract, with whom and to what effect."³ In other words, there is but one external relationship in which the power of the agent to affect the principal's legal situation is a mere incident. As the contract with the third party is governed according to the orthodox doctrine, by the law of the place where it is made, this also covers the agent's authority.

It has never been stated, but it appears almost certain to the present writer that the continuous American practice ultimately laid down in the Restatement comes from that decision. While in the first mentioned theory the *lex loci contractus* of the *agency* contract applies, in this view the *lex loci contractus* of the *third party* contract governs the extent of the agent's authority.

(c) *Modern theory.* The German, and to a certain degree the English, courts have recognized that the power of an agent to affect the rights and duties of the principal constitutes an independent institution and ought to have its own proper law, not necessarily coincident with those governing either of the two other relationships.

Notwithstanding other propositions advanced in this field, these three conflicts doctrines demonstrate their intimate connection with the development of representation in the municipal systems, or more exactly, in the general science of private law.

2. Agency (Mandate) and Authorization

The Roman *ius civile* did not progress to a true concept of representation in obligatory contracts, although business life, protected by the praetors, furnished an increasing num-

³ *Carnegie v. Morrison* (1841) 43 Mass. 381, 397 (issuance of a letter of credit by the agent of London bankers in Boston).

ber of auxiliary institutions and Justinian's compilation presented a treasury of scattered remedies.⁴ The Continental commentators, sometimes unable to continue adequately the ancient development, clung to the contract of *mandatum*, which was recognized in classical and Byzantine times as one of the four orthodox contracts concluded by consent and enforced by corresponding civil actions. Discarding all the more helpful possibilities that the Corpus Juris richly offered from oriental and occidental practice, the doctrine preferred the pattern of the classical *mandatum*. In Rome mandate was a contract between principal (*mandans*) and agent (*is cui mandatur*, later *mandatarius*) imposing on the agent an obligation, originally gratuitous, to perform a factual work or to conclude a legal transaction in the interest of the mandator or of a third person. The agent, in making a contract with another party in performance of his obligation to the principal, necessarily entered alone into the contract with the third party. The effects of this contract had to be transferred within the internal relationship from the *mandatarius* to the *mandans*. On this ancient foundation, the main line of doctrinal tradition took its orientation toward the agency contract rather than toward an institution of representation. When, finally, on the Continent, during the seventeenth century, as a result of various previous impulses, representation by free persons was formally recognized in law, the old formulations were nevertheless retained, and the legal doctrine mirrored life in a curiously distorted picture. Thus Puchta taught:

The effect of the mandate is partly the constitution of representation with its effects, in this respect the mandate is called authority, partly an obligation between the mandant and the mandatary from which the former acquires the *actio mandati directa*, the latter the *contraria*.⁵

⁴ RABEL, Grundzüge des Römischen Privatrechts (1915) 507-512, and in subsequent articles, mostly followed in the literature.

⁵ PUCHTA, Pandekten § 323.

This doctrine was in force as late as 1871, when its critic, Laband, described it as follows:

Wherever someone acts instead of another upon his authority, a mandate is assumed to exist; the principal is called mandant and the agent mandatarius; agency, mandate, contract of authorization are words used synonymously by the lawyers. Those distinguishing more exactly, refer the term agency to the relationship between mandant and mandatarius, authority to the relationship between the mandant and the third party; agency indicates the internal, authority the external side of the relationship.⁶

Conflicts law has experienced many strong influences of this conception. The writers, viewing representation from the angle of "mandate," without thinking assumed that the law governing this contract also determines whether and to what extent a transaction made by the agent in any country constitutes rights and duties for the principal. Hence, provided that the *main* contract is effective in all other respects, it binds the principal if the law governing the contract of *agency* (mandate) so determines.

The law thus specified was, moreover, schematically identified with the *lex loci contractus* of the mandate. Again, to ascertain the place of contracting of the mandate, the traditional opinion held the mandate to be completed at the place where the agent "accepts the charge,"⁷ that is, in general, where the agent lives. But counterpropositions preferred the place where the mandant "receives the acceptance" from the agent,⁸ or where the mandant is established,⁹

⁶ LABAND, 10 Z. Handelsr. 183, 203 with respect to the German part of the literature.

⁷ CASAREGIS, Discursus de commercio, disc. 179, §§ 1, 2 n. 191 followed by HERTIUS, 1 Opuscula de Collis. Leg. 147; BURGE, 3 Commentaries, pt. 2 ch. 20 p. 753; STORY § 285; FIORE (ed. 2) §§ 129 ff.; DESPAGNET 894 § 300 (reserving contrary intention); ROLIN, 3 Principes § 1390; WAHL in Baudry-Lacantinerie et Saignat 266 n. 1 § 500.

⁸ 7 LAURENT 541 §§ 452 f.

⁹ ASSER-RIVIER, Eléments § 97.

which both come down to localizing it at the domicile of the principal.

This awkward theory has still some followers,¹⁰ especially in Italy¹¹ and in Latin America.¹²

Not until Laband's famous article from which I have just quoted, was it clearly understood that a sharp distinction is needed. (1) Principal and agent are connected by a relationship producing a right or a duty, or both, of the agent to act on account of the principal. This relationship may be based on a contract without consideration, as the Roman *mandatum* was a gratuitous promise. But in modern times it flows normally from such contracts as agency or partnership, or from an appointment of an administrator or guardian by a court, or directly from law. (2) Authority is the power of the agent to conclude a contract with a third party.

Employment, partnership, and the like may exist without authorization, and the latter may be conferred without imposing any contractual duty. Authority may exist contrary to internal directions by the principal to the agent; formalities may be prescribed only for the underlying contract or only for the authorization; death or revocation may terminate the former only, et cetera.

The distinction was fully carried out in the German doctrine and elaborated in the German Civil Code of 1896¹³ and the subsequent literature. At present, it prevails in the modern currents everywhere in civil law countries, including

¹⁰ Probably for the same reason, the Draft submitted by BARON NOLDE to the Institute for International Law, 33 *Annuaire* (1927) III 219, speaks merely of mandate as governed by the domiciliary law of the principal, and ignores the problem of authority.

¹¹ FEDOZZI-CERETI 740 ff., with the only concession to the local law that it ought to safeguard its own imperative provisions.

¹² E.g., Argentina: ALCORTA, 3 *Der. Int. Priv.* 109 ff.

Brazil: ESPINOLA, 2 *Lei Introd.* 572 § 242; SERPA LOPES, 2 *Lei Introd.* 360.

¹³ BGB. §§ 164 ff. on "representation" and "authority" are included in the general part, separated from the sources of obligations.

the views of the leading French writers of private law¹⁴ and, although not too apparent, in most Latin-American legal literature. Numerous recent codes,¹⁵ among them the Italian Civil Code of 1942,¹⁶ have changed the former system and separated the doctrines of representation and agency.

This dualism so slowly perceived in the Continental doctrine was equally obscured in the late and difficult beginning of true representation in England. The doctrine of Principal and Agent started from that of Master and Servant and never could be entirely separated from it. Command and ratification were the first grounds for making the master liable for the contract or tort of the servant.¹⁷ Authority remained until recently such a ground, a condition of vicarious liability, and hence a part of the doctrine of agency rather than a clearly autonomous subject. In our times, however, despite some antiquated arrangements of encyclopedias and inappropriate definitions,¹⁸ English and American writers have been fully aware of the significance of

¹⁴ France: 1 COLIN et CAPITANT (ed. 11) 91, *cf.* 2 *id.* (ed. 10) 863, 865; DEMOGUE, 1 Obligations §§ 89-155; PLANIOL et RIPERT, 6 *Traité Pratique* (ed. 2) 61 § 55.

¹⁵ The Swiss C. Obl. (1881) arts. 394-406 on mandate followed the French model, C. C. arts. 1984-2010. The Rev. C. Obl. adopts the division in representation and authority, arts. 32-40, and the sources of obligations, especially mandate, arts. 394 ff.

Poland: C. Obl. arts. 93 ff. on representation, arts. 498 ff. on mandate.

The same distinction is made in the Scandinavian countries.

As to these laws and for further references, see MÜLLER-FREIENFELS, "Law of Agency," 6 *Am. J. Comp. Law* (1957) 165, 172 f.

¹⁶ The Italian C. C. (1865) arts. 1737-1763 is similarly replaced by C. C. (1942) arts. 1387-1400 on representation and authority, arts. 1703 ff. on mandate and related contracts.

¹⁷ POLLOCK & MAITLAND, 2 *History of English Law* (ed. 2, reprint 1952) 528 f.; HOLDSWORTH, 8 *History of English Law* (1922) 222, 227 f., 252 f. See also HOLMES, *Agency*, in *Collected Legal Papers* (1920) at 96.

¹⁸ In such a modern English book as CHESHIRE & FIFOOT, *The Law of Contracts* (ed. 5, 1960) 386 f., agency and authority are still not called by their names but described as "the two aspects of the contract of agency." What we call authority is circuitously defined "as leading to privity between principal and third party."

authority.^{18a} They even share in two theoretical developments of the German doctrine that bring the conceptual distinction to a climax.

The German Civil Code frankly admits that the principal may declare his grant of authority directly to the third party (§ 170), or by public notification (§ 171), and treats him in the same manner, if he embodies his authorization in a written instrument and the agent shows it to the third party (§ 172). These cases are plainly recognized in the American Restatement of Agency as "apparent authority" (§§ 8, 9).

Another characteristic feature of the modern system is that authorization is conceived as a unilateral act of the principal,¹⁹ in full contrast to the contract of agency. This construction, formulated in the German Civil Code, § 167, is likewise laid down in the Restatement of Agency.²⁰ It has also not been considered too subtle by the English courts in which the point has been recently reaffirmed in a case of conflict between English and German law.²¹

There is, of course, a fundamental difference between the two great systems. In civil law, representation requires that the agent should be authorized to act, and in fact should openly act, in the name of or at least on behalf of the

^{18a} The distinction between the agent's power to bind the principal in legal transactions and the underlying relationship is especially emphasized by MECHEM, Agency (ed. 4) 11 § 23 and by FERSON 215 ff., 239 ff., whereas the treatises on agency by HANBURY 3 ff. and by POWELL (ed. 2) 35 f. are rather vague in this regard.

¹⁹ It is another question whether this act is "abstract," that is, may operate irrespective of the validity of the agency contract. National Socialist writers, in denying this effect, which is debatable, attacked the entire doctrine; for example, HERBERT MEYER, 2 Z. Ak. deutsches R. (1935) 53. But here Swiss law recognizes one of the rare cases of abstract acts; see OSER-SCHOENENBERGER art. 32 n. 27.

²⁰ Restatement of Agency §§ 15, 16, 26 comment a; unchanged in the Restatement of Agency (Second) (1958). The separation is felt but not quite correctly expressed as late as in TIFFANY, Agency 9.

²¹ Lewis, J., in *Sinfra AG v. Sinfra, Ltd.* [1939] 2 All E. R. 675, 682: "A power of attorney is not a contract. It is a onesided instrument." Lindley, L. J., in *Chatenay v. The Brazilian Submarine Telegraph Co., Ltd.* [1891] 1 Q. B. 79 at 85.

principal, so as to make him from the beginning the exclusive party to the contract.

At common law, when an agent acts in his own name and the other party does not know him to be an agent, the agent becomes the party to the contract, but the "undisclosed" principal may be sued by the third party, or may sue the latter under certain conditions.²² Accordingly, the concept of authorization must be defined broadly enough to cover the manifestations by which the person in whose interest, though not name, the act is to be done makes himself the principal. It is essential for our purposes that authorization be therefore understood in a double sense: the one for civil law consisting in the agent's power to act in the name of the person represented; and the other for common law consisting in the agent's permission to act either in the principal's name or as an undisclosed agent, or both. This conception is no more difficult than the common law doctrine itself, but precise terminology is not available to cover this large ground.

Terminology. The Restatement of Agency chooses to speak vaguely of the power "to affect the legal relations of the principal" (§ 7).^{22a} If authorization be defined as assent of the principal that the agent should contract in his name "or on his behalf,"²³ this identification would go counter to the common significance of "on behalf" as indicating disclosed principals, named and unnamed, or only the latter.²⁴

²² See GOODHART and HAMSON, "Undisclosed Principals in Contract," 4 *Cambr. L. J.* (1932) 320, conclusion at 356, and more recent articles by MÜLLER-FREIENFELS: "Die 'Anomalie' der verdeckten Stellvertretung (Undisclosed Agency) des englischen Rechts," 17 *RabelsZ.* (1952) 578; 18 *id.* (1953) 12; "The Undisclosed Principal," 16 *Mod. L. Rev.* (1955) 299; "Comparative Aspects of Undisclosed Agency," 18 *id.* (1953) 33.

^{22a} In England, the same definition is advocated by DOWRICK, "The Relationship of Principal and Agent," 17 *Mod. L. Rev.* (1954) 24, 36 f.

²³ Thus BRESLAUER, 50 *Jurid. Rev.* (1938) at 308 n. 7.

²⁴ See, e.g., BOWSTEAD, Agency art. 27, "in whose name or on whose behalf," with respect to ratification which is not permitted to an undisclosed principal.

Nor is "on account" a distinctive term, although it would admirably designate the representation of interests, since the word seems to be employed in the Agency Restatement sometimes also as a synonym of the term "for a disclosed principal."²⁵

For international purposes, we had better revert to an old terminology as follows:

Acting in the interest of another person ("on account" of a principal in a proper sense) may be either:

(1) direct (open) representation, i.e., acting "on behalf" of a principal (disclosed agency), namely, either (a) in the name of another person, or (b) on behalf of whom it may concern (unnamed agency; Restatement: partially disclosed principal); or:

(2) indirect representation (representation of interest but not of right), i.e., acting in the agent's own name for an undisclosed principal.

In order to embrace all these institutions, authority broadly defined may be termed as a power to act "on account" of the principal, which seems identical with the power "to affect his legal situation."²⁶

Conflicts law must adopt the distinction between agency and authorization. Authority originates or survives if its law so disposes, irrespective of an accompanying agency contract following its own law. An American food concern may send an employee to Guatemala to buy bananas, and his power to bind the firm may be construed under the law of that state. This, however, is no reason why his salary and

²⁵ See, e.g., §§ 7 comment d, 85 (1) and illustration 1; *cf.* § 4. In § 199, however, "on his account" and "on account of the principal" expressly mean an undisclosed principal. The Restatement of Agency (Second) improved the wording of § 85 (1); the ambiguous words "on account of" have been replaced by "for."

²⁶ Agency Restatement and Agency Restatement (Second) § 7: "Authority is the power of the agent to affect the legal relations of the principal . . ."; Conflicts Restatement § 345: "on account."

the right of the firm to dismiss him should not be subject to American law.

Conflicts rules, on the other hand, may readily combine direct and indirect representation referring both to a national law which may or may not recognize the common law doctrine.

3. Fiction of Identity

Other sources of theoretical mistakes arose with the various primitive attempts to lay down the principle of open (disclosed) representation. The slogan, *qui facit per alium, est perinde ac si faciet per se ipsum*, much used in the medieval development of the English master and servant doctrine,²⁷ came to embody the idea that the represented and the representing persons are deemed to be one, in a merger of personalities. That this fiction dominated the history of agency in England, is not an exact proposition according to prevailing opinion.²⁸ But a distinct tradition of writers on conflicts law on the Continent took inspiration from some remarks of Casaregis. This jurist, who died in 1728, explained the transfer of property in goods sent from a seller to the buyer through delivery to a carrier, by the following construction (for which there were ancient analogies): The seller, a "correspondent" of the buyer, is his commissioner. In complying with the buyer's order, he assumes a double personality, since in consigning the goods he conveys the property from himself as vendor to himself as the buyer's

²⁷ See for the early occurrences, SAYRE, "Criminal Responsibility for the Act of Another," 43 Harv. L. Rev. (1930) 689, 690 n. 9.

²⁸ The sources collected by HOLMES, History of Agency, in 3 Select Essays in Anglo-American Legal History (1909) 368, in the prevailing opinion do not support Holmes' hypothesis that modern agency doctrine in general, and the rules concerning the undisclosed principal in particular, originated from the fiction of identity. See POLLOCK & MAITLAND, 2 History of English Law (ed. 2, reprint 1952) 532 n. 1; YOUNG B. SMITH, "Frolic and Detour," 23 Col. L. Rev. (1923) 444, at 452 and cited authors; WÜRDINGER, Geschichte der Stellvertretung (agency) in England (1933) 241.

agent.²⁹ This dictum was read together with the same author's doctrine—which Story qualified as “so reasonable in itself,”—that the principal's order for purchase plus the ultimate consent by the agent form the contract *in loco in quo et ipse (mandatarius) et venditor existunt*.³⁰

In a long chain of subsequent writings these figures of speech led to the conception that the principal, represented by half of the agent's double personality, appears himself in the conclusion of the main contract. Among the various consequences derived therefrom in municipal law, it was contended by some outstanding Romanists that the contract with the third party is exclusively and immediately concluded by the principal.³¹ In this radical view, all requisites of consent to the main contract, such as sanity of mind, serious intention, freedom from coercion, fraud, and misrepresentation, the significance of knowledge in such matters as warranty of title and quality, were exclusively referred to the principal.³² However, in other versions, less emphasis was laid on the principal's part, and in some the fiction had even a reversed effect of making the principal disappear behind his representative.

In 1828, the English chancellor, Lord Lyndhurst, adopted the obvious application of the fiction to conflicts law, by stating that:

“If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them.”³³

Story found the same view accepted in two Louisiana de-

²⁹ CASAREGIS, *Discursus de commercio*, disc. 38 § 51 (ed. 1737) p. 126.

³⁰ Disc. 179 § 10 (ed. 1737) p. 192; STORY § 285.

³¹ DERNBURG, 1 *Heidelberger Kritische Zeitschrift* 18 as cited by LABAND, *infra* n. 32; UNGER, 2 *System des österreichischen allgemeinen Privatrechts* (ed. 3, 1868) 136.

³² *Contra*: LABAND, 10 *Z. Handelsr.* 225 f.; THÖL, 1 *Handelsrecht* (ed. 6, 1879) 236 § 70.

³³ *Pattison v. Mills* (1828) 1 *Dow & Cl.* 342, 363.

cisions.³⁴ It has been approved in the case of *Milliken v. Prati*³⁵ and often since. The French and Italian literature followed largely the same trend.³⁶ The person of the principal merges, *se confond*, with that of the agent,—this dogma appears as late as in the work of André Weiss.³⁷ In his words, a French principal acting through an agent in Belgium, is considered "to be on the Belgian soil."³⁸

These fictions are, like so many others, artificial and fallacious. As Bar pointed out,³⁹ how can the contract be regarded as made by the principal at the place of the agent, if the agent nevertheless decides whether and on what terms the contract should be made? And moreover, with the logic employed in this traditional approach, why should we not reach the opposite conclusion, viz., that the contract is deemed made at the principal's real domicile?

As to legislative policy, of course, the overemphasis laid on the external side of agency is certainly preferable to the overstressing of the internal side of which the mandate theory is guilty. But in many respects it is important not to forget that both principal and agent contribute to the effect of representation. Although they do so by no means on the same plane in concurrent acts of consent to the main contract, as was sometimes contended,⁴⁰ they cooperate, the one by conferring authority and the other by making the contract.

³⁴ Mr. Justice Mathews in *Whiston v. Stodder* (1820) 8 Mart. (La.) 95, 134; *Malpica v. McKown* (1830) 1 La. 248, 254; STORY § 285.

³⁵ (1878) 125 Mass. 374.

³⁶ See 3 FIORE § 1150.

³⁷ WEISS, 4 *Traité* 373.

³⁸ Exactly to the same effect, VALÉRY § 658: by charging his employee to go to France to represent him, the master transports himself in some manner to that country under guise of this representative; hence the contract is formed as though the master were present.

³⁹ 2 BAR § 268. Among recent Latin-American writers, 2 RESTREPO HERNÁNDEZ §§ 1294-6 has warned against the fiction.

⁴⁰ See HUPKA, *Vollmacht* 36 against MITTEIS, *Die Lehre von der Stellvertretung* 109, 182.

The merger theory was rather detrimental to the early formation of the American conflicts rules. As an illustration, we may remember the Louisiana case of 1830, in which a shipmaster entered into a contract in Mexico and the Mexican law affirmed his implied authority and made the shipowner personally liable, contrary to the law of Louisiana where the owner was domiciled. The court applied the Mexican law as the law of the place where the contract with the third party was made, simply because if the owner had been personally present and had concluded that contract, the measure of his liability would be determined under Mexican law.⁴¹ That the principal was not present and did not make the contract, was forgotten under the spell of the fiction.⁴²

In *Milliken v. Pratt*,⁴³ a case considered as leading in conflict of laws concerning both the place of contracting and agency, the fiction was extended in a particularly offensive way. A married woman who could not bind herself under her domiciliary law of Massachusetts, delivered a note to her husband, guaranteeing the debt. The husband sent it by mail to his creditor in Maine. The Massachusetts court, eliminating its own law, held her liable under the law of Maine, because "if the contract is completed in another state, it makes no difference in principle whether the citizen of this state goes in person or sends an agent, or writes a letter across the boundary line between the two states." This makes the place of the recipient of a letter a place of acting by agent, treating the mail as agent although it is only a messenger. And in all the innumerable situations covered by this broad definition, the party giving a declaration is considered as quasi-present at a place where either the recipient is present or the contract is deemed to be made.

⁴¹ *Arayo v. Currell* (1830) 1 La. 528, 20 Am. Dec. 286, 289.

⁴² See the pointed refutation by Story in *Pope v. Nickerson* (1844) 3 Story, U. S. Circ. Ct. Reports, 465, 480.

⁴³ (1878) 125 Mass. 374.

The real question had nothing to do with agency⁴⁴ and leads to the debatable question of the place at which a declaration by letter is localized, in order to satisfy the devious test of the place of contracting. The true issue involved the territorial scope of the laws restricting or freeing the capacity of married women.⁴⁵

4. The Developed Systems

In many older and some quite recent treatises of conflicts law, all there is of agency is the eternal question where a contract through an agent is made. The question is idle, since the agent alone concludes the contract.

The true problems of voluntary representation arise from its tripartite structure. In sum, we have to distinguish the contract (if any) creating obligatory rights and duties between principal and agent; the unilateral authorization by the principal empowering the agent to make a contract (or other transaction) with a third person; and this contract itself.

It may also be recalled that civil law only considers acting on behalf of a principal as representation, and accordingly requires the principal's authorization to act on his behalf. In the best elaborated doctrine, the agent must make it clear to the third person that he acts not only in the principal's interest but to make him immediately the exclusive party.⁴⁶ Where the agency is undisclosed, the contract exclusively regards the agent personally, and only the actions arising between agent and principal provide the means of transferring the effects of the external transaction to the

⁴⁴ *Bell v. Packard* (1879) 69 Me. 105, 31 Am. Rep. 251 presents a skillful argument and leaves the mail out of it. The contrary decision in *Hauck Clothing Co. v. Sophia Sharpe* (1900) 83 Mo. App. 385 is equally tendentious.

⁴⁵ See *infra* Ch. 40 ns. 48 f. and ns. 99 f.; cf. 46 Mich. L. Rev. (1948) at 634 and, most recently, EHRENZWEIG, *Conflict* 475 ff. § 178 with further citations.

⁴⁶ German BGB. § 164 par. 2.

principal. There are, however, important exceptions. Particularly in the case of a commission agent, claims acquired by the agent in his own name are deemed to belong to the principal as between these two persons or their creditors. The cautious provision of the German Commercial Code (§ 392 paragraph 2) to this effect has been hesitatingly extended by judicial practice to other cases. Scandinavian law has definitely gone (to some extent) beyond the German pattern.⁴⁷ These modifications of the logical antithesis between representation in law and representation in interest have given rise to a suggestive comparison with the common law doctrine which confers rights and duties on an undisclosed principal. The two systems starting from opposed principles admit exceptions that diminish the contrast. They retain, however, their basically different outlooks and both leave notable gaps.⁴⁸ Thus, they lend importance to the question what law governs.

In the international field, the opposition of the systems was once incisively diminished by the common law rules presuming that the agent of a foreign, nonresident, or absent principal is not authorized to act on behalf of the principal, and that he is exclusively personally bound when acting in his own name. The usages of trade on which these distinctions were based, have disappeared.

A remarkable divergence exists also in the types of intermediaries developed in commercial life and then constituted special legal institutions. In common law, the terms, agent, factor, broker, and commission agent have retained much of their original colloquial meaning with overlapping con-

⁴⁷ Scandinavian law as adopted in Sweden, Agency Law of April 18, 1914, §§ 57, 58, see CAPELLE, *Das Aussenverhältnis bei der Vertretung fremder Interessen nach Skandinavischem Recht*, in *Festschrift für Leo Raape* (1948) 325, 330.

⁴⁸ See in the first place SCHMIDT-RIMPLER, *Das Kommissionsgeschäft*, in *Ehrenberg's Handb.* V, 1, 479, 610; HANS R. HARTMANN, *Das Ausführungsgeschäft im deutschen und englischen Kommissionsrecht* (Rostock 1935) reviewed by SCHMIDT-RIMPLER, 11 *Z.ausl.PR.* (1937) 744-753.

notations. They are not identical with any nomenclature of a civil law country, in most of which the language equally fluctuates between commercial routine and legal exactitude. In Germany, such expressions as *Prokurist*, *Handlungsbevollmächtigter*, *Kommissionär*, *Handelsvertreter*, and *Filialeleiter*, are most rigidly legal.^{48a} The language of conflicts law ought to be broad enough to embrace all such categories in a few rules.

II. ANGLO-AMERICAN FORMULATIONS OF THE CONFLICTS RULES

I. Dicey

The two rules of Dicey have been so often cited in the English courts that they must be mentioned, though with utmost disapproval. Rule 170 predicates under the headline of "Contract of Agency" that:

"An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created."

Does this section deal with authority or the contract of agency? With respect to the latter, the application of the general subsidiary criterion of *lex loci contractus* would be entirely wrong. However, the notes refer to the American cases dealing with the powers of a shipmaster and a partner.

On the other hand, Rule 171 says that:

"The rights and liabilities of the principal as regards third parties are, in general, governed by the proper law of the contract concluded between the agent and the third party."

Taken literally, this rule, comparable to § 346 of the Restatement (Second),^{48b} only determines the scope of the

^{48a} As to terminology concerning commission agents, see STOLL, "Kollisionsrechtliche Fragen beim Kommissionsgeschäft," 24 *RabelsZ.* (1959) 601, 603 f.

^{48b} Cf. Restatement (Second), Tent. Draft No. 6 (1960) 66.

proper law of the contract. In this regard it is superfluous, because it plainly repeats what has been said in Rule 154. But evidently Rule 171 is intended to include authority, which, though totally missing in the text of the rule, is subject of the comment. The seventh edition of Dicey's book has, in contrast with previous editions, refrained from the attempt to proclaim the *lex loci contractus* for these matters.⁴⁹ However, the proposition of applying the proper law of the main contract cannot be endorsed either.^{49a}

2. Restatement

The Restatement of the Law of Conflict of Laws, under the topic of "creation of a contract" establishes one rule (§ 342) concerning the obligations of a principal and his agent as between themselves,⁵⁰ unfortunately calling for "the law of the place where the agreement was made." Authority is separated and treated in three bewildering rules, which can only be approximately understood in connection with the Restatement of Agency. The latter Restatement, in an original attempt to break down the powers of agents into categories, distinguishes four classes:

(1) "authority," short-named, created by manifestation of the principal to the agent;⁵¹

(2) "apparent authority," created by manifestation of the principal to the third party;⁵²

(3) estoppel, which on condition that the third party "changes his position," produces an action for him against the principal;⁵³ and

⁴⁹ On this point of the criticism, see BRESLAUER, 50 *Jurid. Rev.*, *supra* n. 23, at 303. See now the thorough criticism by the editors of DICEY (ed. 7, 1958).

^{49a} *Cf. infra* Ch. 40 p. 171.

⁵⁰ At the same time, the sections in question deal with partnership. It has been submitted before (Vol. II, Ch. 21) that this treatment is wrong insofar as the personal law of partnerships is ignored. Of course, partnership is also one of many sources of representation.

⁵¹ Restatement of Agency and Restatement of Agency (Second) §§ 7, 26.

⁵² *Id.* §§ 8, 12 comment a, 27.

⁵³ *Id.* §§ 31 (1) comment a.

(4) unnamed "powers" arising in various situations,⁵⁴ which, for instance, include the acts incidental to, or usual, or necessary for conducting authorized transactions.⁵⁵

While these classes, despite certain doubts, may be helpful for analytical purposes in municipal law, it is astonishing that the Conflicts Restatement should undertake to lay down three different rules for the three groups (1), (2), and (4), omitting (3). We shall look into the confusing results of this effort.⁵⁶ But we may take encouragement from the neat separation of authority from agency.

3. Encyclopedias

The various comments on the conflicts rules in practitioners' works are unenlightening and full of contradictions. They ought to be radically reformed.

III. THE THREE SUBJECT MATTERS OF CONFLICTS LAW

The right categories of operating facts to be subjected to conflicts rules are easily found. The three distinguishable relationships among the three persons involved in agency require three independent conflicts rules, although, of course, they by no means necessarily have to refer to different laws.

I. Authority

The law or laws governing the power of an agent to act on behalf, or on account, respectively, of the principal have to comprehend creation, extent, modification, and termination of the power. Authorization by ratification must also be included, and all shades of manifestations to the third party or the public through which authority is either really constituted or only apparently but reliably asserted.⁵⁷ There

⁵⁴ *Id.* § 12 comment b refers to §§ 161 ff., 194 ff.

⁵⁵ *Id.* §§ 161, 194.

⁵⁶ *Infra* Ch. 40 p. 163.

⁵⁷ The subject of what in common law was shortly called implied authority, has been much discussed in the German doctrine. A full and critical report

is no sense in differentiating in conflicts law powers conferred by the principal on the agent directly, or by declaration or conduct on which the third party relies. For, in any case where any relations between the principal and third parties should arise, the third party may only rely on some manifestation, i.e., declaration, act, real or apparent acquiescence, not of the agent but of the principal.

2. Underlying Relationship⁵⁸

The internal situation between principal and agent, whether based on a contract or not, extends to all their obligations toward each other, including the duty of the agent to follow the instructions of the principal and to notify all third persons concerned of modifications or termination of his authority. It would seem that also the fiduciary position of agents and the control by the principal to which they are subjected in American law, general as they appear,⁵⁹ are incidents of the underlying relationships, such as employment and partnership, rather than of the authority.

3. External Relationship

Where an agent concludes a contract with a third party, or makes or receives a unilateral legal statement, in the principal's name, such transaction is the basis for all relationships imaginable between the principal or the agent on the one hand, and the third party on the other.

on the not too happy formulations of the German Civil Code and the literature is to be found in THEMISTOCLES D. MACRIS, of Athens, Greece, *Die Stillschweigende Vollmachterteilung* (Marburg 1941).

On the French doctrine, see the informative article by LÉAUTÉ, "Le mandat apparent dans ses rapports avec la théorie générale de l'apparence," 45 *Revue Trim. D. Civ.* (1947) 288.

⁵⁸ Following the common law terminology but distinguishing as we do, FALCONBRIDGE, *Conflict of Laws* (ed. 2) 432, speaks of "authority," in opposition to "power"; this corresponds in the case of disclosed agency with what we call the internal instructions given within the underlying relationship.

⁵⁹ See Restatement of Agency and Restatement of Agency (Second) §§ 13,

Due to the extraordinary confusion in this field, the assertion has sometimes been ventured in the United States that a contract made by an authorized agent is governed by the law of the agent's domicil or of the place where the agent exercises his authority.⁶⁰ This is true of authorization but not of the third party contract. Nor is this contract subject to the *lex loci contractus*,⁶¹ any more than other agreements. The governing law is simply determined according to the type or individual character of the contract itself, sale, bailment, loan, et cetera.

The law governing the "main" or "third party" contract (or other transaction), whatever law it may be, decides whether a party to it can be represented by another person at all, or under what circumstances; whether, for instance, authorization must be given by a special act or in a written document⁶² and whether the agent must make known his authority to the third party.⁶³ The particular common law doctrine regarding the rights to sue and be sued when the principal is not disclosed in the contract, also belongs to the effects of the main contract, which has not always been understood.⁶⁴

⁶⁰ 15 C. J. S. 886, Conflict of Laws § 11 n. 28.

⁶¹ 2 C. J. S. 1038, Agency § 8 n. 83.

⁶² With regard to the formal requirements, this is a delicate question; see *infra* Ch. 40, III, 1, pp. 174 ff.

⁶³ 9 Répert. 21 No. 6.

⁶⁴ In *Maspons v. Mildred, Goyeneche & Co.* (1882) 9 Q. B. D. 530, 539 the Appeal Court correctly declared that the nature and extent of the authority given by a domiciled Spaniard to another in Havana, Cuba, was to be ascertained under the Spanish law there in force but, when this was ascertained, the law governing the third party contract determined "the persons who can sue and can be sued on that contract." Wrongly, BRESLAUER, 50 *Jurid. Rev.* (1938) 301, 309, 310 f. assumes that the latter question is the very question of authority, that therefore the decision is inconsistent and that it proclaims the law of the place of the main contract for authority. Also DICEY (ed. 7) 876 is not quite clear on the classification. REESE, "Agency in Conflict of Laws," *XXth Century Comparative and Conflicts Law* (1961) 409, 417, clearly supports the view taken here.

In Germany, the doctrine is unsettled; see KEGEL, *Kom.* (ed. 9) 552 and BRAGA, "Der Anwendungsbereich des Vollmachtstatuts," 24 *RabelsZ.* (1959) 337, 338.

In Switzerland, the *Cour de Justice Genève* (Nov. 25, 1952) *Sem. Jud.* 1954,

The same is also true, however, with regard to the effects of the contract, if the agent's authority is missing or insufficient.⁶⁵ In this respect again confusion is frequent.⁶⁶ The American courts are not in similar danger because they apply the law of the main contract to every problem of authority. Correct classification is assured, if we remember that in the best opinion liability of an unauthorized agent to the other party is based on his fraudulent or innocent misrepresentation of authority.⁶⁷ Common law has led the way in this construction, which is expressly formulated in the provisions of the Restatement of Agency on implied warranty of authority⁶⁸ and has been consistently recognized by the English courts.⁶⁹

We shall deal next with authority (Chapter 40) and subsequently with the most typical contracts between principals and agents. The transaction with a third party with all its just-mentioned incidents, is determined by its own nature.

201, decided a case where the alleged agency was not disclosed, according to the Swiss law of the main contract, to the effect that the alleged principal could not sue the third party. PATRY, "A propos de la représentation en droit international privé," Sem. Jud. 1954, 377, criticizes the court's approach without good reason.

⁶⁵ See RABEL, 3 *Z.ausl.PR.* (1929) 824 (criticizing 2 ZITELMANN 211, 1 FRANKENSTEIN 591) followed by RAAPE, *IPR.* (ed. 5) 502 f. See also FEDOZZI-CERETI 751.

⁶⁶ Thus, RG., 76 *Seuff. Arch.* 2 is confused. See RABEL, *supra* n. 65, at 823. The tortuous ways of the doctrine since Casaregis are still reported by such authors as ALCORTA, 3 *Der Int. Priv.* 113.

⁶⁷ HUPKA, *Die Haftung des Vertreters ohne Vertretungsmacht* (1903) on the basis of comparative research. With meticulous consequence KOSTERS 771 advocates with the Dutch H. R. (April 4, 1913) W. 9494 the law of the place where the agent warrants authority, to govern the liability of the agent to the third party.

⁶⁸ See § 329 Restatement of Agency and Restatement of Agency (Second).

⁶⁹ See *Brit. Russian Gazette and Trade Outlook, Ltd. v. Ass. Newspaper, Ltd. etc.* [1933] 2 K. B. 616—C. A.

Authority

AS EXPLAINED before, the present chapter is exclusively intended to report on the conflicts concerning the authority of agents, that is, their powers to enter into transactions with third persons on behalf or on account of a principal. For the sake of simplicity, we shall suppose that the transaction with a third person is a contract in the technical sense which we have called the *main contract* or the *third party contract*. The local connections between which the choice of law for the existence and the scope of authority must be determined are not numerous. The selection ought to be confined, roughly speaking, to two contacts, namely, the places where the principal is deemed to be situated and where the agent is deemed to act. We may call them the *law of the principal* and the *local law*.

I. THE CONFLICTS RULES

1. Policies of Conflicts Rules

The influential theories of Story¹ and Bar² had a common merit. They emphasized the policy problem inherent in the choice of law governing the validity and effect of an agent's authority. Both eminent writers were in agreement that the protection of the principal's interest was of prevailing significance. Although they realized the difficulty for a third party to obtain full knowledge of the existence and extent of the powers of a person acting on behalf of a foreign prin-

¹ STORY § 286 (b), and in *Pope v. Nickerson* (1844) 3 Story, U. S. Circ. Ct. Reports 465.

² 2 BAR 69.

principal, they argued nevertheless that the latter could only be made liable under the law of his domicile. In this view, the third party must inform himself concerning the facts of the agency on which he relies, or else be satisfied with what liability an unauthorized agent may incur. It was thought intolerable that one should, without having conferred the requisite power under his own law, incur liability by reason of another person's transactions. This might subject him to any law in the world!

The Restatement, in its first section on the subject, § 343, approaches this appreciation of the problem by prescribing the law of the place where the agreement constituting authority is made.

An opposite view, however, has doubtless acquired superior strength. Arguments and formulations vary, but the emphasis in all variants has shifted from the principal's place to that of the agent's activity. Lord Phillimore, in a much noticed brief remark, pointed to "the duty as well as expediency of upholding bona fide transactions with the subjects of foreign states," which he called the first principle of private international law.³ His many followers have concluded that security of commerce requires protection of the third party in assuming that the agent has the powers that he would have under the local law. In the case of "apparent authority," though for unknown reasons only in this case, the Restatement likewise refers to the law of the state where "reliance is placed" on the authorization (§ 344). According to another analysis, the state in which the transaction takes place is entitled to preference over the foreign law to which the principal may be subject.⁴ It is often argued that the creation of an authority is of less importance than its practical exercise by the agent in enter-

³ 4 PHILLIMORE § 705; 2 MEILI 39; ROLIN, 3 Principes 420 ff.

⁴ THÖL, 1 Handelsrecht (ed. 6, 1879) § 67 n. 3.

ing into a transaction with a third party. Accordingly, § 345 of the Restatement proclaims the law of the place where the agent is to "act for the principal or other partners," and the German courts stress the law of the place where the authority "develops its effect."⁵

Both basic theories have been recently attacked for considering the protection of interests instead of being content with a simple application of the law of the place of performance.⁶ This idea, however, rests on the old, inadequate theory of mandate as containing a duty which is to be "performed."

The debate has indeed suffered from a congenital defect, namely, an unwarranted generalization of reasoning. As will appear immediately below, Story and Bar dealt with special cases in which the powers of the agent were from the beginning limited by a law deserving universal effect. In pursuance of their arguments, we may contend that the law of the principal governs the powers of a shipmaster and those conferred on certain representatives directly by law or by public appointment. On the other hand, where a principal constitutes authorization by an ordinary, private, voluntary act, intending its use in a foreign state, the law of this state is justifiedly considered competent to construe the validity and effects of the authorization. In the former cases the protection of the principal, in the latter cases the protection of the third parties, obtain preference.

The two theories, thus, can be reconciled. Neither does Story's opinion mirror the present American law,⁷ nor is it completely obsolete,⁸ nor wrong because of unilateral consideration of the risk of the principal.⁹ But it is no more

⁵ See *infra* n. 74.

⁶ BATIFFOL 282 § 315.

⁷ KUHN, *Comp. Com.* 277, *cf.* *Recueil* 1928 I 258.

⁸ BRSLAUER, 50 *Jurid. Rev.* (1938) 307.

⁹ 2 BEALE 1196.

correct to harmonize, as does Wharton,¹⁰ the theory of the principal's law in *Pope v. Nickerson* and the proper law doctrine adopted in the *Chatenay Case* by the supposition that the intentions of the parties were different.

We shall first discuss the special situations of authorizations recognized everywhere as constituted under the law with which the principal is connected. The rest of this chapter will be devoted to the domain, commonly the only one envisaged, of the powers of privately constituted agents.

2. Authorizations Internationally Determined by Their Source

(a) *Shipmaster's powers.* Story, in his treatise,¹¹ discussed the common law rule that the master of a ship has a limited authority to borrow money in a foreign port and give a bottomry bond only in cases of necessary repairs and other pressing emergencies, while in some maritime countries the master has a broader authority, or at least a broader liability may attach to the vessel and the owner. Story approved the English practice restricting the master of an English ship according to the law of the domicile of the owner.

Later, in the Massachusetts federal circuit court, Story applied this view in the case of *Pope v. Nickerson*¹² in which a Massachusetts vessel, owned by a resident of that state, on a voyage from Malaga to Philadelphia, put in to Bermuda under stress of weather and was sold by the master with the whole cargo. The liability of the owners for the acts of the master was limited by the laws of Spain and Massachusetts to the value of the vessel and her freight, but was unlimited in Pennsylvania.

¹⁰ WHARTON 875 § 408a.

¹¹ STORY § 286 (b).

¹² *Pope v. Nickerson* (1844) 3 Story, U. S. Circ. Ct. Reports 465, 474, 19 Fed. Cas. 1022 No. 11,274.

Story held¹³ that "if the ship is owned and navigated under the flag of a foreign country, the authority of the master to contract for and to bind the owners, must be measured by the laws of that country, unless he is held out to persons in other countries, as possessing a more enlarged authority. . . . If any person chooses to trust him under any circumstances, or beyond this—it is a matter of blind credulity, and at his own peril. . . . If we were to resort to a different rule—to the laws of the different countries which the ship might visit, for the interpretation of his powers, while he was in the ports of that country—we should have the most extraordinary and conflicting obligations arising. . . ."

To be sure, Story, while arguing about the force of the law of the flag, exclaimed that "No one ever imagined that in any other case of agency to be transacted in a foreign country, the principal was bound beyond the instructions or authority given to his agent. . . . The authority confided (to him) by the principal is measured by the interpretation and extent of that authority, by or according to the law of the place where it is given, by the *lex loci* and not by the laws of a foreign country. . . ." However, this is an entirely mistaken obiter dictum, whereas his decision in the instant case was perfectly correct.

That a shipmaster's authority is to be measured once and for all according to the law of the flag, may indeed be called a universally settled rule.^{13a} It has been adopted in England, clearly in *Lloyd v. Guibert*¹⁴ and probably in constant practice.¹⁵ It appears in the resolutions of interna-

¹³ *Id.* at 475 ff.

^{13a} This statement is supported by FICKER, "Die Bestimmung des Vollmachtstatuts in besonderen Fällen," 24 *RabelsZ.* (1959) 330, 332.

¹⁴ (1865) L. R. 1 Q. B. 115; CHESHIRE (ed. 6) 220.

¹⁵ M. WOLFF, *Priv. Int. Law* (ed. 2) 435 § 416, 443 § 424.

tional congresses¹⁶ and in the *Código Bustamente*.¹⁷ It prevails commonly.¹⁸ In this respect, it can be said therefore that legitimate reliance of the public may be based not on local laws but only on the law of the state to which the vessel belongs.

Story and other common law jurists have spoken of the master's authority as interpreted under the law of the flag. On the Continent, it is often directly construed as a legal power. There is no substantial difference of meaning. The decisive consideration is the international preference enjoyed by the law of the state where the vessel is registered.

(b) *Legal authority*. To refute the application of *lex loci contractus* of the main contract, Bar contended that security of commerce, instead of requiring this application, on the contrary demanded the application of the law under which the authority was given.¹⁹ For illustrations, he referred to the directors of a corporation, the powers held in civil law on the ground of family relations, and those of a shipmaster. "What would be the use, for instance, for a stock corporation to limit the powers of a director by requiring assent of the board or of the assembly of stockholders, if he were not so bound in contracting abroad?"

These are forceful arguments. But they support the *lex domicilii* merely in application to what are called in civil law countries *legal representatives*. Such include the father, mother, guardian, or curator of an individual, inasmuch as they are granted by law supervision over persons or property

¹⁶ Congresses of Antwerp and Brussels, see 1 *Revue Int. Dr. Marit.* 426.

¹⁷ Art. 279.

¹⁸ With the ill-reputed exception of a German case; see KEGEL, *Kom.* (ed. 9) 551 n. 6; RAAPE, *IPR.* (ed. 5) 506; FICKER, *supra* n. 13a, at 332.

For France, see citations in 3 *Répert.* 30 No. 45 and BATIFFOL, *Traité* (ed. 3) 663 § 609.

Denmark: LANDO, *Mellemmandens kompetence i internationale kontraktforhold* (1956) 11-13.

United States: EHRENZWEIG, *Conflict* 446 note 13 and accompanying text. REESE, *supra* Ch. 39 n. 64, at 414 n. 2, seems to disagree.

¹⁹ 2 *BAR* 69.

and conclude legal transactions in the name of the child or dependent person, or assist in his transactions; the organs of legal persons; receivers in bankruptcy, administrators of decedents' estates and all other agents acting with legally defined powers for estates, without being the titular owner as common law trustees are.

The principle extends to formally fixed powers which cannot be restricted with effect against third parties. Such powers are vested in many countries in the boards of corporations,²⁰ in commercial managers such as *procura institoria* under Italian,²¹ or *procura* under German law,²² in guardians,²³ and others. The investigation of such powers is reduced to a minimum of inquiry.

This doctrine seems to be settled at present, clearly in Germany,²⁴ and also in other civil law jurisdictions.²⁵ It is the only view consistent with the principle of personal law. This law determines in what respect and by whom an individual or association is represented by operation of law.²⁶

At common law, the situation is different. The category of "authority by law" is not unknown, but consists of few and doubted cases.²⁷ Powers based on family relations are scarce. The personal law thus largely disappears behind

²⁰ See Vol. II (ed. 2) pp. 170 f.

²¹ C. C. (1942) arts. 2203 ff.

²² BGB. §§ 49, 50; see for other commercial dependent agents, § 54.

²³ French C. C. art. 450; German BGB. § 1793.

²⁴ When I suggested this approach in 3 Zausl.P.R. (1929) 809 ff., the doctrine seemed insecure, but it has been commonly confirmed since. KEGEL, Kom. (ed. 9) 550; RAAPE, IPR. (ed. 5) 502.

²⁵ E.g., Hungary: Curia (Oct. 27, 1937) 5 Z.osteurop.R. (1938) 396; the manager of an Amsterdam shipping enterprise, a registered merchant in Vienna, had unlimited authority under Austrian law to hire there a Hungarian worker. The present Hungarian law seems to be in accord with this case; see RÉCZEI 179, 282 f.

²⁶ Vol. I (ed. 2) pp. 342, 646; Vol. II (ed. 2) pp. 168 ff.

²⁷ MECHEM, Agency (ed. 4) 10, 26. 2 WHARTON 868 spoke of taking charge of the affairs of another "either by voluntary act of such latter person desiring to be relieved of care, or by act of the law, as in the case of guardianships and commissions of lunacy." EHRENZWEIG, Conflict 445 speaks of "legal authority."

the law of the place of contracting, or that governing the contract.

However, in the broad domain of the law of corporations and other associations, we have found it highly advisable to recognize that the law governing the life of the organization should extend to the powers of the principal officers or managing partners.²⁸ This postulate, it is true, is often neglected.

Illustration: An Ohio corporation owning land in West Virginia conferred on Porter, a real-estate broker (apparently in Ohio), by formal action of its board of directors a power of attorney "to sell the property." In a subsequent lawsuit, the issue depended on the authority of a subagent in West Virginia appointed by Porter. The West Virginia court applied its domestic law, laid down in two preceding decisions of the court, in order to state that the board of directors—in Ohio!—had failed to comply with the formality prescribed in West Virginia that the signature and the corporate seal be affixed.²⁹ Although the law of the forum for several reasons was applicable to determine the subagent's powers, it should not have been extended to the original authorization except upon its questionable force as *lex situs*, which is not even mentioned in the report.

Finally, the powers of all persons appointed by a court or an administrative agency, whether connected with a trust relation or not, are as a rule legally defined and therefore must be expected to be subject to the law of their creation.

In all these cases, neglected in the treatises, the law under which a power is deemed to be constituted has a natural and overwhelming claim. Exceptions for protecting innocent third parties will not be justified except in rare cases. Persons dealing with the alleged principal officers of an association or court appointees, indeed, should be charged with the knowledge of the existence and extent of their

²⁸ Vol. II (ed. 2) pp. 169-172.

²⁹ *Gallagher v. Washington County Savings, Loan and Building Co.* (1943) 25 S. E. (2d) 914, 918. The court invoked § 345 of the Restatement.

powers. On the other hand, they may rely on the source of these powers.

3. Authorization Determined by Local Law

(a) *Former views: Law of the principal.* It is only in the field of authorization by private legal act that the law of the principal has been pushed into the background. For a time it was favored on the Continent.³⁰ Some followers of the mandate theory supported it as the law of the place where the mandator receives acceptance.³¹ More writers have maintained the same device as a subsidiary test, as in the case of an agent sent to several countries.³²

(b) *Local law.* On the other hand, the fiction of identity was a strong factor in promoting the law of the place where the agent represents the principal. As late as 1917, the Appeal Court at the Hague applied Italian law to the authority of a Genoese broker with the justification that the Dutch principal was deemed to have traveled to Genoa.³³

The real grounds, of course, for preferring the law under which the agent "exercises his power"—or however else the courts express the local law—lie in the idea that third persons should be able easily to ascertain the powers of the agent. Most frequently, this consideration has been aided by presumptions concerning the intentions of the

³⁰ Belgium: 7 LAURENT 539 § 450 (place of the principal as the party making the offer of mandate).

Germany: 8 ROHGE. 150.

Italy: FEDOZZI-CERETI 751 and n. 3, reserving the law of the forum protecting bona fide parties.

The Netherlands: Rb. Amsterdam (Dec. 14, 1876) W. 4132.

³¹ *Supra* Ch. 39.

³² Thus, e.g., 2 WHARTON 869 § 406 (who confuses the case with that of a soliciting agent); DIENA, 2 Dir. Com. Int. 283; VALÉRY § 658; 2 SCHNITZER (ed. 4) 672 f. And see *infra* at n. 59.

In Germany, the law of the principal has been recently advocated by KEGEL, IPR. 199 f.; KEGEL, Kom. (ed. 9) 551 f.; contrary to the prevailing opinion, he recommends the application of the local law only in cases where it is necessary to protect the good faith of third persons.

³³ App. s'Gravenhage (June 8, 1917) W. 10208, applying Ital. C. C. (1865) art. 376.

parties. For, so far as the principal manifests his will unequivocally and brings it to the knowledge of the third party, no problem arises. But when he is silent or negligent or relies on internal instructions or legal restrictions relating to the power conferred by him, which are unknown or unusual in the foreign country, construction of his conduct in the light of the local law is regarded as justified. Similar problems arise with respect to the validity and termination of authority.

Other rationalizations are questionable. That modern writers should think (in Savigny's manner) of the principal as "submitting" himself to the foreign law only because he sends his agent there,³⁴ resurrects an antiquated emphasis on the volition of a party. It is also objectionable that Beale terms the question one of jurisdiction.³⁵ Ultimately, Beale ascribes the principal's subjection to the foreign law to the fact that he *causes* the use of the authority in the foreign state.³⁶ Not even this justification is accurate.

Beale's main example is *Milliken v. Pratt* which we have not found to be a suitable part of agency law.³⁷ Accepting its bizarre construction of the mail service as a regular agency, Beale concluded that Massachusetts law was applicable because the woman caused the postal delivery in that state.³⁸ This amounts to saying that a person under a disability at his domicile, can render himself competent by directing his note to another state through the mail. Commonly, the same weird result has been reached under the law of the place where the contract is "completed."

In another case³⁹ adduced by Beale, a married woman

³⁴ 2 BEALE 1198; similarly e.g., RG. (Dec. 5, 1896) 38 RGZ. 194, where all recent decisions stress the needs of commerce.

³⁵ 2 BEALE 1198 § 345.2.

³⁶ Restatement § 345 and comment c.

³⁷ *Supra* Ch. 39 n. 43.

³⁸ 2 BEALE 1197 § 345.2.

³⁹ *Union National Bank of Chicago v. Chapman* (1902) 169 N. Y. 538, 62 N. E. 672.

signed an accommodation note in favor of her husband's firm in Alabama, supposing that it would be discounted in Alabama. The note was, however, taken to Illinois. The New York court declared that she was not liable because of incapacity under her own law. But did she not "cause" the discount in Illinois, in the sense of a *conditio sine qua non*? She did, although it may be contended that she did not *authorize* such discount. Causation is the wrong word also for the reason that it raises the idea of some compulsion on the agent whereas authorization confers merely a power, and a duty of employing it flows only from an accompanying contract.

The true reason for the application of the local law is simply objective expediency, provided that the principal has contemplated acting in the foreign country.

England. Among the approaches taken by the courts in various countries, the most impressive is illustrated by the English case, *Chatenay v. Brazilian Submarine Telegraph Co.*⁴⁰ While numerous other English decisions are elusive or confusing, this Court of Appeals decision is outstanding. A Brazilian executed in Brazil in the Portuguese language a power of attorney authorizing a broker in London to buy and sell shares of stock. The court had to decide under what law the extent of the authority was to be determined. Although starting from the usual references to *lex loci contractus* and *lex loci solutionis*, the Court of Appeal passed to the twofold consideration that (1) the true meaning of the authority was to be ascertained on the ground of all circumstances of the execution of the instrument including the Brazilian law, and (2) if the meaning was that shares were to be bought and sold in England, "the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the par-

⁴⁰ [1891] 1 Q. B. 79, 83 f.; CHESHIRE (ed. 6) 253 f. seems to interpret the case quite differently.

ticular country where it is acted upon." The court, thus, emphasized two distinguishable requisites of representation, one to be determined with a certain regard to Brazilian law, and the other with an exclusive view to English law.

Recent decisions follow the same line.⁴¹

It has been said⁴² that a contrary opinion was expressed in 1933.⁴³ An English insurance company, employed by a New York insurance broker through an English broker, insured a Canadian corporation residing in New York. The American broker cancelled the policy, and the question was whether he had authority and ground to do so. The court affirmed this question, applying New York law to determine the extent of the broker's authority. This decision was amply justified, since the power was considered conferred by the brokerage contract and therefore effective as against the insured. Lord Scrutton, it is true, invoked Dicey's Rule No. 179 and applied the law of New York as the place where the brokerage contract was made.^{43a} But the learned judge would scarcely have followed this theory if the brokerage contract had been concluded somewhere else. This Appeal Court decision, scantily equipped, should not be regarded as overruling former considerations.^{43b}

Germany. Exactly the same approach as that manifested in the *Chatenay Case* was developed by the German courts in an elaborate system presently to be discussed.⁴⁴

⁴¹ *Sinfra Aktiengesellschaft v. Sinfra, Ltd.* [1939] 2 All E. R. 675; *Apt v. Apt* [1947] P. 127, *aff'd*, C. A. [1947] 2 All E. R. 677 at 680: analogy for authorization of a proxy marriage.

⁴² Note, 5 *Cambr. L. J.* (1934) 251; FALCONBRIDGE, *Conflict of Laws* (ed. 2) 437; see SCHOCH, 4 *Giur. Comp. DIP.* 290.

⁴³ *Ruby Steamship Corp. v. Commercial Union Ass. Co.* (1933) 46 Ll. L. Rep. 265, 39 *Com. Cas.* 48, 4 *Giur. Comp. DIP.* No. 161.

^{43a} The former Rule No. 179 in DICEY'S treatise is now Rule No. 170; see p. 141 *supra*.

^{43b} This view is approved by REESE, *supra* Ch. 39 n. 64, at 415. It is questionable whether it is also approved by EHRENZWEIG, *Conflict* 446.

⁴⁴ *Infra* pp. 160 ff. On the Swedish views, see MICHAELI 301 f.

France. The majority of French authors are led by the theory of identity of principal and agent to the application of the law of the place where the agent contracts with the third person.⁴⁵

United States. Likewise, despite Story, the American courts do not apply the law of the principal to an agent's authority. Nor is it true that they determine the validity and scope of an authority under the law of the place where the authority is constituted as has been asserted on the basis of one sole case,⁴⁶ that of *Freeman's Appeal*.⁴⁷ There, the Connecticut court was interested in applying the law of the forum to deny capacity to a married woman domiciled in the state, in opposition to the leading case of *Milliken v. Pratt* and all other cases in point.⁴⁸ The woman, in her own state of Connecticut, had signed a note of guarantee for her husband and handed it to him, and he mailed it to Illinois. The decision was based on her incapacity to authorize him as her agent in Connecticut. What such an argument is worth, is shown by the previous decision of the same court validating a married woman's blank endorsement of an insurance policy, delivered to her husband in Connecticut, on the ground that the husband filled it out in New Jersey.⁴⁹

The usual approach of the American courts is different.

⁴⁵ LAURENT 544; WEISS and VALÉRY, see *supra* Ch. 38 ns. 37, 38. Directly to the same practical effect, BATIFFOL, *Traité* (ed. 3) 662 § 609 and Cass. civ. (July 2, 1946) *Gaz. Pal.* (Nov. 30, 1946) cited by him; and App. Paris (May 21, 1957) *Revue Crit.* 1958, 128, note FRANCESCAKIS.

Contra: ARMINJON, *Droit Int. Pr. Com.* 412; TOMASI, "Les conflits de lois en matière de représentation conventionnelle et l'opportunité d'une convention internationale," *Revue Crit.* 1958, 651, 655 ff.

⁴⁶ Thus 2 C. J. S. 1038, Agency § 8 and n. 82; Restatement § 343. However, a recent case may be added with respect to formality. See *infra* n. 89.

⁴⁷ (1897) 68 Conn. 533, 37 Atl. 420.

⁴⁸ *Supra* Ch. 39 n. 43.

⁴⁹ *Connecticut Mutual Life Ins. Co. v. Westervelt* (1884) 52 Conn. 592. 2 BEALE 1196 n. 3 places the case on a more convincing ground: the assignment of the policy to the beneficiary was the act authorized by the woman.

They determine the powers of an agent according to the law of the place "where the agent exercises his authority," identifying this place with the place where the contract between the agent and the third party is made.⁵⁰ It is not certain under what theory this law, the *lex loci contractus* of the main contract, is applied. The decisions often refer to the alleged general rule of *Scudder v. Union National Bank*⁵¹ that the validity of a contract is governed by the law of the place of contracting. But in almost every single case some additional connection has pointed to the same law, apart from the fact that most decisions are concerned with insurance contracts made by a local agent. If as suggested before,⁵² the rule goes back to a case of 1841, its significance is that the existence and extent of authority is a mere incident of the contract with a third party, quite as form and capacity have been so often treated in this country.

What exact localization this theory furnishes if we abandon the tenet of *lex loci contractus*, will be discussed later.⁵³

Latin America. Despite the continued influence of the old mandate theory, Latin-American writers also seem to veer towards the law of the place where the agent "carries out his mandate."⁵⁴ The hope is justified that authority may be given its own place in the conflicts law.

(c) *Limitations on the local law: Types of agents.* The German doctrine applying the law of the place where the agent exercises his power, was first established in the case

⁵⁰ 2 BEALE 1195; 15 C. J. S. 886 n. 28 and Supp. 1948. This includes recent cases such as *Moore v. Burdine* (La. 1937) 174 So. 279; *Paxson v. Commissioner of Int. Revenue* (C. C. A. 3d 1944) 144 F. (2d) 772.

⁵¹ (1875) 91 U. S. 406.

⁵² *Carnegie v. Morrison* (1841) 2 Metcalf (43 Mass.) 381, *supra* Ch. 39 n. 3. We exclude entirely the liability of stockholders for acts of directors in a state other than that of incorporation, often categorized under the subject of agency, as by *Thomas v. Matthiessen* (1914) 232 U. S. 221 and in England by BRESLAUER, 50 *Jurid. Rev.* (1938) at 314. On the subject itself, see Vol. II (ed. 2) pp. 82 ff.

⁵³ *Infra* II, 1 (a), pp. 169, 171.

⁵⁴ E.g., Brazil: ESPINOLA, 2 *Lei Introd.* 372 § 242; SERPA LOPES, 2 *Lei Introd.* 360 § 261.

of an agent having a permanent and fixed place of business. Bar, the advocate of the law of the principal, conceded an exception for foreign domiciled representatives.⁵⁵ The German courts, in fact, for a long time emphasized the agent's domicile only under a threefold limitation: namely, (1) the agent should be an individual or organization, established at a fixed place of business in a country other than that of the principal; (2) he should have concluded contracts in that country only; moreover, (3) the suit should arise from different interpretations of the scope of authority in the countries of principal and agent.⁵⁶

The typical case, thus defined, presents the core of the matter and seems to be treated practically everywhere to the same effect. In the words of the Swiss Federal Tribunal, "the manifestation of the agent goes out from the territory of his law and is directed from there to the third person."⁵⁷ The latter, as the Reichsgericht constantly states, has to rely on this law.

This unanimity may partly be explained by the fact that in outstanding cases the solution is obtainable from both ends of the controversial line of thought. The courts often stress the necessity for the third party to depend on the local law. But where the agent is a branch or agency in the exclusive service of the principal firm, his place of business may be regarded as a special domicile of the principal himself. Such reasoning has inevitably prevailed when a foreign corporation carries on business in a state. Whether or not that state prescribes that an agent with full powers must be appointed and registered, the powers of any permanent

⁵⁵ BAR, in 1 Ehrenberg's Handb. 345 and n. 5; followed by HUPKA, *Vollmacht* 252; similarly, 2 WHARTON 867 § 405.

⁵⁶ Germany: RG. (Dec. 5, 1896) 38 RGZ. 194; (Jan. 14, 1910) 66 Seuff. Arch. No. 73; (Dec. 5, 1911) 78 RGZ. 55.

⁵⁷ Switzerland: Inspired by 2 MEILI 39, BG. (Dec. 22, 1916) 42 BGE. II 648, 650 (validity of "procura" of a foreign branch); *accord*, (Dec. 14, 1920) 46 BGE. II 490, 493 (branch manager); (March 5, 1923) 49 BGE. II 70, 74 (although concerned with agency in contracting, seems also conclusive for authority).

representative of the foreign corporation are conveniently measured by the local standard.

The same solution is to be found where the agent is a domiciled independent contractor. When a Dutch firm through its branch in Cardiff, England, employed an Italian brokerage firm domiciled in Genoa, Italy, to sell coal, the Dutch court did not hesitate to apply the Italian Code of Commerce in construing its authority.⁵⁸

But, while modern followers of the law of the principal are forced to acknowledge concessions in the cases mentioned, some have insisted on their rule in the case of a traveling salesman having no fixed domicil.⁵⁹ Nevertheless, the German courts which once proclaimed such a distinction,⁶⁰ have enlarged their formulation of the rule in such generally expressed dicta that it is prevailingly understood to include the powers of any agent.⁶¹ In the United States, it has not been doubted that when a traveling salesman goes from state to state selling goods, "the situs of the contracts he makes is where he exercises his authority."⁶² The recent English decision in the *Sinfra Case* has recognized that

⁵⁸ The Netherlands: App. Haag (June 8, 1917) W. 10208, with the argument that because authorization was given to a brokerage firm carrying on its business in Genoa, Italy, the contract constituting the authority was made in Italy. The court distinguishes sharply the contract made through the agent with the third party. *Cf.*, e.g., Swiss BG. (July 20, 1920) 46 BGE. II 260, 263: the plaintiff, having a special agent in Switzerland, had to take into consideration that the acts of its representative are determined under Swiss law.

⁵⁹ *Supra* n. 32.

⁶⁰ RG. (June 15, 1920) 76 Seuff. Arch. 2, still followed by NUSSBAUM, D. IPR. 263. But the decision was confused and has no authority; see for criticism, RABEL, 3 Z.ausl.PR. (1929) 822.

⁶¹ See the authors cited in 3 Z.ausl.PR. (1929) 815 n. 1; and *adde* LG. Berlin I (Oct. 5, 1932) IPRspr. 1932 No. 63 with comment by RABEL, 7 Z.ausl.PR. (1933) 802. For an excellent survey on the German cases, see VON CAEMMERER, "Die Vollmacht für schuldrechtliche Geschäfte im deutschen internationalen Privatrecht," 24 RabelsZ. (1959) 201, based on reports by several authors, *id.* at 326-341; a French translation of the survey is reproduced in Conférence de la Haye, Actes et documents de la neuvième session, vol. 1, at 257.

⁶² Succession of Welsh (1904) 111 La. 801, 35 So. 913 (for the purpose of applying the Louisiana law of seller's privilege); *Kamper v. Hunter Land Co.* (1920) 146 Minn. 337, 341, 178 N. W. 747.

where a power of attorney is issued for use in several countries, the scope of a copy for use in England is determined by English law;⁶³ the English presumption is that any authority given for several countries entitles the agent to act in each country in accordance with the laws thereof.⁶⁴

Kinds of problems. Since the differences of municipal rules concerning the extent of authority, and particularly of implied authority, are outstanding in judicial discussions everywhere, they appear also in the foreground of the literature from Story to the present time. But the rule that the law of the agent's act governs, nationally enlarges its own domain. Problems such as the effect of ratification and termination of authority cannot conveniently be solved in a different manner. The scope of the local law expands, and it becomes the general law governing voluntary authority. The American practice has never made a distinction among the problems.

(d) *The Restatement.* In § 343, whether an agreement constitutes "authorization" is said to be determined by the law of the place where it is made, the *lex loci actus*. However, § 344 subjects "apparent" authority to the law of the state "where reliance is placed upon such apparent authorization." Finally, § 345, under the condition that there is authority or apparent authority for acting in a state, leaves it to this state to decide "whether an act done (there by the agent) on account of the principal imposes a contractual duty upon the principal."

We know that Beale⁶⁵ intended to consider the risks and rights not only of the principal, as Story did, but also of the third party, which he found protected in the cases. But we are faced once more with patently contradictory rules, since here less than anywhere else can creation and effects

⁶³ *Sinfra Aktiengesellschaft v. Sinfra, Ltd.* [1939] 2 All E. R. 675.

⁶⁴ *Esher, M. R.*, in the *Chatenay Case* at 83, cited by DICEY (ed. 7) 875 f.

⁶⁵ 2 BEALE 1196 § 345.1.

of the legal relationship be submitted to different laws. If § 343, for instance, says that the state where an agreement is made determines whether it constitutes an authorization, does this not include the requirement of personal capacity to appoint an agent? Yet, illustration 2 to § 345 states that a married woman's promissory note signed and handed to her husband in X is valid if the wife is responsible under the law of Y where it was to be, and was, discounted. Certainly this is the solution prevailing in the courts. But this practice clashes with the broad language of § 343. To read Beale's own comment to § 345,⁶⁶ it seems that he endorsed the cases in many other respects. Is, then, § 343 in reality restricted to the question whether P in X sends the agent to state Y to act on his behalf (*cf.* § 345 comment c)? This would make sense, but does not exhaust the meaning of the section.

For comment a to § 345 of the Restatement assigns to § 343, *viz.*, the *lex loci actus*, the "extent" of authority. However, illustration 3 to § 345 calls for the law of the place of acting to determine, according to § 345, implied authority.

The place of reliance (§ 344) must be something different from the place where the agent "acts" (§ 345), and the difference might reflect a diversity of opinion about the selection of convenient contacts. But what this place of reliance exactly is, why the rule is changed from § 344 to § 345, and what is meant by the agent's "act," is nowhere explained. The suspicion seems justified that the reliance rule for apparent authority intends to satisfy some scholastic need for a symmetrical contraposition of the manifestations to the third party in contrast to manifestations to the agent.

The confusion is due in the first place to the stereotyped

⁶⁶ 22 BEALE 1195.

use of *lex loci contractus* and, in the second place, to the erroneous belief that the distinctions proposed in the Agency Restatement could support differentiated rules of conflict. Leaving these obscure riddles unsolved, we may remark with satisfaction not only, as noted before,⁶⁷ that agency and authority are neatly distinguished but also that the local law receives a significant role with the express purpose of protecting the expectation of third parties.^{67a}

(e) *International Drafts*. The International Law Association (I. L. A.), at the Conferences of 1950 (Copenhagen) and 1952 (Lucerne), approved two Draft conventions concerning the conflict of laws in matters of agency, elaborated by a committee under the chairmanship of Algot Bagge.

The Copenhagen Draft of 1950^{67b} contains conflict rules for any kind of agency with only some general exceptions in article 1. The Lucerne Draft of 1952,^{67c} on the other hand, deals exclusively with conflict of laws regarding agency in matters of sale of goods to which the Hague Convention of 1955^{67d} is applicable. Both drafts define the agent as a person "*qui accomplit des actes pour le compte d'un autre,*"^{67e} and the Lucerne Draft expressly adds that the act may be

⁶⁷ Ch. 39 p. 143.

^{67a} The Restatement (Second), Tent. Draft No. 6 (1960) neither contains the above criticized rules of the first Restatement nor any other conflict rules concerning authority. But the reporter in charge of the Restatement (Second) of the Conflict of Laws dealt with the subject in two articles, the position of which is virtually in agreement with the views here taken; see REESE, *supra* Ch. 39 n. 64, at 409, and REESE & FLESCHE, "Agency and Vicarious Liability in Conflict of Laws," 60 Col. L. Rev. (1960) 764.

^{67b} I.L.A., Report of the 44th Conference (Copenhagen 1950) 192-197; see the explanatory comments by GUTZWILLER, *id.* at 183-192.

^{67c} I.L.A., Report of the 45th Conference (Lucerne 1952) 309-314; see notes *id.* at 304-308.

^{67d} See *supra* Ch. 36 n. 1.

^{67e} In the English version of the Copenhagen Draft the words "*pour le compte de*" are translated by "on behalf of," whereas the English version of the Lucerne Draft speaks more accurately of acts "for the account of" another. As to these problems of terminology, see *supra* p. 133.

done in the agent's own name as well as in the name of the principal (article 2). Thus the drafts are intended to include cases of undisclosed agency. In article 3, both drafts lay down the principle of the autonomy of the parties to determine the law governing the relationship between principal and agent; and the following articles 4 of both drafts, respectively, contain conflict rules for those cases in which the parties did not designate any law. But the law applicable according to these provisions obviously does not determine the agent's authority, i.e., his power to bind the principal by legal acts involving third parties, especially by contracts with them. This follows from article 7 of the Copenhagen Draft and from article 8 of the Lucerne Draft. Both provisions, differing from each other only as to their wording, subject the agency, as between the principal and the third party, to the law of the place where the agent has acted.

The Eighth Hague Conference on Private International Law (1956) discussed the two drafts which were submitted to it by the International Law Association.^{67f} The Conference decided that the problem should be studied by a special committee.^{67g} But before such committee was appointed, it became obvious that the countries participating in the Hague Conferences are not very much interested in a unification of the conflict rules concerning the relationship between principals and third parties. The main reason for their reluctance seems to be that there are only a few cases in which difficulties in this regard arose. Apart from this, certain regional groups of countries are endeavoring to elaborate uniform laws on agency; and so is the International Institute for the Unification of Private Law in Rome.^{67h} For these reasons the Ninth Hague Conference

^{67f} See *Conférence de la Haye, Actes de la huitième session* 223-229.

^{67g} *Id.* at 356.

^{67h} See *Year-Book* 329 ff.

on Private International Law (1960) decided not to take any further steps at the moment.⁶⁷¹

4. Consideration of the Principal's Law

In applying the local law of the place where the agent "exercises" his authority, the English and German courts expressly presuppose that the principal has agreed that the agent should act for him in the specific country. With a similar intention, though less correctly, the Restatement, § 345, requires "causation" by the principal for the agent's acts in the foreign country (*supra* pp. 156 and 163). The American courts require "some conduct of the principal . . . warranting a legal presumption of agency."⁶⁸

Does all this mean a preliminary conflicts rule referring to the law of the principal's domicile or of the place where he constitutes the authority? In my own former proposal I suggested that the law of the principal's domicile ought to determine "whether the principal has declared his assent that the agent should act for him in the specific foreign country."⁶⁹ The Restatement takes a similar position, as § 343 subjects the question whether an authorization to

⁶⁷¹ See Conférence de la Haye, Actes et documents de la neuvième session, vol. 1 p. 283. For a discussion of the I.L.A. Drafts and of the advisability of an international convention on conflict of laws in matters of agency, see TOMASI, *supra* n. 45, at 663.

⁶⁸ KUHN, Comp. Com. 277, *cf.* Hauck Clothing Co. v. Sophia Sharpe (1900) 83 Mo. App. 385. The mother in Missouri sent her note to the son in Indiana "without legal restriction and with legal authority to sell it, where and to whom he wanted," at 392.

⁶⁹ RABEL, 3 Z.ausl.PR. (1929) 835, *cf.* 7 *id.* (1933) 806.

Cf. the English *Sinfra* Case, *supra* n. 63; the judge contrasts extent and revocability with "formation," and leaves a question open as to formality and capacity.

Germany: OLG. Hamburg (March 18, 1895) 16 Hans. GZ. (1895) HBL. 139: the law of the flag decides whether the shipowner could be bound "at all" by the signing of the bill of lading, whereas the law of the port of destination under German practice governs the rest of the problems. OLG. Hamburg (March 3, 1914) 35 Hans. GZ. (1914) HBL. 131: the Italian agent was not at all authorized to contract for the Hamburg firm, hence no question of the extent of authority arose.

act in the foreign country exists, to the law of the place where the agreement is made. This is usually the domicile of the principal.

However, this reservation has been criticized as too subtle,⁷⁰ and it would be consistent with the point of view preferred in discussing consent by silence and analogous question,⁷¹ here also to abandon insistence that the above formulated question should be determined by any special law.^{71a} In the *Chatenay Case*, the court required the ascertainment that the Brazilian principal by his power of attorney under the circumstances prevailing in Brazil intended to authorize selling and purchasing in England. But this question was not expressly assigned to Brazilian law; the judgment may be read as applying English law in prescribing an investigation of the Portuguese language, the Brazilian usages, and the legal knowledge of the principal in order to construe his intention. This is probably how the English commentators understand the case.⁷²

An express intention of the principal to submit his authorization to the law of a certain country is extremely rare. But a tacit selection of the applicable law has sometimes been correctly assumed when the powers were given for the purpose of proceeding in the courts or government offices of a foreign country.⁷³ By the same reasoning, the English rules providing for strict interpretation of powers

⁷⁰ BATIFFOL 282 n. 5; BRESLAUER, *supra* p. 149 n. 8, at 312.

⁷¹ See Vol. II (ed. 2) p. 524.

^{71a} To the same effect, VON CAEMMERER, *supra* n. 61, at 210; whereas REESE, *supra* Ch. 39 n. 64, at 412-414, submits that the forum, before applying the local law, should determine (1) if there is a relationship between the principal and the agent of a sort that makes appropriate the imposition of responsibility upon one for the act of the other and (2) if the principal has a sufficient connection with the local law. But REESE does not suggest deciding these questions according to the principal's law; instead, he urges the forum to "apply its own conceptions" (*id.* at 414).

⁷² See CHESHIRE (ed. 6) 247.

To a similar effect, probably RAAPE, IPR. (ed. 5) 503, speaking of simultaneous application of the law of the principal.

⁷³ LG. Berlin I (Oct. 5, 1932) IPRspr. 1932, No. 63 at 135.

of attorney,⁷⁴ apply where a sealed deed of authorization is conferred in England.

II. THE DEFINITION OF LOCAL LAW

I. Various Views

Although the distinct trend of the courts in the United States, England, Germany, the Netherlands, and probably most other countries has veered toward the local law, no agreement has resulted in the exact definition of this law. Usually there is no reason for doubt, because a permanently established agent of a foreign principal concludes a contract with a third party in the country of his domicile. Thus, the extent of the general authority of a London ship broker to make a charter party for a foreign shipowner or charterer certainly is subject to English law.⁷⁵ But which of the three involved connecting factors, viz., the conclusion of the contract, the domicile, or the agent's part in the conclusion, prevails if these factors do not coincide?

(a) *Lex loci contractus of the main contract.*⁷⁶ The French authors and the American cases are probably to be interpreted to the effect that authority is governed entirely by the law of the place where the main contract is made.

If we do not believe in the force of the *lex loci contractus*, this rule may be transformed into either of two possible variants. It might be concluded that authority should be determined by whatever law governs the main contract. This agrees with an approach sometimes suggested in Europe.⁷⁷

⁷⁴ See BOWSTEAD, Agency 49 art. 36.

⁷⁵ E.g., the Netherlands: Rb. Rotterdam (Oct. 29, 1930) W. 12345, N. J. 1934, 631.

⁷⁶ KOSTERS 769 advocates this law when it is more favorable to the third party than the law of the principal's domicile.

⁷⁷ BRESLAUER, 50 Jurid. Rev. (1938) at 308 optimistically contends that this is the true doctrine to be drawn from the English cases.

CASSONI, "La procura nel diritto internazionale privato," 14 Dir. Int. (1960) 256, 264 f., asserts that according to Italian conflict of laws, authority is

Or the place where the agent does the act embodying his consent to the main contract might be emphasized. This would bring the American tradition into a near relation to the following attempts at localization.

(b) *Law of the agent's domicil.* Whenever the local law has been applied in view of a permanent domicil of an agent, his place has been contemplated as that where he exercised his powers or acted in the interest of the principal; the law of this place governed his transactions. In particular, the German and Swiss highest courts have constantly had such a situation in mind.⁷⁸

(c) *Law of the place of operation.* A few American decisions mention, among coincidental facts, the place where a power of attorney was to be exercised. Thus, a power of attorney to lease Mexican land was subjected to Mexican law because, among other contacts, it was "to be exercised in Mexico."⁷⁹ The termination by death of an authority to sell Texas land was declared to be governed by Texas law with the justification that attempts had been made to carry out the power in the state.⁸⁰ Commonly, it is true, such language seems to mean nothing else than the place where the main contract is made.⁸¹

The German courts have constantly used the same language in the formula that the power conferred by authorization is governed by the law of the place where that power is to take effect or "deploys its force,"⁸² for instance, the

governed by the law of the main contract, but his reasoning is predominantly based on Italian internal law of agency.

⁷⁸ All the cases *supra* ns. 56, 61, and n. 57 are conclusive on this point.

⁷⁹ *Merinos Viesca y Compania v. Pan American P. & T. Co.* (D. C. E. D. N. Y. 1931) 49 F. (2d) 352; *cf.* 2 C. J. S. 1038 at n. 83.

⁸⁰ *Gilmer v. Veatch* (Tex. Civ. App. 1909) 121 S. W. 545.

⁸¹ This is the impression given by 12 C. J. 451; 5 R. C. L. 934; 11 Am. Jur. 395 § 112 n. 11; *Succession of Welsh* (1904) 111 La. 801, 35 So. 913; *Kamper v. Hunter Land Co.* (1920) 146 Minn. 337, 340, 178 N. W. 747.

⁸² See in particular RG. (Dec. 5, 1911) 78 RGZ. 55; (June 14, 1923) *Recht* 1923, No. 1222; KG. (Dec. 14, 1933) IPRspr. 1933, No. 9; BGH. (July 30, 1954) IPRspr. 1954-55, No. 1, at 4.

place where the agent and the third party meet.⁸³ It is identical with the place of "reliance" according to § 344 of the Restatement and its illustration, in the case of an agent's showing his written power of attorney to the third party. The contract may be concluded subsequently at any place. If A sends T an offer with notice that he is authorized by P to transact with him, he may be considered as using the authority at his own place, while the contract may be considered completed by the mailing of T's acceptance. It may also be said in such a case that the agent "acts" at his own place (Restatement § 345), although T places his "reliance" on the letter when he receives it. Or vice versa, the agent may visit the other party and show his authority while he subsequently writes the decisive letter from his own domicil. It is true that the other party is supposed to rely on the authority at the very moment of contracting, whether he sees a written authority at this moment or not at all; but the formulation here in question stresses the act of the agent in which he leans on the authorization.^{83a}

Also an English judge has stated that the place where an authority is "operated," determines the law.⁸⁴

2. Rationale

Ad (a) The proposition of applying the law governing the main contract is manifestly wrong, despite its adoption in the courts of this country. If A in London, agent of a Bombay firm P, sells to T in New York 100 bags of jute, deliverable f. o. b. Bombay, the sale is governed by the Anglo-Indian Sale of Goods Act. To determine for this

⁸³ RG. (March 23, 1929) Leipz. Z. 1929, 1268 No. 3.

^{83a} REESE, *supra* Ch. 39, n. 64, at 415, recommends somewhat vaguely, in cases of the kind mentioned, the application of the law of the state where the agent's action was centered.

⁸⁴ *Sinfra Aktiengesellschaft v. Sinfra, Ltd.*, *supra* n. 63, at 682; in *Apt v. Apt* [1947] 2 All E. R. 677—C. A. at 679, Cohen, L. J., refers to the law of the intended place of performance, which was a sufficient formula in the instant case.

reason the power of the London agent under the same law, would defy the very idea from which the argument starts. The applicable law would be that of the principal instead of that on which T may rely.

On the other hand, in *Maspons v. Mildred*,⁸⁵ the English Court of Appeal held that the extent of an authority given and accepted in Havana, Cuba, between firms there domiciled was governed by Spanish law, then in force in Cuba. Nevertheless the main contract concluded with the third party, a firm in England, by correspondence, was declared to be under English law, probably according to the party's intentions. It would have been grotesque to determine the extent of the agent's power by English law.

Again, suppose that A, the local agent of a foreign finance corporation P, makes a loan to T and the printed loan form includes a stipulation for the law of P's home state. Does this clause extend to the question whether the agent was entitled to waive some forfeiture clause of the printed form? The courts are unanimous in subjecting this question to the local law.

Ad (b) In the narrower, but by far most important, case of a permanently established agent, the law of his place offers a sound compromise. The business place of a branch manager or a servant of the foreign principal, amounts to a secondary seat of the latter. If the contract is made in the jurisdiction where the agent resides, which is the regular case, no practical doubt disturbs the courts. It would be pedantic to search for another place of reliance. Indeed, the locality in which the agent shows the written power of attorney to the third party, or where the principal orally tells him that he authorizes A, is immaterial in such a situation.

Illustration. P of New York at a convention in Chicago tells T of Arizona that he has a new district manager A for

⁸⁵ *Supra* Ch. 39 p. 145 n. 64.

several states with headquarters in Denver, Colorado, and hopes that T will patronize him. According to § 344 of the Restatement, this "apparent authorization" would be determined by the law of Illinois. If subsequently, A makes an offer by letter to T in Arizona and T accepts by letter, according to § 345 of the Restatement, the "effect" of the authorization would be determined by the Arizona law which conflicts with § 343 and § 344, but in this case agrees with the decisions. Under the German rule for agents with fixed domicil, the Colorado law governs the acts that the agent is entitled to make. It is submitted that this agrees with the presumable intentions of all three parties.

Ad (c) The place where the agent "acts" (Restatement § 345) may be any place in the course of his activity from his assertion that he is authorized to the completion of the third party contract.

In American decisions, it is true, this exact point has never been raised. In one case,⁸⁶ the district manager of the Firestone Corporation in Oklahoma went to Texas for the purpose of concluding a contract and at the same time made an oral promise to a third beneficiary. But since the federal court in Texas stated that "the foreign corporation *sent* its district manager to *this state*," the possibility was not considered that his implied authority might have been governed by the law of Oklahoma; under the circumstances, the agent was not functioning as district manager but as a special envoy.

Conclusion. The law of the principal has lost its claim to govern generally the conditions and effects of authority. A logical solution would always point to the place where the agent warrants his authority expressly or impliedly. But it might in some cases be doubted where this place is. Moreover, if he or the principal manifests the authorization during the negotiations, the ultimate consent by the agent to the contract is the more important event.

⁸⁶ Firestone Tire & Rubber Co. v. Fisk Tire Co. (C. C. A. Texas 1935) 87 S. W. (2d) 794.

While such doubts challenge a single rule, judicial experience has furnished, instead of one, two rules.

If an agent, acting for a foreign principal, carries on his function from a fixed place of business, the law of this place governs.

In all other cases, the law of that place should govern, in which the agent manifests (declares or dispatches) his consent to the main transaction.

The law of the principal's domicil is not even applied when it is more favorable to the third party than that just mentioned. When a Danish city, having contracted with a domiciled agent of a German firm for the purchase of certain goods, resorted to a provision of the German Commercial Code, § 91, paragraph 2, authorizing third persons to address notice of defects and rejection of goods to the agent, the Reichsgericht refused the plea. Because security of commerce requires that persons dealing with the agent should be able easily to examine and ascertain the scope of his authority, for this purpose, they must rely on the law at the place of the agent. A larger extent of powers under the law of the principal is not necessarily more favorable to the third party. "It may be disadvantageous to him, for instance, where it is in question whether his declaration to the agent binds or obligates him. In no case should the application of any law depend on its being or not being favorable to him."⁸⁷ This, in my opinion, is convincing.

III. SCOPE OF THE LOCAL LAW

1. Validity of Authority

(a) *Form.* Although the majority of American cases apply the *lex loci contractus* of the main contract,⁸⁸ there is no firm rule. When a power of attorney was signed in

⁸⁷ RG. (Jan. 14, 1910) 66 Seuff. Arch. No. 73. All these propositions made in 3 Z.ausl.PR. (1929) 835 seem to me still the best.

⁸⁸ 2 BEALE §§ 332.4, 342.1.

Italy before a vice-consul of the United States without a seal being affixed, the act was recognized as formally valid in accordance with Italian law, and hence declared sufficient to support the execution by the agent of a sealed instrument in the United States.⁸⁹ This agrees with the first Restatement rule rather than with the traditional rule, although it is not clear why an American consul should be supposed to act under Italian rules of formalities.

Municipal laws include many formal requirements for authorizations. The rule of the common law just alluded to requires that an authority to execute a deed must also be under seal.⁹⁰ In many states of the United States authority for an agent to contract for the sale of land⁹¹ requires an instrument satisfying the statute of frauds, like the sale itself.⁹² In a widespread doctrine, authority is generally subjected to the same formalities as the authorized contract.⁹³ The German law has taken the contrary viewpoint; although a contract to transfer title to land requires solemnization by court or notary,⁹⁴ authorization to conclude such contract is formless,⁹⁵ however, increasing exceptions have been stated.⁹⁶

⁸⁹ *In re Everett Estate* (1941) 112 Vt. 252, 23 Atl. (2d) 202.

⁹⁰ BOWSTEAD, Agency 31 art. 24; Restatement of Agency and Restatement of Agency (Second) § 28. But this Restatement § 29 notes that if an oral authorization is insufficient to make a deed of conveyance effective, it suffices to maintain the deed regarded as a memorandum of a contract to convey.

⁹¹ Authority to transfer land or rights in immovables is another thing and always is governed by *lex situs*.

⁹² MECHEM, Agency (ed. 4) 11 ff., 17; POWELL 20 f. For a recent example of a contrary West Virginia statute under which oral authorization to contract for real estate is permitted, see *Gallagher v. Washington County Savings Loan and Building Co.* (1943) 25 S. E. (2d) 914.

⁹³ Restatement of Agency and Restatement of Agency (Second) § 26 and § 28 (1) with exceptions in § 28 (2).

Georgia: C. C. (1910) § 3574; a "broad and sweeping rule," *Byrd v. Piha* (1927) 165 Ga. 397, 141 S. E. 48; *Oellrich v. Georgia R. R.* (1884) 73 Ga. 389.

Italy: C. C. (1942) art. 1392.

⁹⁴ BGB. § 313.

⁹⁵ 103 RGZ. 295, 300-302, and many other decisions.

⁹⁶ See comments to § 313 of the BGB.

The conflicts question has scarcely been treated with special reference to authority. The repeatedly mentioned German conflicts rule, in its latest broad formulation, seems to extend to formalities the law of the place where the agent exercises his authority; this place is identical with the situs when the agent sells an immovable at the place of its location.⁹⁷

The American practice, on the other hand, ought to be crystallized to the effect that the law governing the third party contract should determine the form in which the power must be conferred upon the agent.^{97a} This result logically and conveniently includes the closely connected problem whether the agent needs a special authorization for the intended transaction, this being under all circumstances an incident of the main contract.⁹⁸

On the optional theory of *locus regit actum*, finally, an authorization would also be sufficient if its form complies with the law of the place where the principal constitutes it. How far this theory may be carried, seems to deserve future investigation.^{98a}

(b) *Capacity*. In the United States, this problem has been lost in the game of searching for the place where a married woman makes a contract when she sends a note through correspondence, agents, or messengers.⁹⁹

In civil law, the personal capacity of a principal to authorize an agent is in practice governed by the law of the former's domicile rather than his nationality.¹⁰⁰

⁹⁷ See ZWEIGERT, "Die Form der Vollmacht," 24 *RabelsZ.* (1959) 334 and cases cited by him. To the same effect, the Draft of a Uniform Law on Agency, *supra* n. 67h, art. 5, requires the formality prescribed by the law of the country where the agent's act is to be accomplished.

^{97a} See REESE, *supra* Ch. 39 n. 64, at 417.

⁹⁸ *Supra* Ch. 39 p. 145.

^{98a} See ZWEIGERT, *supra* n. 97, at 335.

⁹⁹ *Supra* pp. 138, 159.

¹⁰⁰ On the ground of the older theory (STORY and BAR, *supra* ns. 1, 2) the domicile of the principal determines all of the authority. Consistently,

If we eliminate *lex loci contractus* and avoid confusion with the main contract, the problem reverts to the question of policy, whether a principal, incompetent by his domiciliary law, should be deemed capable if the law of the place where his authorization is used so provides. According to the conclusions reached in Volume One, capacity to establish obligations should be determined under their proper law, if not accorded by the personal law. The law governing authority to create obligations, therefore, should be able to grant capacity.^{100a}

(c) *Intrinsic requirements.* American as well as German courts do not hesitate to determine such questions as nullity and revocability¹⁰¹ of a power of attorney according to the local law.

2. Implied Authority

Modern laws abound in usages, customary constructions, legal presumptions, and legal rules, defining the acts which agents of certain classes or under certain circumstances are authorized or not authorized to do on account of the principal. Some codes, particularly the German Commercial and Civil Codes, have elaborated various categories of such commonly called "implied" authority, and the Restatement of Agency also distinguishes "authority," "apparent authority," estoppel, and unnamed other "powers." The Conflicts Restatement, § 344, it is true, singles out "apparent" authority for applying the law of the place where the third party places "reliance" upon such authority. To the con-

only domicile, not nationality, remains a possible test for determining the capacity of authorizing, which I adopted in 7 Z.ausl.PR. (1933) 806. But in the following text I give up even this restricted role of the personal law.

^{100a} The German doctrine seems to prefer the law of the principal's nationality; see BRAGA, "Der Anwendungsbereich des Vollmachtstatuts," 24 *RabelsZ.* (1959) 337 f. Cf. also MAKAROV, "Die Vollmacht im internationalen Privatrecht," in 2 *Scritti in onore di T. Perassi* (1957) 37, 43 f.

¹⁰¹ *Infra sub* (3) and (4).

trary, it has become evident in considering the case law of German courts that there can be no distinction on the international plane among constructions, presumptions, and rules, or among court interpretation, legal rules of construction, and subsidiary legal rules, as well as between statements or conduct of the principal toward the agent and toward the third party, or between directly obligating declarations and estoppel.¹⁰² They are not neatly separable even in the most elaborate municipal laws, and in fact not distinguished in many jurisdictions. They must be of equivalent significance in the conflict of laws. Neither English nor American courts, to my knowledge, have shown any inclination to classify in heterogeneous compartments what is distinguished as express and apparent authority, and in the latter category, as authority to do what is usual in a particular trade or what agrees to local usage, authority extended by statute, etc. The idea of estoppel in its broadest meaning appears to Continental observers of the English theory as present more or less in all parts of the doctrine of implied authority.¹⁰³

Illustrations. (i) P in state X hands to A his written authorization to purchase goods on P's account in state Y. A shows this statement to T in Y. P is bound to T according to the law of Y without respect to internally declared restrictions. The Restatement, § 344, illustration, expressly decides this case under the law of Y, because the authority is apparent and T relies on it in state Y. The substantive rule, however, is exactly the same in the German Civil Code (§ 172) which expressly says that where the principal has handed the agent a written authorization and the agent shows it to the third person, the agent is authorized in

¹⁰² I refer for details to my repeatedly cited article, 3 Z.ausl.PR. (1929) at 825 f. As to American law, REESE, *supra* Ch. 39 n. 64, at 413 f., seems to be in agreement with the position here taken that there should be only one conflict rule for the various cases of apparent authority and the like.

¹⁰³ Cf. MACRIS, *supra* p. 144 n. 57, at 278 ff., 293.

relation to this person. Although thereby a true authorization is recognized, the German conflicts rule simply applies the law of Y as that of the place where the agent acts upon his authority. The right conflicts rule naturally covers this case.

(ii) Whether a traveling salesman is entitled to sell for cash and to grant deferment of payment, is a question of the extent of his power, regulated in Germany by a legal rule and in France by an implied agreement (*mandat tacite*). In the case of a French salesman traveling in Germany, the German *Reichsoberhandelsgericht* once decided the question under the French law of the principal,¹⁰⁴ whereas it would be determined at present according to the German Commercial Code (§ 55, paragraph 2). Even the authority of a commercial agent under the German Commercial Code (§ 91, paragraph 2) to accept certain statements of third persons, although considered a "legal authority," has been refused to the Danish agent of a German firm acting in Denmark.¹⁰⁵ English and American courts decide to the same effect.

(iii) An agricultural producer in Silesia sent eggs for sale through an agent on the market of Berlin. The sender was to be deemed to have "submitted" to the usages of the Berlin market. As Willes, J., said in *Lloyd v. Guibert*, "whoso goes to Rome, must do as those at Rome do."¹⁰⁶ The *Reichsgericht*, criticized for having ignored this rule,¹⁰⁷ amended its practice immediately.¹⁰⁸

This resort to the local laws is also supported by the differences in the usual national types of agents. An English factor, operating in England, cannot be conveniently treated like a Brazilian commercial agent in Brazil. The legal presumptions and usual constructions defining what the authorized broker or clerk or traveling salesman may and may not

¹⁰⁴ ROHG. (Dec. 4, 1872) 8 ROHGE. 150, Clunet 1874, 81.

¹⁰⁵ RG. (Jan. 14, 1910) 66 Seuff. Arch. No. 73.

¹⁰⁶ (1865) 6 Best & Sm. 100, 131 Eng. Rep. 1134.

¹⁰⁷ RG. (June 26, 1928) JW. 1928, 3109, IPRspr. 1928 No. 39, criticized by Dove, JW. *ibid*.

¹⁰⁸ RG. (Oct. 13, 1928) IPRspr. 1928 No. 40.

do on the account of the principal, are commonly intended merely for agents carrying on business within the state and for all such agents.

The American decisions show similar tendencies. Most of those in point,¹⁰⁹ it must be noted, do not deal with our general problem but concern insurance agents, a very special matter, the local sphere of the state where the insured lives being much emphasized in constitutional and conflicts practice of the courts. With this reservation, the cases may be cited regarding the authority of local insurance agents to issue a policy,¹¹⁰ to waive conditions,¹¹¹ or to give binding information.¹¹² The law of the insured person's residence has been applied under the theory that the contract was made, or in the case of insurance of immovables, the object was situated¹¹³ in that state.

No separate rule is apparent with respect to general agents.¹¹⁴ General powers are the main subject of the customary and legal definitions of implied authority. Whether, of course, the particular main contract can be made by a general agent, or whether special powers are needed for such purposes as contracts relating to land, lawsuits, compromises on litigious matters, or gifts, is a problem of the main transaction itself.

¹⁰⁹ *Perry v. Pye* (1913) 215 Mass. 403, 102 N. E. 653 (cf. 2 BEALE 1195 n. 6) does not offer any problem.

¹¹⁰ *Gallagher v. Liverpool & London & Globe Ins. Co.* (Tex. 1918) 206 S. W. 212; *Grant v. North American Benefit Corp. of Illinois* (1928) 223 Mo. App. 104, 8 S. W. (2d) 1043.

¹¹¹ *Cohen v. Home Ins. Co.* (1916) 6 Boyce 207, 97 Atl. 1014; *American Fire Ins. Co. v. King Lumber & Mfg. Co.* (1917) 74 Fla. 130, 77 So. 168; *Keesler v. Mutual Benefit Life Ins. Co. of New York* (1919) 177 N. C. 394, 99 S. E. 97; *Sovereign Camp W. O. W. v. Newsom* (1920) 142 Ark. 132, 219 S. W. 759 (including estoppel); *Springfield Mtl. Ass. v. Atnip* (1925) 169 Ark. 968, 279 S. W. 15 (false indication of age by the agent).

¹¹² *McMaster v. New York Life Ins. Co.* (C. C. N. D. Ia. 1897) 78 Fed. 33. England: *Pattison v. Mills* (1828) 1 Dow and Cl. 342.

¹¹³ Cases of *American Fire Ins. Co.*, *Gallagher*, *Keesler*, *supra* ns. 110, 111.

¹¹⁴ Contrarily to NUSSBAUM, D. IPR. 264, see the decisions of LG. Berlin I and KG., *supra* n. 97.

3. Ratification

The old conflicts literature was affected by the theoretical mistakes of doctrines which involved "ratification" and "confirmation" of contracts made by an unauthorized agent and unnecessarily bothered about distinctions between lack of and transgression of authority.¹¹⁵ The modern view is very simple; it accepts the Roman idea of ratification. *Mandat et qui ratum habet* means that ratification is an authorization subsequent to the main contract. Its nature is identical with a precedent authorization. This idea operated in indirect representation in the internal relationship between principal and agent,¹¹⁶ but its effect on the agent's power is confined to disclosed agency, even in the common law doctrine.

Opinions are divided only with respect to the permissibility of such belated confirmation. Thus, in the United States, three solutions depend upon whether ratification is allowable at all, or after a reasonable time, or so long as the other party does not cancel the contract.¹¹⁷

From the nature of ratification as a true authorization, it follows that its effect is retroactive, and this, too, is commonly settled. Hence, there is no reason why the law of the place where the agent acts should not extend to this incident. No fiction of "submission" of the principal to the foreign law¹¹⁸ is needed.^{118a}

¹¹⁵ See, e.g., 7 LAURENT 546 § 457.

¹¹⁶ The latter is meant in CASAREGIS, *Discursus* 179 §§ 20, 64, 76, 89 and his followers including 3 FIORE § 1151.

¹¹⁷ HUNTER, "What is the Effect of a Ratification of an Agent's Unauthorized Contract?" 5 *La. L. Rev.* (1944) 308.

¹¹⁸ BEALE, "The Jurisdiction of a Sovereign State," 36 *Harv. L. Rev.* (1923) 241, 258; assumption of a renvoi is tentatively construed by GRISWOLD, "Renvoi Revisited," 51 *Harv. L. Rev.* (1938) 1165, 1200.

^{118a} REESE, *supra* Ch. 39 n. 64, at 416, takes the view that the forum "should use its own conceptions" in order to decide whether the principal's conduct could fairly be thought to amount to a ratification. About such an additional test, see *supra* pp. 167 f. and n. 71 a.

(a) *Normal rule.* The rule, therefore, is that the law of the place where the agent acts as a representative governs the validity and effect of a manifestation of the principal allegedly consenting to the agent's transaction.¹¹⁹ The Restatement, § 331 (1), accedes to this rule saying, as is habitual, that this place is "the place of contracting."¹²⁰

Since there is no material difference between acting without any authorization, and acting beyond authorization,¹²¹ it does not matter, contrary to certain older doctrines, whether principal and agent before the ratification were bound by contract or whether the agent acted as a *negotiorum gestor*. This result was reached by Story, speaking for the Supreme Court of the United States, in 1832, although he operated with an imaginary *lex loci solutionis*.¹²²

(b) *Soliciting agent.* It is well settled that when an agent, sent out to solicit orders, transmits an order to his principal and the latter declares his consent to the customer, the contract is made by the principal himself.¹²³ The reason, however, is not as is sometimes confusedly assumed, that the agent has no authority to contract. Whether he has or

¹¹⁹ United States: Dord v. Bonnaffee (1851) 6 La. Ann. 563; Golson v. Ebert (1873) 52 Mo. 260; Pugh v. Cameron (1877) 11 W. Va. 523; Hill v. Chase (1886) 143 Mass. 129, 9 N. E. 30; WILLISTON, 1 Contracts § 278; 2 BEALE 1076.

Canada: Quebec: Trudel v. Assad (1912) 14 Que. Pr. 202.

See also art. 8, as it appears in the two drafts of the I.L.A., *supra* ns. 67b and 67c.

¹²⁰ Is the objection to this rule by STUMBERG (ed. 2) 230 not influenced by the theory of the last act of completing a contract, of which he himself is rather critical?

¹²¹ Restatement § 331 says: "beyond or contrary to his instructions," which confuses the relationships.

¹²² Boyle v. Zacharie (1832) 6 Pet. S. C. 635, 8 L. Ed. 527. The consignee of a cargo in New Orleans furnished suretyship and paid when the ship was attached there. The shipowner recognized the intervention, and Story localized his duty in Louisiana, because *if* he had contracted with the defendant (Story says: "authorized" him) to advance money there on his account, this contract would have been performable there and the *lex loci solutionis* would be applicable.

¹²³ GOODRICH 264 n. 24; 7 LAURENT § 456 *in fine*; 1 FIORE § 133; 2 RESTREPO HERNÁNDEZ § 1297.

not, the material point is that he does not purport to conclude the contract. The place of the agent is immaterial in this case, as also his powers are. The result, that the principal makes the contract, is recognized by the American courts also for the purpose of ascertaining in what state a corporation does business by such a contract;¹²⁴ whether Louisiana's privilege of the vendor applies;¹²⁵ and under what law title is reserved, incidentally to the contract.¹²⁶

But the main contract, in reality, has its own law, according to its nature and this law governs offer and acceptance.

(c) *Abnormal solution.* Suppose that in the case of a liquor sale a soliciting agent in Iowa (where the sale would have been invalid) went beyond his authority and made a sale as if he were empowered to conclude the contract without reserving the approval of his principal in Illinois (where the sale would have been valid). But he sent the order to the principal who confirmed it to the buyer. According to the normal rule, since the agent sold the liquor in Iowa, the contract, as governed by the law of Iowa, would be invalid and not subject to approval by the principal, although the latter, of course, might have made a new offer. This self-evident result seems to agree with the two decisions of the Iowa Supreme Court¹²⁷ which have subsequently

¹²⁴ *Aultman, Miller & Co. v. Holder* (C. C. E. D. Mich. 1895) 68 Fed. 467; *State Mutual etc. Ins. Co. v. Brinkley* (1895) 61 Ark. 1, 35 S. W. 157. See also *State v. Colby* (1894) 92 Iowa 463, 61 N. W. 187; *Kling v. Fries* (1876) 33 Mich. 275.

¹²⁵ *Clafin v. Mayer* (1889) 41 La. Ann. 1048, 7 So. 139.

¹²⁶ *Barrett v. Kelley* (1894) 66 Vt. 515, 29 Atl. 809.

¹²⁷ In *Tegler v. Shipman* (1871) 33 Iowa 194, 200, the court stated as the general rule, that, "if the agent simply took an order from defendant upon his principals in Rock Island, which they might fill or refuse at their option, it was a Rock Island contract, and the plaintiff can recover unless it is shown that they sold the liquors with intent to enable the defendant to violate the provisions of the act. . ." The decision in *Taylor v. Pickett* (1879) 52 Iowa 467, 3 N. W. 514, concerning the territorial scope of a license to sell, upheld instructions to the jury saying that "it would be a sale at the house," if the agent took orders subject to final acceptance by the principal, whereas the sale would be illegal if orders were taken "not subject to approval."

been invoked for a contrary view by a federal circuit court. This court decided in *Shuenfeldt v. Junkerman*, an Iowa case, that although the contract was concluded in Iowa by an unauthorized agent, the confirmation by the principal, the firm in Chicago, constituted an acceptance of the order and completed the contract in Illinois, hence validly. When the validity of the contract is in question, as in liquor and Sunday contracts, the court considered "the very time and place where and when the act was done that gave life to the contract."¹²⁸ Incautious commentators have tentatively extracted the recognition of a ratification having no retroactive effect.¹²⁹ The Restatement finally takes from this isolated decision the impulse for an astonishing general rule.¹³⁰ The individual decision in the *Shuenfeldt Case* may be condoned as an instance of extraordinary favor extended by the courts to interstate contracts affected by the crude sanctions of Sunday and liquor laws. Moreover, as usual, the belief in *lex loci contractus* promoted extravagancies. But it is a grave mistake to disturb the international function of the normal rules by such arbitrary exceptions.

Illustration. Suppose an ammunition manufacturer in Illinois sends a soliciting agent to Bolivia, who, pretending to be authorized to sell, accepts an order from an unlicensed dealer for delivery in a Bolivian port. While the buyer, violating Bolivian laws, must know that the contract is void, American courts, according to the Restatement, should argue that the manufacturer supplementing his authorization concludes the contract under American law and therefore makes a valid contract. Every part of this argumenta-

¹²⁸ *Shuenfeldt v. Junkerman* (C. C. N. D. Ia. 1884) 20 Fed. 357; HARPER *et al.*, Cases 374.

¹²⁹ 11 Am. Jur. 394 § 112.

¹³⁰ § 331 (2): "If by the law of the place where the agent acted, there is no contract as a result of the ratification, the ratification is regarded in the state where it is made as the acceptance of an offer made to the agent and transmitted by him and if the acceptance completes a contract, the contract is there made."

tion is wrong. A unilateral confirmation of a void agreement is ineffectual. That the traditional theory of illegality at the place of performance is defied, would not matter so much as that the contract is really governed by Bolivian law, because of all the circumstances.

The liquor cases could have been approached differently. Shuenfeldt, by the order, had delivered the goods at a railway station in Chicago, his own city. The sale, for this reason, and for this alone, could have been governed by Illinois law. Equally, in the hypothetical case of an armaments sale in Bolivia, if the goods were to be delivered f. o. b. New York, the buyer would be rightly supposed to comply with the laws of the United States, when sued in an American court; the decision would depend on the court's conception of international policy.

4. Termination

Death of the principal and revocation of authorization have been controversial matters in the municipal laws. From the old point of view of a merely two-sided relationship, rights and obligations between master and servant, mandator and mandatary, naturally ended with such events, and the powers of the agent, too, were automatically ended. But the Roman praetor granted actions against a master during a year after he withdrew the *peculium* from a slave.¹³¹ A shop manager had the powers of an *institor* so long as his name was not canceled in the shop.¹³² Modern systems have prolonged either the underlying contract, or at least the authority, beyond its original termination, in the interest of third persons, or even of an innocent agent.

(a) *Death of principal.* A general power of attorney conferred in California for sale of land in Texas was ended

¹³¹ *Actio annalis de peculio*, LENEL, *Edictum Perpetuum* 277, 282 ff.

¹³² ULPIAN, D. 14-3.11 § 3.

under Texan law by the death of the issuer, although it would have been valid until notice to the agent under California law. The court in Texas based this decision on the attempt to carry out the powers in Texas.¹³³

This represents the universally prevailing and recommendable conflicts rule,¹³⁴ alone consistent with the application of the local law to apparent authority. That the continuation of the power should require the consent of two laws, or even three,¹³⁵ is strictly objectionable.

(b) *Revocation.* An irrevocable general power of attorney was signed by an American in New York for any transaction on his behalf regarding his German assets. Under the law of New York, this authorization, not coupled with an interest of the agent, was revocable. German courts, under a questionable rule, have treated irrevocable general authorizations as void, at least for the purpose of transactions contemplating transfers of rights in immovables. This German rule was applied to the case on the theory that authority is subject to the law where it is exercised.¹³⁶ If, conversely, a German authorization were used in New York, its revocability would doubtless have to be determined under New York law.

The identical solution has been recently followed in an English case,¹³⁷ and may also be advocated as a universal rule.

¹³³ *Gilmer v. Veatch* (Tex. Civ. App. 1909) 121 S. W. 545.

¹³⁴ Thus, against STORY § 286 d: 4 PHILLIMORE 571 § 705; 3 FIORE § 1154; ALCORTA, 3 Der. Int. Priv. 116; cf. 2 WHARTON 871.

¹³⁵ Thus, 2 RESTREPO HERNÁNDEZ § 1306.

¹³⁶ LG. Berlin (Oct. 5, 1932) IPRspr. 1932, No. 63, discussed as to the questionable municipal rule and the pioneering conflicts rule in my article, 7 Z.ausl.PR. (1933) 797, evidently unknown to BATIFFOL 282 n. 6. To the same effect, KG. (Dec. 14, 1933) IPRspr. 1933, No. 9.

¹³⁷ *Sinfra Aktiengesellschaft v. Sinfra, Ltd.* [1939] 2 All E. R. 675, 682.

CHAPTER 41

Employment and Agency

I. THE SUBJECT MATTER

WHILE voluntary authorization operates in the relation between the agent or, in common law, the principal, and the third party, the internal relationship between principal and agent rests upon a contract commonly termed contract of agency, although this word is also used differently. This includes, for instance, a contract of brokerage for buying securities, and excludes a sales contract made by a buyer intending a resale, or any other party contracting on his own account. To embrace, however, the contracts for a factual work, generally the word "employment" is added which really has no recognized legal meaning and overlaps the scope of agency; brokerage may also be called an employment.¹ Although these two terms do not express a neat contrast, there is a distinction, important at least for conflicts law, between the two groups of contracts involved.

Common law has an appropriate and significant terminology: "Master and servant" is a broad old doctrine within the category of "principal and agent." Its criterion is the superior choice, control, and direction, by the master, of the servant's conduct and method in doing the work.² In Europe,

¹ 35 Am. Jur. 448 § 5; 144 A. L. R. 740; 151 *id.* 1331.

² This distinction was first suggested by 2 MEILI 80 to the extent that he advocated the law of the organization into which the employee integrates himself by his contract. The same result was recently proposed by 2 FRANKENSTEIN 335 (inconsistent with 333 ff.); 2 SCHNITZER (ed. 4) 711 ff.; BRESLAUER, 50 Jurid. Rev. (1938) at 293 (despite the vacillating English cases). No distinction has been made in the International Law Association, Vienna Draft 1926, 34th Report (1927) 509 ff.

the same outstanding type of contract has emerged more recently from ancient narrow and modern broad concepts.

In Romanistic tradition, *locatio conductio operarum* (*louage de service, Dienstmiete*), the hiring of services, was comparatively the most adequate analogue; the Institute of International Law spoke of conflicts rules for this type as late as 1927.³ But the full ground was covered only by the addition of *locatio conductio operis* (*Werkvertrag*), the contract for performing work, and numerous special kinds of contracts.

On the other hand, the modern term *Arbeitsvertrag, contrat de travail, or contratto di lavoro*, was sometimes extended to all types of contracts in which the obligation to work is outstanding. At present, however, this name is reserved for the contract concluded with dependent employees, industrial and agricultural as well as white collar workers, including even high-placed employees. This contract of work is to be defined as the private law contract whereby a person obligates himself to work with a certain continuity in the service and according to the directives of another person for a salary.⁴ It is unnecessary to restrict this concept to the accomplishment of material acts as contrasted with the conclusion of legal transactions.⁵

The National-Socialist doctrine was eagerly at work to eradicate the very idea of this individual private contract of labor. But it has withstood totalitarian fanaticism.⁶

³ *Annuaire* 1927 III 219.

⁴ Germany: 1 HUECK & NIPPERDEY (ed. 6) 104.

France: ROUAST in Planiol et Ripert, 11 *Traité Pratique* (ed. 2) 8 § 767; 2 COLIN et CAPITANT (ed. 10) 745 § 1128.

Italy: BALDONI, *Rivista* 1932, 348, and *cit.*; Notes in 37 *Riv. Dir. Com.* (1939) II 387 to Cass. (Jan. 23, 1939) 40 *id.* (1942) I 177.

Switzerland: OSER-SCHOENENBERGER 1118 No. 9.

Brazil: CESARINO JUNIOR, 2 *Direito social brasileiro* (ed. 2, 1943) 132 § 228.

⁵ Thus ROUAST et DURAND, *Précis de législation industrielle* (ed. 3, 1948) 316 § 262 and 321 § 268, excluding the contract of "mandat."

⁶ At least these writers (SIEBERT, MANSFELD, etc.) tried to degrade the labor contract to an "auxiliary" position, see, e.g., RHODE, 3 *Zeitschrift der*

The thus established distinction of types is indeed of interest in conflicts law. In localizing the relations of an employer, there is a difference between his subordinates, bound to his business organization and instructions, and the professional persons lending him their services. Local connections have an overwhelming influence on the activity of independent contractors, while their importance in the other case is conditional and limited, although by no means insignificant. To anticipate the tendency of the most adequate decisions, we may observe that contracts of independent persons are governed by the law of their own domicil, and employment contracts with "servants" are governed by the law of that place of the principal's business to which the employee is attached. Usually, of course, servants live in the state where they are working, so as to make the laws of their domicil and of their working place identical. For this reason, the groups are often confused without any harm done. Moreover, the concept of servant in municipal law is for certain purposes sometimes reasonably extended beyond its usual scope.⁷ But for analytical purposes and for the practical needs of individual cases the distinction is needed.

Under this approach it is of minor significance that, in civil law, servants are supposed to make contracts as simple agents in the name of their principal, as for instance commercial clerks (German *Handlungsgehilfe*), whereas members of professions either act in their own name, such as the commercial "agents" (German *Kommissionär*) or, in appearing for their clients, exercise their own functions, such as attorneys.

Our productive materials for the conflict of laws regarding the employment of servants are scarce and are further

Akademie für Deutsches Recht (1936) 371. A good survey on the discussion is given by CESARINO, *supra* n. 4, 125 ff.

⁷ See *infra* n. 59.

diminished by the prevalence of workmen's compensation in the cases. This subject, for compelling reasons, requires special discussion. Only insofar as the law governing the employment contract is deemed to determine the question of indemnization for accidents may contributions be extracted from these cases.

II. MASTER AND SERVANT⁸

1. *Lex Loci Contractus*

The law of the place of contracting has also been applied to employment contracts.⁹ This has remained the declared rule in Italy.¹⁰ The same rule obtained in the earliest English case on the subject,¹¹ but other decisions reaching a seemingly similar result may be explained by additional local connections. The Dutch Supreme Court insisted on the rule in 1926 whenever the agreement fails to modify it.¹² In Austria the more recent practice applies foreign law where

⁸ ROUAST, "Les conflits de lois relatifs au contrat de travail," 1 *Mélanges Pillet* 195; CALEB, "Contrat de travail," 5 *Répert.* 210 ff.; GEMMA, *Dir. Int. del Lavoro*; GAMILLSCHEG, *Internationales Arbeitsrecht*; GAMILLSCHEG, "Les principes du droit du travail international," *Revue Crit.* 1961, 265, 477, 677; LANFRANCHI, *Derecho internacional privado del trabajo* (1955); SIMON-DEPITRE, "Droit de travail et conflits de lois devant le deuxième Congrès international de droit du travail," *Revue Crit.* 1958, 285; KAHN-FREUND, "Notes on the Conflict of Laws to Employment in English and Scottish Law," 3 *Riv. Dir. Int. Comp. Lav.* (1960) 307.

⁹ FOELIX § 105; DESPAGNET § 300; 7 LAURENT § 454; WEISS, 4 *Traité* 374.

¹⁰ Italy: C. C. Disp. Prel. (1865) art. 9; C. Com. (1882) art. 58; C. C. Disp. Prel. (1942) art. 25 par. 1. GEMMA, *Dir. Int. del Lavoro* 159 ff.; however, makes a meritorious attempt to apply the law of the place of performance on the ground of implied party agreement. Other Italian authors suggest the forcible application of Italian law to all cases where the place of employment is situated in Italy, whereas, in their opinion, the remaining cases are governed by the law applicable according to the rules of C. C. Disp. Prel. (1942) art. 25, par. 1; cf. authors cited by GAMILLSCHEG 154-158 and MORELLI (ed. 7) 154-156.

¹¹ *Arnott v. Redfern* (1825) 2 *Car. & P.* 88, per Best, C. J.

¹² The Netherlands: H. R. (Dec. 2, 1926) W. 11606, N. J. 1927, 321. The facts are left obscure in the reports, and the tendency to favor the *lex fori* is all too transparent, though the Dutch branch manager seems to be prejudiced thereby.

the contract is made abroad with a foreigner.¹³ Before 1917, the Brazilian courts did the same where the principal was a foreigner.¹⁴

It is scarcely necessary to mention again how often a decision asserts adherence to the *lex loci contractus*, while performance and all other fact elements point to the same result. This is particularly frequent in the United States.¹⁵ More remarkable, however, are decisions contrasting the law of the place of hiring with the law of domicil, as when a minor Irishman comes to Scotland and is there regarded as having capacity to be hired, because he is emancipated through independent establishment, "forisfamiliaried," although not domiciled in Scotland.¹⁶

Lex loci contractus is a convenient rule if both parties are domiciled in the same state where they make the contract. There is no reason why an intended foreign place of work should be material in such a case. When Italian parties contracted in Italy for service in the German branch of the firm, a German court correctly applied Italian law.¹⁷ It is farfetched to say that a French industrialist establishing a new factory in Africa and hiring personnel in France to

¹³ Austria: Allg. BGB. § 37; OGH. (Jan. 24, 1933) and (May 28, 1934) discussed by WAHLE, 10 Z.ausl.PR. (1936) 788, overruling the former decisions cited by NUSSBAUM, D. IPR. 272 n. 2 and BATIFFOL 268 n. 5.

¹⁴ Brazil: Sup. Trib. Fed. (June 20, 1896) Agr. No. 140, Jur. Sup. Trib. 1896, 67, OCTAVIO, Dicionário No. 266 against one dissident vote, which was followed in the C. C.

¹⁵ For this and other reasons, the long case lists in 2 BEALE 1196 are insignificant.

¹⁶ M'Feetridge v. Stewarts & Lloyds [1913] Sess. Cas. 773, per Lord Salvesen, at 790.

¹⁷ Germany: OLG. München (April 5, 1909) 23 ROLG. 245, 22 Z.int.R. (1912) 175.

Sweden: S. Ct. (May 21, 1941) Nytt Jur. Ark. 1941, 350 No. 80: contract between Swedish domiciled parties signed in Sweden for service in Johannesburg, South Africa; stipulation for restraint of competition validated under Swedish law; cf. SCHMIDT, Revue Crit. 1948, 430.

Austria: OGH. (Oct. 22, 1957) JBl. 1958, 186 note SCHWIND, Clunet 1959, 872: contract between Austrian parties signed in Vienna for service in Hungary; the court applied Austrian law.

take there, is contracting under an African law,¹⁸ or that a couple of American missionaries hiring a maid in the United States for their station in China, have Chinese law in mind.

By itself, *lex loci contractus* is an inept rule, despite Dicey¹⁹ and Beale.²⁰

2. Law of the Master's Domicil

Where a contract is made outside the principal's residence or place of business, considerable authority has nevertheless selected the latter place for choice of law.²¹ This approach is wrong when the law of the place of the headquarters is applied to workers in foreign branches of a firm. But restricted to the cases where the servant is in fact attached to the central business place of his firm, the rule is excellent. It is corroborated in many instances by the comprehensive integration of modern employees into the particular business organization. Working conditions (whether determined by collective agreement or unilateral regulation), duties and benefits, discipline, hospitalization, and insurance, are in force for all affiliated persons without reference to the place where they sign the contract or where they live. Where no other local attachment is manifest, the main office of the firm is the natural center.

This localization of the employment relationship naturally also extends to:

(i) Employees occasionally or temporarily sent out by their employers to perform services in another country;²²

¹⁸ Thus, ROUAST in *Mélanges Pillet* at 203.

¹⁹ DICEY (ed. 5) 724 or (ed. 7) 873; as to the inconsistency of his exposition, see BRESLAUER, 50 *Jurid. Rev.* (1938) 282.

²⁰ 2 BEALE 1192 f.; Restatement § 342.

²¹ Institute of Int. Law, 22 *Annuaire* (1908) 291, art. 2 (h).

England: WESTLAKE 310 § 218.

France: ROLIN, 3 *Principes* 418 § 1390.

Germany: OLG. Hamburg (Oct. 30, 1902) 6 ROLG. 5.

The Netherlands: KOSTERS 756; MULDER (ed. 2) 169.

²² United States: In the workmen's compensation cases, it has been often assumed that temporary work incidental to employment in a foreign state is no ground for the jurisdiction of the board. See *Proper v. Polley* (1932)

(ii) Traveling salesmen who have no fixed place of business in the country or countries visited by them.²³

The combination of the master's domicil and the conclusion of the contract between present persons, e.g., when the future employee was invited there to negotiate the contract, has prompted several English decisions to apply the law of this place.²⁴ This also seems a sound solution. On the other hand, the appointment of a soliciting sales agent for Michigan by an Ohio corporation certainly should not be an Ohio contract simply because the contract is consummated there by approval of the corporation.²⁵

3. Law of the Servant's Working Place

Prevailing opinion may at present be stated to the effect that where the servant is attached to a place of business

259 N. Y. 516, 182 N. E. 161; *Darsch v. Thearle Duffield Fire Works Co.* (1922) 77 Ind. App. 357, 133 N. E. 525. For details, see *infra* Ch. 42 pp. 224 ff.

England: *South African Breweries v. King* [1899] 2 Ch. 173; [1900] 1 Ch. 273—C. A.

France: ROUAST in *Mélanges Pillet* at 206.

Germany: R. Arb. G. (April 1, 1931) and (July 1, 1931) IPRspr. 1931, Nos. 53, 54 (dicta as to private law). See, for further references, GAMILLSCHEG 127 f.

Italy: GEMMA, *Dir. Int. del Lavoro* 162 f.

Switzerland: Ob. Ger. Zürich (June 22, 1933) 9 Z.ausl.PR. (1935) 710: activity in various countries with possible change of domicil according to the orders of a Swedish principal governed by Swedish law, though uncodified and not known to the German agents.

²³ England: *Arnott v. Redfern*, *infra* n. 24.

Germany: ROHG. (Dec. 4, 1872) 8 ROHGE. 150; *cf.* RG. (Dec. 1, 1911) 22 Z.int.R. (1912) 311 (German law of a German firm employing an Italian traveling salesman, as tacitly stipulated law).

²⁴ *Arnott v. Redfern* (1825) 2 Car. & P. 88: "English contract" between a London principal and a traveling Scotch sales agent on commission, made while the Scotchman was in London. *In re Anglo-Austrian Bank* [1920] 1 Ch. 69; P, German corporation, A, manager in England, contract made and signed in Germany.

Oppenheimer v. Rosenthal [1937] 1 All E. R. 23; P, German corporation, A, manager of associated business in England, contract made in Germany. Younger, J., emphasized that the agent was directed and controlled by the firm.

United States: *Weiner v. Pictorial Paper Package Corp.* (1939) 303 Mass. 123, 131, 20 N. E. (2d) 458, 462.

²⁵ This against *Aultman, Miller & Co. v. Holder* (C. C. E. D. Mich. 1895) 68 Fed. 467; actually the decision sought to avoid invalidity of the contract because the corporation had no license for doing business in Michigan.

different from the main office, the local law is applicable. Manifestly, this view complements rather than replaces the theory that the law of the principal's place governs. The working place to which the employee is attached depends on the employer's organization.

(a) *Domestic working place.* This approach has been preferred by many courts in favor of their own law. Sometimes they construct a "submission" of the principal to this law, sometimes it is claimed that private and public labor laws are interrelated and must be given territorial force. Such a rule, technically based either on *lex loci solutionis* or on public policy, in deviation from the regular test of the court, was applied in older Austrian decisions,²⁶ in Brazil under the Introductory Law of 1917,²⁷ often in Italy,²⁸ and occasionally elsewhere.

(b) *Domestic or foreign working place.* We may, however, at present presume that in most countries the rule

²⁶ OGH. (June 1, 1929) and others, see WAHLE, 10 Z.ausl.PR. (1936) 788.

²⁷ Brazil, on the general rule of Introd. Law of 1916, art. 13 I, cf. OCTAVIO, Dicionário No. 266 at the end.

²⁸ E.g., App. Genoa (April 18, 1904) Riv. Dir. Com. 1904 II 361: P, Berlitz school in Milan, A, Swiss in Switzerland where contract was made for teaching in Milan, Italian law applied restraining the teacher's activity after termination; Cass. (July 28, 1934) Foro Ital. 1934 I 824, Rivista 1934, 557: Belgian company employs an Italian, contract made in Belgium, work in Italy, Italian law prevails and invalidates the clause for Belgian arbitration. Against the latter conclusion, BALDONI, Rivista 1934, 566: at present the place of business decides, not the place of contracting.

Hungary: Curia P II 4864 (1931): P, firm in Saloniki, A, Hungarian in Greece, Greek law; Curia P II 2214 (1933): P, foreign firm, A, Hungarian in Hungarian branch, Hungarian law. See SZÁSZY, 11 Z.ausl.PR. (1937) 175 Nos. 8, 9. As to the present Hungarian doctrine, see RÉCZEI 250.

The Netherlands: Trib. Amsterdam (April 7, 1932) N. J. 1932, 1541, 11 Z.ausl.PR. (1937) 203 No. 31: P, stock company domiciled in Amsterdam and carrying on a branch in Netherlands India, A, Dutchman to serve there, Netherlands-Indian law; App. Amsterdam (May 16, 1935) N. J. 1935, 1335, 11 Z.ausl.PR. (1937) 229 No. 133: P, shipowner in Netherlands India, A, to serve on ships based there, Netherlands-Indian law prohibiting attachment of the wages (apparently the principle of the place of work rather than that of the flag is invoked). MEIJERS, N. J. 1927, 323, Note: commonly the place where the work is to be performed is assumed (to decide). Further cases are cited by GAMILLSCHEG 165 f.

Germany: GAMILLSCHEG 125 ff.; and BAG. (May 9, 1959) NJW. 1959, 1702; BAG. (May 13, 1959) 7 BAGE. 362.

is bilateral. Even when the place of work is not within the country, the law of the employer's business place to which an employee or worker is permanently assigned as a matter of organization, governs his relations with his employer. This is true for the foreign systems.²⁹ The same rule has been claimed with respect to the United States,³⁰ and is supported, if not by an impressive array of decisions, at least by a promising trend.³¹

²⁹ Canada: *Wilson v. Metcalfe Construction Co.* [1947] 3 D. L. R. 491, *aff'd* [1947] 4 D. L. R. 472: American domiciled in Canada employed by an American firm in the construction, in Alaska and Canada, of the Alaska Highway, law of Alaska.

Belgium: App. Bruxelles (Nov. 26, 1938) *Pasicrisie* 1940 II 92: both parties Belgian nationals, contract made in Belgium, but work abroad, hence foreign law for form and notice; Trib. com. Bruxelles (Jan. 26, 1935) *Jur. Com. Brux.* 361, 364: P, Swiss, A, English, contract made and entire performance in Belgium, Belgian law.

France: Theory advocated by ROUAST in *Mélanges Pillet* at 205; CALEB, 5 *Répert.* 215 and BATIOFFOL 270, who, however, states only two decisions not concerning workmen's compensation; of these claims, *Cour Paris* (Jan. 12, 1900) *Clunet* 1900, 560, favored "implicit" adoption of *lex loci solutionis*, whereas *Cour Pau* (Feb. 28, 1922) *Clunet* 1922, 406 would not deal with a true conflict of laws. In a recent case the French Court of Cassation affirmed the decision of a Court of Appeals, which had ruled that employment contracts are normally governed by the law of the working place; see *Cass. civ.* (Nov. 9, 1959) *Revue Crit.* 1960, 566 note SIMON-DEPITRE. Another French court applied the law of Vietnam to a French citizen's employment contract to be performed in that country; see *Trib. Seine* (June 1, 1960) *Revue Crit.* 1961, 198 note SIMON-DEPITRE.

Germany: KG. (Nov. 23, 1910) 23 *ROLG.* 61, 22 *Z.int.R.* (1912) 168: P, German firm, A, Warsaw employee, Warsaw-Polish law, hence no jurisdiction of a German merchant tribunal. OLG. Hamburg (July 16, 1936) *JW.* 1936, 2939, 2940: provision of agent, who has to serve in Hamburg, is governed by German law. R. Arb. G. (July 20, 1935) *JW.* 1935, 3665, 6 *Giur. Comp. DIP.* 353 No. 269: an American corporation, through an agent, engaging an actor for performances in the United States, American law to decide whether the corporation can be sued on the agent's contract. For further cases, see *GAMILLSCHEG* 125 ff.

Switzerland: BG. (Oct. 21, 1941) 67 *BGE. II* 179 speaking of the activity of the agent as primary whence it is concluded that the court generally applies the law of the working place, see 2 *SCHNITZER* (ed. 4) 712-714, *cf. infra* n. 63 on 60 *BGE. II* 322. BG. (Dec. 22, 1916) 42 *BGE. II* 650: branch manager.

³⁰ BATIOFFOL 266, as law of the place of performance; *Restatement (Second), Tent. Draft No. 6* (1960) § 346 *l.*

³¹ United States: *Garnes v. Frazier & Foster* (Ky. 1909) 118 S. W. 998 (statute of frauds); *Denihan v. Finn-Iffland* (1932) 143 *Misc.* 525, 256 N. Y. *Supp.* 801 (damages for unjustified discharge; contract held to be concluded in Pennsylvania, but subject to New York law as the place of performance);

4. Special Rules

(a) Cases actually applying the national law common to the parties are isolated.³² Employment contracts have much more important local connections which overshadow this nationalistic criterion.³³

(b) Contracts of employment made by the state or other public entities for public constructions have often been said to depend on the law of the seat of the principal.³⁴ This rule would better be reduced to the meaning of the general rule stated above.^{34a}

(c) Briefly it may be noted that the contracts by which master and crew of a seagoing vessel are hired, as a rule, are commonly governed by the law of the flag.³⁵

Vandalia R. Co. v. Kelley (1918) 187 Ind. 323, 119 N. E. 257 ("Indiana contract," because the railroad employee is employed there); *Roth v. Patino* (1945) 185 Misc. 235, 56 N. Y. Supp. (2d) 853, 855 concerning workmen's compensation. Under the contract theory of most states, as well as under the quasi-contract theory of New York (*infra* Ch. 42), a workmen's compensation statute is not applied where a worker is a foreign resident and performs his work wholly outside the state. Thus, the claimants, in *Cameron v. Ellis Construction Co.* (1930) 252 N. Y. 394, 169 N. E. 622, a Canadian sand pit worker, and in *Elkhart Sawmill v. Skinner* (1942) 111 Ind. App. 695, 42 N. E. (2d) 412, a Michigan timber cutter, were not regarded as having a New York or an Indiana employment contract, respectively. For further cases and comments, see ROTHMAN, "Conflict of Laws in Labor Matters in the United States," 12 *Vand. L. Rev.* (1958/59) 997 and *Restatement (Second)*, Tent. Draft No. 6 (1960) 142-148.

³² Germany: OLG. Hamburg (Oct. 30, 1902) 6 ROLG. 5; R. Arb. G. (Aug. 27, 1930) JW. 1931, 159 and in other decisions; *contra*: NUSSBAUM 272 n. 3, BATIFFOL 268 n. 2.

Italy: App. Torino (April 6, 1934) *Rivista* 1935, 416.

³³ Against the special rule, Cour Paris (Jan. 12, 1900) *Clunet* 1900, 569: two Americans in Paris, French law; German RG. (Mar. 16, 1895) 5 *Z.int.R.* (1895) 507; OLG. Dresden (Jan. 25, 1907) 14 ROLG. 345: only certain German provisions are public policy; Greek Supreme Court (1932) No. 131, 43 *Themis* 449.

³⁴ Institute of Int. Law, 22 *Annuaire* (1908) 290 art. 2 (e); Poland, Int. Priv. Law, art. 8 No. 4; SZÁSZY, *Droit international privé comparé* (1940) 577.

^{34a} *Accord*, GAMILLSCHEG 175 with further citations in n. 196.

³⁵ United States: *The City of Norwich* (C. C. A. 2d 1922) 279 Fed. 687; 56 C. J. 925, *Seamen* § 7 on 46 U. S. C. A. § 564 n. 13; American prohibitions expressly made applicable to seamen on foreign vessels, see *The Troop* (D. C. W. D. Wash. 1902) 117 Fed. 557, *aff'd*, *Kenny v. Blake* (C. C. A. 9th 1903) 125 Fed. 672.

5. Public Law and Public Policy

(a) *Public law.* In cardinal points, legal protection for workers has been beneficially unified under the conventions promoted by the International Labor Office. For the remaining differences, agreement seems to exist that the state policy over industrial, commercial, and agricultural labor as expressed in the compendious modern administrative law, has territorial force, prevailing over private law and excluding private international law.³⁶ On the other hand, the public law is territorially restricted. It extends to working places within the jurisdiction and those occupations on foreign soil which have been termed radiations from a domestic center by the German Supreme Labor Court.^{36a} Thus, where an engineer is sent by his employer, a machine manufacturer, to install a machine sold to a foreign country,³⁷ or employees live in a neighboring town beyond the state border, laws concerning unemployment or social insurance may extend to them. But when groups of German enterprises were organized in order to carry on important works

England: Merchant Shipping Act, 1894, s. 265 (subsidiarily).

Belgium: Trib. com. Antwerp (Dec. 1, 1904) 20 *Revue Int. Dr. Marit.* (1905) 934; Law of June 5, 1928, art. 17.

France: Code du Travail Maritime (Law of Dec. 13, 1926) art. 5, with exceptions, see VERNEAUX, 8 *Répert.* 529 ns. 22-25.

Germany: RG. (Oct. 30, 1926) 39 *Z.int.R.* (1929) 276; Seemannsgesetz of July 26, 1957, § 1.

Italy: Disp. Prel. C. Navig. art. 9 (if the flag is not Italian, the law may be chosen differently by the parties).

The Netherlands: Rb. Rotterdam (Feb. 1, 1932) W. 12533, 1 VAN HASSELT 419 (preferring the English place of the principal to the Dutch place where the seaman was enlisted in the ship's crew).

For further references, see GAMILLSCHEG 177-179.

In *Air Line Stewards Ass'n v. Northwest Airlines, Inc.* (C. C. A. 8th 1959) 267 F. (2d) 170 it was held that the law-of-the-flag doctrine does not justify the extension of the Railway Labor Act to employees of an American air carrier working completely outside the United States, because Congress did not intend to give extraterritorial effect to the act.

³⁶ See Vol. II Ch. 33.

^{36a} The term "*Ausstrahlung*" (radiation) has been adopted and analyzed by German legal writers: GAMILLSCHEG 180-182.

³⁷ Swiss BG. (March 4, 1892) 18 BGE. 354.

in France, for reparations after the First World War, the German laws on labor representation and the hiring of disabled war veterans were held inapplicable, although the employment contracts were presumably governed by German law.³⁸

It has been held, on the same theory, in Austria, that the law regulating the legal situation of commercial servants is inapplicable to the employees of foreign enterprises,³⁹ and in Greece that the right of a worker injured abroad to compensation under the foreign law does not concern international public policy.⁴⁰

(b) *Collective labor agreements.* Labor contracts, negotiated in collective bargaining between employers and labor unions, in the common opinion, are effective in the district in which the employer's working establishment is physically situated. The state in which this place is, determines all particulars.⁴¹ But insofar as these contracts pertain to private law, it is recognized that they may be extended through agreement of the parties to foreign-located branches.⁴² And the elements of private law contained in the standard agreements on working and wage rules incorporated into the individual labor contracts,—which have been correctly described in this country as third party beneficiary agreements, subject to the conventional law of contracts,⁴³—may be expected to be enforced in courts of other states.

(c) *Public policy.* Less well settled, however, is the ex-

³⁸ Supreme Labor Court (April 1, 1931) and (July 1, 1931) IPRspr. 1931 Nos. 53, 54.

³⁹ OGH. (May 28, 1934) cited by WAHLE, 10 Z.ausl.PR. (1936) 788.

⁴⁰ Aeropag (1932) No. 131, 43 Themis 449.

⁴¹ 2 HUECK & NIPPERDEY (ed. 6) 359; BALDONI, "Il contratto di lavoro nel diritto internazionale privato italiano," in 24 Rivista (1932) 346, 362; GAMILLSCHEG 360 ff.

⁴² 2 HUECK & NIPPERDEY (ed. 6) 360; cf. C. GREGORY, *Labor and the Law* (1946) 385.

⁴³ MULROY, "The Taft Hartley Act in Action," 15 U. of Chi. L. Rev. (1948) 595, 629.

tent to which the private law of the forum should intrude into a private employment contract governed by foreign law.⁴⁴ The domestic private law in question includes the termination of employment by dismissal and the compensation in case of unwarranted or premature dismissal, restraint of trade on a former employee, duties of preserving the health and morals of servants, and presumably laws prescribing place, time, and means of wage payments. The territorial character of all provisions on such matters is often in the mind of writers.⁴⁵ If the work is to be done in the forum, the domestic law would thus necessarily be applied.

In the most appropriate view,⁴⁶ however, provisions of public labor law for the protection of employees are, of course, compulsory for the working conditions within the territory, but private interests safeguarded by protective provisions of local private law do not include relations governed by foreign law. The distinction is emphasized by the fact that public interests merely create duties of the employer towards the state, without giving the employee a cause of action, whilst contractual rights are enforceable against the other party.

It is true that modern consideration for the worker has in part breached these confines. Private duties towards the employee may duplicate the public duties towards the state; public social protection may influence, directly or by con-

⁴⁴ Cf. Vol. II (ed. 2) pp. 562, 579.

⁴⁵ See for France, ROUAST in *Mélanges Pillet* at 211 ff. (with exceptions); CALEB, 5 *Répert.* 210 ff. (characterizing some of these problems as tort); following this lead, App. Bruxelles (Nov. 26, 1938) *Pasicrisis* 1940 II 92, *Journ. des Trib.* 1940, c. 87, even though the contract is made in Belgium between Belgian nationals, prescribes territorial application of the law of the foreign working place protecting the employees as to "paid furlough, form and effects of notice and discharge." Distinctions have been made by GEMMA, *Dir. Int. del Lavoro* 161 ff.

⁴⁶ This view has been developed against many other theories by KASKEL, see *Kaskel-Dersch, Arbeitsrecht* 258, and advocated by I HUECK & NIPPERDEY (ed. 6) 125 ff.

struction, the contractual relationship. All this has been observed in Europe,⁴⁷ and exactly the same development is occurring at present in the United States.

Thus, the Fair Labor Standards Act expressly prescribes an action for the employee against the employer.⁴⁸

The New York Labor Law only provides that the wages to be paid upon public works "shall be not less than the prevailing rate of wages,"⁴⁹ and the Appellate Division, accepting the correct principle, specifically found that the Labor Law gave an exclusive remedy to be exercised only by the fiscal officer.⁵⁰ The Court of Appeals, however, held that a laborer could enforce the provisions of the statute by common law action since they must be inserted in the contract.⁵¹

III. INDEPENDENT AGENTS

1. Rule

More or less definitely, a part of the literature⁵² and the bulk of court decisions in many countries have decided that contracts made with attorneys, solicitors, physicians, or other persons exercising a public profession, as well as

⁴⁷ I HUECK & NIPPERDEY (ed. 6) 125 ff.; GAMILLSCHEG 185 ff.

⁴⁸ § 16 (b), 52 Stat. 1069 (1938), 29 U. S. C. § 216 (b) (Supp.). Applied to Bermuda Base in Vermilya-Brown Co. v. Connell (1948) 69 S. Ct. 140. The effect of this decision was restricted by the legislature; see 29 U. S. C. § 213 (Supp. V, 1958). Note the similarly restricted effect attributed to the Railway Labor Act in Air Line Stewards Ass'n v. Northwest Airlines, Inc., *supra* n. 35.

⁴⁹ § 220 subd. 3, Cons. Laws, Book 30; *cf.* subd. 5 (c) and 7 on the enforcement by the fiscal officer.

⁵⁰ *Fata v. Healy Co.* (1941) 263 App. Div. 725, 726.

⁵¹ *Fata v. Healy Co.* (1943) 289 N. Y. 401, 405, 46 N. E. (2d) 339: "It cannot be doubted that provisions requiring the contractor to pay such wages are also inserted in the contract, whether voluntarily or under compulsion of the public body which is a party to the contract." (Note that this does not mean public interest in every labor contract.) *Cf.* LENHOFF, "Optional Terms (*Jus Dispositivum*) and Required Terms (*Jus Cogens*) in the Law of Contracts," 45 Mich. L. Rev. (1946) 39, 75.

⁵² ROLIN, 3 Principes 416; NEUMEYER, 2 Int. Verwaltungs R. 253, 262 ff.; NUSSBAUM, D. IPR. 274; 2 SCHNITZER (ed. 4) 712, 739 ff.; ARMINJON, Droit Int. Pr. Com. 409 and n. 1. KEGEL, Kom. (ed. 9) 562 ff.; DELAUME, "Les conflits de lois et le contrat de commission," in HAMEL, Le contrat de commission (1949) 349 ff.

commercial orders to commission agents, factors, brokers, or any merchants acting in the interest of the principal, are governed by the law of the state where these persons have their permanent place of business. It has rightly been argued that no one can expect such persons, sought out at their domicile, to change their conditions according to the nationality or domicile of the client or customer; they exercise functions within the social and cultural framework of their state; they are under legal rules and professional organizations governing a substantial part of their activity.

It should be regarded as immaterial in this connection whether the acting person discloses his principal or not and whether his order is given from case to case or is a standing assignment.

In opposition to this view, *lex loci contractus* retains a role in Italy and probably other Latin countries. Also Beale and the Restatement have turned the meaning of the cases to the stereotyped rule of the law of the place of contracting.⁵³ These are undesirable remainders.

2. Public Professions⁵⁴

(a) *Attorneys*. The English Privy Council once decided a case where the plaintiff, an attorney of Quebec, was appointed to represent the British Government in an international commission between Canada and the United States on the payment for fishing rights. The contract with the attorney was perhaps made in Ottawa, Ontario, and the meetings were held in Halifax, Nova Scotia. The Canadian

⁵³ Restatement § 342; 2 BEALE 1192 § 342.1; Ital. Disp. Prel. C. C. (1942) art. 25; 7 LAURENT § 454; DESPAGNET 635. Contrary to the First Restatement, the Restatement (Second), Tent. Draft No. 6 (1960) § 346 *l* is in agreement with the view here suggested; see Illustrations 6 and 7, *id.* at 145 f. For criticism, see EHRENZWEIG, Conflict 529.

⁵⁴ Inst. of Int. Law, 22 Annuaire (1908) 291, art. 2 (g).

Poland: Int. Priv. Law, art. 8 (6): notaries, attorneys, and other persons exercising a public profession; WESTLAKE § 218: barristers. The Polish Draft 1961, art. 15, does not contain this, or a similar, provision.

courts and the Privy Council, however, selected the law of Quebec for determining the fees due to the plaintiff because this was the state where he normally exercised his professional functions.⁵⁵ The same view is held in other countries,⁵⁶ and is probably in the mind of American courts.⁵⁷

(b) *Physicians*. Cases are scarce,⁵⁸ but no opinion opposing the above view is known.

3. Commercial Agents

(a) *Permanent agents*. This term may indicate independent merchants who place their activities at the service of a firm, either as exclusive distributors in an assigned territory or to administer buildings, buy or sell in continuous relationship, solicit orders, or cash money. The delimitation of these types from the field of master and servant is sometimes difficult to state. Wise courts have extended by analogy

⁵⁵ *Regina v. Doutre* (1884) 51 L. T. R. 669, Clunet 1886, 116—P. C.

⁵⁶ Austria: OGH. (Jan. 17, 1928) JW. 1929, 160.

Germany: RG. (Oct. 25, 1935) 149 RGZ. 121: German attorney, as executor of will acting in the United States, fees according to the law of his legal domicile; RG. (March 20, 1936) 151 RGZ. 193: Austrian attorney for German party, "the law in force at the professional domicile governs the relations between the attorney and his client," Austrian law; BGH. (Nov. 15, 1956) 22 BGHZ. 162: American attorney for German party, fees being validly agreed upon according to the law of his place of business not violating German public policy.

Greece: 2 STREIT-VALLINDAS 229 n. 7.

Switzerland: App. Bern (April 7, 1933) 8 Z.ausl.PR. (1934) 826 (Yugoslavian law).

France: App. Paris (July 5, 1954) *Revue Crit.* 1955, 525, note Y.L.; App. Paris (May 6, 1961) *Revue Crit.* 1962, 188, note GAVALDA; (both decisions applying Swiss law to contracts with Swiss attorneys).

⁵⁷ *Roe v. Sears, Roebuck & Co.* (C. C. A. 7th 1943) 132 F. (2d) 829 (limitation of action) is not strict evidence since everything happened in Illinois.

In *Lust v. Atchinson etc. R. Co.* (1932) 267 Ill. App. 60 it was held that the law of the place (San Francisco) where the attorney entered into his contract with his client determined whether the attorney has a lien for the costs of the suit against the defeated adversary. But evidently this decision was supported by the facts that the attorney was domiciled in San Francisco and the judgment was rendered there.

As to the problem of whether federal law or state law governs a contract with an American attorney in a case pending in a Federal Court, see *Greenberg v. Panama Transp. Co.* (D. C. D. Mass. 1960) 185 F. Supp. 320.

⁵⁸ Germany: OLG. München (June 11, 1926) 75 Seuff. Arch. 313 No. 129. In addition, see EHRENZWEIG, *Conflict* 532.

legal provisions literally restricted to commercial servants so as to comprehend certain groups of merchants.⁵⁹ Therefore, conflicts rules should not necessarily require a radical distinction of functions.

In the United States, the clear tendency to apply the law of the agent's domicile has been concealed under the cover of *lex loci contractus*.

Illustration. The Transit Bus Sales Company, a resident of Wisconsin, obtained by written contract exclusive distribution of interurban busses manufactured by Kalamazoo Coaches, Inc., in the territory of "a number of states," including Wisconsin and Upper Michigan. The court after much argument about the doubtful "place of contracting" construed it as being in Wisconsin.⁶⁰ The sales territory,

⁵⁹ For example, in the United States where a truck driver uses his own vehicle to transport goods of another, courts have allowed common law action for injury or death, or applied statutes on workmen's compensation, social security, and unemployment compensation. *Cf.* Note, 144 A. L. R. 735, 740, but see 151 A. L. R. 1331.

In Germany, the case of independent contractors employed similarly to servants (*Arbeitnehmerähnliche Agenten*) has been much discussed, see HUECK in 39 Riv. Dir. Com. (1941) I 143 at 145; 1 HUECK & NIPPERDEY (ed. 6) 52 f.

A nice example, for our purposes, is furnished in a German case, RG. (Jan. 8, 1929) JW. 1929, 1291. A German firm appointed a firm in New York as exclusive general agent for distributing its goods in the United States and Canada. The goods, however, were to be bought by the American party as buyer and resold by it within its territory. In the words of the annotator, TIRZE, the New Yorker is not an "agent" (in the German sense) since he sells in his own name; he is not a commercial employee, since he sells in carrying on his own business; and he is not a commission agent since he distributes on his own account. The court finds a relationship similar to "agency" as justification for applying by analogy the limitations on dismissal by the principal, prescribed for agency in § 92 of the Commercial Code. Of course, the court should not have applied German law at all, much less without a word of justification, *cf.* IPRspr. 1929 No. 34.

⁶⁰ *Transit Bus Sales v. Kalamazoo Coaches, Inc.* (C. C. A. 6th 1944) 145 F. (2d) 804; *Alexander v. Barker* (1902) 64 Kan. 396, 401, 67 Pac. 829 directly applied the law of Cherokee, the place of activity and performance, to the validity of the contract of agency.

In *Gaston, Williams & Wigmore of Canada, Ltd. v. Warner* (C. C. A. 2d 1921) 272 Fed. 56, the broker employed for the sale of a ship was domiciled in New York where the brokerage contract was made and the vessel was to be delivered. It was held immaterial to the earning of the fee, on the ground of the law of New York, that both parties to the sale were British subjects and hence the sale, in wartime, was void.

of course, afforded no clue since the states of both parties are included. The decision in favor of Wisconsin law could have been very simple, on the ground of the place of business of the sales agent.⁶¹

In another recent case of a contract, combining sales and agency, exactly the same result has been based upon the law of the place of performance.⁶²

In a long chain of decisions, German and Swiss courts have developed the constant doctrine that the law of that place governs where "the agent deploys his activity," meaning the fixed domicil where the agent is established and from which he is active in the interest of the principal.⁶³

(b) *Brokers and occasional agents.* We distinguish this

⁶¹ This theory should have been followed in *Smith v. Compania Litogr. de la Habana* (1926) 127 Misc. 508, 217 N. Y. Supp. 39. The plaintiff was to represent the defendant company of Cuba in the United States and Canada, and made the contract *inter praesentes* in Cuba. The court referred to the law of Cuba as *mere lex loci contractus*, which is insufficient, and as supplanting *lex loci solutionis*, because the agent had to work in several countries (a known, inappropriate approach). Finally, the Cuban law not being in evidence, the *lex fori* was applied. The agent probably had a domicil in the United States from which he traveled; the decision does not state the contrary. Even so, he lived and worked in North America. This fact surely supports the application of some American law—though not the *lex fori*—in preference to the labyrinthian solution of the court.

⁶² *Cowley v. Anderson* (C. C. A. 10th 1947) 159 F. (2d) 1.

⁶³ Germany: RG. (Oct. 11, 1893) JW. 1893, 549 (rights of agent after notice); 38 RGZ. 194, 51 *id.* 149; JW. 1899, 146 No. 21; OLG. Kolmar (March 27, 1896) 8 Z.int.R. (1898) 45, Clunet 1903, 886 (agent for buying flour in Paris, French law); OLG. Hamburg (June 26, 1909) 21 ROLG. 385 (English agent for exclusive distribution for Great Britain and colonies, English law of restraint of trade); OLG. München (March 8, 1956) IPRspr. 1956/57 No. 46 (Italian with domicil in Munich acts as agent for an Italian firm, German law).

Otherwise, RG. (Oct. 28, 1932) 138 RGZ. 252 (on the ground of express agreement for the German law of the principal). RG. (Jan. 8, 1929) JW. 1929, 1291 (without justification and much criticized). BGH. (March 19, 1956) IPRspr. 1956/57 No. 23 (agreement for German law implied in statements by counsels in court).

Switzerland: BG. (Sept. 18, 1934) 60 BGE. II 322 (French general agent for France and the French colonies, French law). BG. (Oct. 25, 1939) 65 BGE. II 168 (as a rule, law of the place where the exclusive representative deploys his activity). For many other cases, see KNAPP, 60 Z. Schweiz. R. (N. F.) (1941) 335 (a) No. 40. A Swiss law of Feb. 4, 1949, by express provision, governs all contracts of permanent agents, insofar as the agent's "field of activity" (*Tätigkeitsgebiet*) is Switzerland, regardless where his place of business is situated. See LITTMANN, *Die kollisionsrechtliche Bedeutung*

group for the one reason that certain doubts have arisen with regard to stockbrokers. Apart from some old decisions which do not even consider the conflict of laws,⁶⁴ there is no controversy with respect to factors and to selling or buying agents contracting in their own name on orders. Certainly the domicil of the principal⁶⁵ and the place where the order is given⁶⁶ are without importance, although both have been favored by some theoreticians.⁶⁷ Thus, where a

von Art. 418, lit. b., Abs. 2 OR. (1955); STOLL, Book review, 25 *RabelsZ.* (1960) 380 f.; 2 SCHNITZER (ed. 4) 742.

Austria: OGH. (July 9, 1937) *Zentralblatt* 1937, 748 No. 433, where the agent is a merchant registered and domiciled in Austria, Austrian law applies.

Hungary: Curia P. VII 3813 (1931), SZÁSZY, 11 *Z.ausl.PR.* (1937) 172 No. 1: a Hungarian firm granted an American firm exclusive distribution of certain skins in the United States and Canada; the agent gave notice and demands damages because the principal made a direct offer to another American firm. The court recognizes American law as governing, but under a sort of natural law, it charges the American plaintiff with lack of good faith because he failed to warn the defendant of the rigidity of American law.

⁶⁴ E.g., *Cartwright v. Greene* (1866) 47 *Barb.* 9 explains the effect of an account of *del credere* under the New York law of the principal, whereas the factors were in San Francisco.

The French Supreme Court, Cass. req. (July 9, 1928) S. 1930.1.17, examining the question whether a broker in Leigh, England, was entitled to insert a clause of arbitration into the contract with the third party, thoughtlessly applied French law; see Note, NIBOYET, *ibid.*

⁶⁵ Thus, *Adams v. Thayer* (1931) 85 N. H. 177, 155 *Atl.* 687, the principal lived in New Hampshire, the contract was centered in Massachusetts.

⁶⁶ *Berry v. Chase* (C. C. A. 6th 1906) 146 *Fed.* 625. French courts do not really apply in this case the *lex loci contractus*, see BATIFFOL 287 n. 3.

⁶⁷ The place where the order is given appears as late as in the proposals of PILLET to the Institute of International Law, 23 *Annuaire* (1910) 283, 291, and in AMEUX's article, 2 *Répert.* 440 f. n. 17, although he concedes that this place is difficult to determine.

Similarly the I. L. A., Copenhagen Draft of 1950, see *supra* Ch. 40 n. 67b, in certain cases favors the law of the place where "the authority has been given" (art. 4); and the Lucerne Draft of 1952, see *supra* Ch. 40 n. 67c, declares applicable the law of the place of business (*établissement*) "through the intermediary of which the authorization is given" or received, respectively (art. 4).

To the same effect GUTZWILLER, 43 *Annuaire* (1950) 74, 86 ff. and probably Restatement (Second), Tent. Draft No. 6 (1960) § 346m par. (1). The new Restatement subjects contracts with stock brokers to the law of the exchange, if the contract "is entered into by a broker in the state where the exchange is situated." This rule apparently refers to the place where the broker makes the contract rather than to his place of business and is therefore along the lines of the proposals mentioned before.

grain broker in Chicago is ordered to buy or sell grain on the Chicago Board of Trade Exchange or a stockbroker in New York is ordered to transfer securities on the New York Stock Exchange, the local law of the broker and the exchange governs the entire contract, including validity, performance, and effects of wrong performance by either party.⁶⁸ However, complications do exist.^{68a}

The American practice has become fairly firm in applying this rule to the question whether the contract is invalid as gambling or wager.⁶⁹ The contract is even enforced in the states where it would be invalid under domestic law,⁷⁰ the few exceptions⁷¹ probably being obsolete. However, this concerns the relation of the states to federal institutions for the common benefit. Would the rule be applied to foreign exchanges as well? We have seen a more restrictive practice in European courts.⁷²

All these propositions, which make the place where the contract or part of the contract is made a decisive criterion, meet with the very same criticism that has been pointed out regarding art. 3 (2) of the Hague Convention 1955; see *supra* Ch. 36 n. 28b and text.

⁶⁸ France: Trib. com. Seine (July 4, 1894) Clunet 1894, 994 (London broker); and many subsequent decisions, see BATIFFOL 287 n. 3; *adde* Paris (March 7, 1938) Clunet 1938, 739.

Belgium: Cass. (June 4, 1940) 70 Pand. Belges 599, cited by BRÄNDL, Int. Börsenprivatrecht 85 n. 13.

Franco-German Mixed Arb. Trib. (July 25, 1925) Ruperts' Merck & Co. v. Broca & Cie., 5 Recueil trib. arb. mixtes 795; (Feb. 22, 1926) Cohen v. Herz, 6 Recueil trib. arb. mixtes 228.

Germany: RG. (May 10, 1884) 12 RGZ. 34, 36; (April 1, 1896) 37 RGZ. 266 (although the instant contract was invalidated by public policy); RG. (June 18, 1887) 4 Bolze No. 26, according to NUSSBAUM, D. IPR. 276 n. 2 denies the right of the English broker to intervene as a party according to English law.

Italy: Cass. Napoli (Sept. 18, 1914) Clunet 1915, 703, and many other decisions, the "absolutely prevailing opinion" according to CAVAGLIERI, Dir. Int. Com. 425 n. 1.

^{68a} Thoroughly discussed by STOLL, "Kollisionsrechtliche Fragen beim Kommissionsgeschäft unter Berücksichtigung des internationalen Börsenrechts," 24 *RechtsZ.* (1959) 601.

⁶⁹ Winslow v. Kaiser (1934) 313 Pa. 577, 170 Atl. 135.

⁷⁰ Jacobs v. Hyman (C. C. A. 5th 1923) 286 Fed. 346; MEYER, *The Law of Stock Brokers and Stock Exchanges* (1931) 678.

⁷¹ MEYER, *id.* 677 n. 4.

⁷² Vol. II (ed. 2) pp. 569 ff. The criticism there expressed is supported by STOLL, *supra* n. 68a, at 634 ff.

A difficulty arises where the broker's place differs from the location of the exchange. Of course, it is commonly realized that the parties reasonably contemplate the rules of the exchange at which the order is intended to be executed.⁷³ American courts, furthermore, have conveniently applied the rules of an exchange not determined by the parties but at which the contract would be customarily executed.⁷⁴ In connection with this view, the legality of the operation always depends on the law of the state of the exchange and not of the place where the order was given or received, thus excluding the law of the broker's domicile.⁷⁵ Sometimes, a direct correspondence between the client and the substitute of his local broker, at the seat of the exchange, has facilitated the decision that the entire contract was governed by the law of the exchange.⁷⁶

Nevertheless, in numerous respects there remains room

⁷³ E.g., *Winslow v. Kaiser* (1934) 313 Pa. 577, 170 Atl. 135. The defendant client "was visited with knowledge of the board's rules which allowed the matching of orders to buy and orders to sell."

France: E.g., Trib. com. Dijon (July 1, 1908) Clunet 1910, 536 (selling out).
Germany: *Infra* n. 79.

Switzerland: See Vol. II Ch. 28.

⁷⁴ *Berry v. Chase* (C. C. A. 6th 1906) 146 Fed. 625, 629. The Restatement (Second), Tent. Draft No. 6 (1960) § 346m par. (2) (a) only takes into account the case in which the customer knows the exchange where the transaction is to be made. Even in this case, the application of the law of the exchange has been criticized at the 37th Annual Meeting of the American Law Institute; see Proceedings 563-566.

⁷⁵ *Brooks v. People's Bank* (1921) 233 N. Y. 87; 134 N. E. 846; *In re Clement D. Cates & Co.* (D. C. S. D. Fla. 1922) 283 Fed. 541, 545; *Hoyt v. Wickham* (C. C. A. 8th 1928) 25 F. (2d) 777, 779; *Lyons Milling Co. v. Goffe & Carkener* (C. C. A. 10th 1931) 46 F. (2d) 241, 245; MEYER, *The Law of Stock Brokers* 677 n. 4, Supp. (1936) 236 § 181.

Germany: To reach the same result, the Reichsgericht goes so far as to apply the law of the exchange as the general law of the contract, see *supra* n. 72 and BRÄNDL, *Int. Börsenprivatrecht* 94.

France: The courts emphasizing generally the determination of legality by the law of the exchange, e.g., Trib. sup. Colmar (Jan. 17, 1923) Clunet 1924, 1049 and Note, NAST, might decide likewise where the broker is established elsewhere. It is true that the frequent detour of decision through construing the place where the commission agent receives the order as place of contracting might mislead in this case.

⁷⁶ *Hoyt v. Wickham*, *supra* n. 75. In *Mullinix v. Hubbard* (C. C. A. 8th 1925) 6 F. (2d) 109, 114 the order was given in Memphis to a local branch

for the broker's law. Some decisions have ignored the problem, and some have directly referred to the law of the exchange, although the operation is made through a local broker with the aid of a subagent. On the other hand, in what appears to be the best considered decision, the Massachusetts court states that, as in the absence of specification the order was executed in New York, it was only "in certain respects subject to the rules and regulations of the New York Stock Exchange," but not "to be governed by the laws of that state relating to stock bought on margins."⁷⁷ This question was determined under the law of Massachusetts, considered as the law of the place of contract; we ought to add that payment and delivery were due there, and more important yet, the broker was domiciled there.

As a Quebec decision justly asserts, advances made by a broker in buying and selling at an exchange are to be recovered under the law governing the contract with the client, and not by the law of the place where the buying and selling took place.⁷⁸

The German Reichsgericht, to the contrary, prefers the law of the exchange as a whole⁷⁹ to that of the broker. But this is just another consequence of overemphasizing the *lex loci solutionis*. Prevailing German literature is in opposition.⁸⁰

of the New York stockholders; hence no further question of localization occurred.

France: A similar case, though with express submission to the rules of the London stock exchange, in Trib. com. Seine (June 8, 1931) Clunet 1932, 629.

⁷⁷ Papadopoulos v. Bright (1928) 264 Mass. 42, 46, 161 N. E. 799 citing Barrell v. Paine (1922) 242 Mass. 415, 425, 136 N. E. 414; Marshall v. James (1925) 252 Mass. 306, 310, 147 N. E. 740.

⁷⁸ Finlayson v. Kell (1921) 23 Que. Pr. 328.

⁷⁹ RG. (Nov. 30, 1899) JW. 1900, 19 No. 32; (Nov. 21, 1910) JW. 1911, 148 (German broker ordered to sell securities in the United States, American limitation of action); *contra*: LEHMANN in 5 Düringer-Hachenburg II 676. RG. (May 30, 1923) 107 RGZ. 36, see *infra* n. 80.

France: Similarly, the editor of Clunet in Notes, e.g., Clunet 1938, 742, 745, speaking of the law of the exchange as "professional law."

⁸⁰ This is the main point of controversy between German writers and the

The law of the broker's place of business, hence, should govern such problems as free consent and capacity of the parties, time and place of payment and of delivery to the customer, remedies for nonperformance by the broker, and his duty to account. Where the broker under his own law, e.g., German, is entitled to take up the ordered transaction in lieu of a third party, he may do so despite the contrary law of the state, e.g., England, where the exchange is situated in which the order would otherwise be carried out. But of course this question is decided under the usages of the exchange in the case where the order is performed by a subagent. On the other hand, if the customer fails to provide cover according to the contract, the broker is entitled to sell out by any method recognized at the exchange.⁸¹

(c) *Real-estate broker*. When a real estate broker is domiciled at the situs of the immovable, this fact determines the applicable law without regard to the place where the brokerage agreement is made or a purchaser is found.⁸² The Georgia court, so reasoning, decided to apply the *lex loci solutionis*,⁸³ but this, too, is not the adequate rule. The broker sues for his fees, which he earns when he presents a buyer able and willing; this may occur at any place. If the broker resides outside the state of situs, an Illinois decision has applied the Louisiana law of the situs on the ground that the agreement was made there.⁸⁴ This, however, hap-

Reichsgericht, 107 RGZ. 36; cf. NUSSBAUM, D. IPR. 276 n. 2; STAUB-KOENIGE in 4 Staub 638 § 383 n. 37; BRÄNDL, Int. Börsenprivatrecht 91; LEHMANN in 5 Düringer-Hachenburg 676 § 383 n. 25.

⁸¹ Switzerland: BG. (Oct. 21, 1941) 67 BGE. II 179, 181 recognizes this in principle, although by substituting Swiss law for the "unknown" Czechoslovakian procedure, the rights of the banker of Prague against the Swiss customer were frustrated.

⁸² Pratt v. Sloan (1930) 41 Ga. App. 150, 152 S. E. 275; since the broker was not licensed in Florida, the Georgia court dismissed his claim.

⁸³ BATIFFOL 288 n. 3 claims this construction for his theory.

⁸⁴ Benedict v. Dakin (1909) 243 Ill. 384, 90 N. E. 712: the fees are determined according to the standard of Louisiana which is half of that of Illinois.

pened only by accident, as the activity of the broker was centered in Illinois where he also found a purchaser. *Lex loci contractus* in this case, as *lex loci solutionis* in the first case, is beside the point. The *lex situs* has simply scored another undeserved victory.

Even more questionable are other decisions invalidating the brokerage and depriving the broker of his fees on the ground of his lack of license. While understandably the law of the situs upholds its public policy with respect to its land,⁸⁵ an Illinois court decided against a broker, licensed in Illinois, who found a purchaser for Illinois land in New York, where he was not licensed,⁸⁶ and in New York a broker's suit was dismissed because he was not licensed to deal in Pennsylvania land.⁸⁷

Consistently, the contract ought to be centered at the domicile of the broker. The broker, then, should be required to be licensed at his domicile, and the situs may void his claim if he is not licensed there, although even this, once more, unduly disturbs the private law in the interest of administrative interstate diversity.^{87a}

4. Public Policy

Under the French law, the promise of an exaggerated fee to any agent, including solicitors, barristers, notaries, architects, and enforcement agencies, may be reduced by the court. It has been correctly argued that the law of the contract rather than the French territorial law should apply.⁸⁸

⁸⁵ Moore v. Burdine (La. 1937) 174 So. 279.

⁸⁶ Frankel v. Allied Mills, Inc. (1938) 369 Ill. 578, 17 N. E. (2d) 570.

⁸⁷ Angell v. Van Schaick (1892) 132 N. Y. 187, 30 N. E. 395.

^{87a} For criticism and a completely different interpretation of the cases in point, see EHRENZWEIG, Conflict 529-532; EHRENZWEIG, "The Real Estate Broker and the Conflict of Laws," 59 Col. L. Rev. (1959) 303.

⁸⁸ MAURY, Revue Crit. 1936, 371 ff., 382, commenting on a decision applying the French provision for the honorarium of a foreign advocate on a contract made in France.

CHAPTER 42

Workmen's Compensation

I. THE SUBSTANTIVE LAW

1. Municipal Systems¹

IT HAS always been recognized that liability of employers for injury to the health of employees could be based on tort, which, however, required either proof, or at least a *prima facie* showing, of fault. The German Civil Code, § 618, added a contractual duty of employers to protect the employee against dangers to life and health, and this has been adopted in other codes. In the industrial age, however, special institutions have increasingly been found necessary to provide accident compensation not based on tortious and contractual liability of the employer and even despite excusable fault of the injured employee. In

¹ Strangely, despite an immense literature, no satisfactory modern comparative work exists.

United States: SCHNEIDER's *Workmen's Compensation* (ed. 3, 1941) Vol. I §§ 155-218; 1958 Cumulative Supp. Vol. I pp. 184-233; LARSON, *The Law of Workmen's Compensation* (1952) Vol. 2 §§ 84.00-91.77; 1962 Supp. pp. 331-356; EHRENZWEIG, *Conflict* 144 ff., 220 ff., 604 ff.; STUMBERG (ed. 2) 212 ff.; YNTEMA, 2 *Giur. Comp. DIP.* (1932) 338, 340; HANCOCK, *Torts* 211; CHEATHAM, *Cases* (ed. 4) 473-484, 1961 Supp. pp. 52-57, and articles cited by the authors of this casebook.

European countries: The most informative general survey is still afforded by NEUMEYER, 2 *Int. VerwaltungsR.* (1922) 437 ff. § 69. The various publications of the International Labour Office contain numerous details. In addition, see GAMILLSCHEG 257 ff.; BINDER, "Zur Auflockerung des Deliktsstatuts," 20 *RechtsZ.* (1955) 401, 488 ff.; VESTER & CARTWRIGHT, *Industrial Injuries* (1961) Vol. 1 Ch. II, 1 (1); BERENSTEIN, "Les tendances actuelles dans la réparation des accidents du travail," 2 *Riv. Dir. Int. Comp. Lav.* (1955) 75.

On Latin America, a short report by TIXIER, "The Development of Social Insurance in Argentina, Brazil, Chile, and Uruguay," 32 *Int. Labour Rev.* (1935) 610 is mainly concerned with the social and administrative features.

As to comparative aspects, see, furthermore, LAROQUE, "International Problems of Social Security," 66 *Int. Labour Rev.* (1952) 1, 113.

the common law countries, an additional reform was needed to eliminate the defense of common employment. Progressive impulses were most felt in hazardous industries, which still constitute a special class in New York, but the area of "social protection" has constantly expanded, though it varies in the world.

Finally, the legislative idea of the statutes has changed. The great tendency, taken as a whole, has been from improvements on, or substitutes for, the ordinary tort remedies to a theory of the employer's professional risk, and from individual responsibility of the employer to common liability of the employers of a district or industry, often with contributions by the employees and public subsidies.

Four groups of compensation organization are distinguishable:

(a) A group of mere substitutes for tort actions, such as the British Employers' Liability Act, 1880, is represented in the United States by the Federal Employers' Liability Act, 1908. The former Swiss Factory Liability Act, 1881/1887, illustrated an analogous attempt to insert a somewhat stricter liability in the employment contract.

(b) A superior type of individual liability has been adopted in the workmen's compensation acts of most states of the United States (since 1908), the United States Employees' Compensation Act (1916), the Longshoremen's and Harbor Workers' Compensation Act (1927), and the enactments of England (1925) and many other countries. These statutes apply regardless of real or presumed fault on the part of the employer, or the defense of common employment, and other features of the old master and servant doctrine.

The American compensation acts are of two kinds. "Elective" or "optional" acts operate merely if the parties, or either party, declare for the act, or do not reject its applica-

tion. Statutes of the other kind apply irrespective of any disposition by the parties.

(c) To secure the employee's claim, some of the same statutes in the United States and abroad favor, others require, that the employer take out insurance for the compensation risk. The insurer may be a private company, or a public or semipublic institution, at the employer's option.

By another method, the French Law of 1898 created a trust fund to which all employers contribute, for guaranteeing the claim of the injured in case of insolvency of the employer.

(d) The most effective protection of workers is provided by the system of automatic insurance against accident. On the mere ground of occupation in work in a domestic enterprise the worker enters into a corporative, "social" relation with a public or semipublic insurance fund operating as an administrative agency. Germany adopted this system as early as 1885 under Bismarck and was followed by the states of central and northern Europe, and later by others, including certain jurisdictions on the American continent. Great Britain has joined this system by its National Insurance Acts of 1946.²

² United States: See LENHOFF, "Insurance Features of Workmen's Compensation Laws," 29 Cornell L. Q. (1944) 176, 353.

Great Britain: National Insurance (Industrial Injuries) Act, 1946, and National Insurance Act, 1946, 9, 10, 11, Geo. VI., c. 62 and c. 67. The Employers' Liability Act, 1880, has been repealed by Law Reform (Personal Injuries) Act, 1948, s. 1 (2).

Canada: "Beginning in Ontario in 1914, workmen's compensation laws are now in force in every province except Prince Edward Island. . . . More nearly uniform than any other class of Labour Legislation, the provincial Workmen's Compensation Acts each provide for a system of State insurance . . . the Ontario statute embodies principles adopted from the German system of accident insurance and from a collective liability law enacted in 1911 by the State of Washington." Labour Legislation in Canada. Legislation Branch, Department of Labour of Canada, August 1945, p. 17.

Brazil: Decree No. 85, of March 14, 1935 and following acts, see CESARINO JUNIOR, 2 Dir. Soc. Bras. 321 § 308.

France: Law No. 46-2426 of Oct. 30, 1946, now incorporated into the Code de la sécurité sociale.

2. International Treaties³

International conventions of Geneva established a minimum of unified rules of compensation for the benefit of the workers.⁴ Of great influence is another Convention designed to end the frequent discriminations against alien workers in general, or nonresident workers, or nonresident alien dependents of workers, by guaranteeing reciprocity of treatment. This Equality of Treatment (Accidents Compensation) Convention of 1925, was in force in sixty-one states⁵ in 1962.

II. NATURE OF CONFLICTS

The nature of conflicts between divergent laws on professional accidents varies according to the systems involved.

On the one hand, statutes represented by those imposing employer's liability for presumed fault move in the sphere of quasi-tortious liability. Their application remains tied to the principle of the *lex loci delicti*.

On the other hand, obligatory social insurance of the workers depends exclusively on territorial public law. The requirements of participation in the scheme by business establishments and insured workers are set out in detail in

³ The International Labour Code 1951, published by the International Labour Office, Geneva 1952, vol. 1 pp. 611-652.

⁴ Workmen's Compensation (Agriculture) Convention, 1921; Workmen's Compensation (Accidents) Convention, 1925, Int. Labour Code, *supra* n. 3, at 611-618, 621-622. For the status of ratifications, as of 1962, see International Labour Conference, 46th Session (Geneva 1962) Report III, Part I pp. 22, 267 and pp. 33, 273.

⁵ It has been termed "one of the most widely ratified Conventions"; see International Labour Conference, 45th Session (Geneva 1961), Report VIII, Part I p. 25. For the status of ratifications, as of 1962, see International Labour Conference, 46th Session (Geneva 1962) Report III, Part I pp. 51, 279.

Most recently, the International Labour Conference has endeavored to draft a more general convention on equality of treatment in matters of social security; see proposed text in International Labour Conference, 46th Session (Geneva 1962) Report V, Part II pp. 72 ff. For a discussion of the situation in the United States, see DAFFER, "The Effect of Federal Treaties on State Workmen's Compensation Laws," 107 U. of Pa. L. Rev. (1959) 363.

the statutes, and bind the courts as well as all other agencies. These statutes cannot be applied abroad.

The situation created by most American and similar statutes, despite their different theories, results in the same rule of a purely territorial application of workmen's compensation acts. The American states, with few exceptions, have established administrative boards which by their organization and composition of personnel are intended to administer exclusively the domestic workmen's compensation law. In this majority of states, the particular local circumstances and policies so completely dominate the spirit of the statutes, and a speedy and inexpensive regulation of claims is so important, that application of another state's compensation act is commonly thought to be entirely impracticable.⁶

Five jurisdictions, however, expressly permit an employee hired outside the state to enforce rights acquired under the foreign law.⁷

Continental countries, following the system of individual employers' liability, have usually entrusted the administration of their industrial and agricultural accidents statutes to the labor courts or other segments of the regular judiciary which are regarded as capable of deciding cases according to foreign law. Nevertheless, the arguments and solutions are fairly comparable to those advanced in the United States.

Generally, indeed, the normal conflict arising when a

⁶ *Mosely v. Empire Gas and Fuel Co.* (1926) 313 Mo. 225, 245, 281 S. W. 762, quoted by HANCOCK, *Torts* 214; GOODRICH 244 § 97; Note, 57 *Harv. L. Rev.* (1943) at 246; DWAN, 20 *Minn. L. Rev.* (1935) 19.

⁷ Arizona, Idaho, Utah, Vermont, Hawaii, see Note, 57 *Harv. L. Rev.* (1943) at 246; see also HANCOCK, *Torts* 215, 216. Thus far, even in these states, no case has been decided under foreign law of workmen's compensation; and, in fact, application of foreign law can hardly be achieved if the administration of this law is geared to specified tribunals; see 2 LARSON, *supra* n. 1, at 357 § 84.20; ROTHMAN, "Conflict of Laws in Labor Matters in the United States," 12 *Vand. L. Rev.* (1959) 997, 1000 n. 10; Note, 6 *Vand. L. Rev.* (1953) 744, 749 n. 15.

worker employed in one state is injured in another, is a conflict of jurisdictions rather than of substantive laws.^{7a} The intricacies and ramifications of this subject, however, have given it a certain prominence in the treatment of conflicts law.

III. THE THEORIES

An able survey of the territorial delimitation of American workmen's compensation statutes, by their express provisions or court construction, has stated six types of solutions, one of which has five variants.⁸ Arminjon enumerates six different theories in France.⁹ Resorting to historical and comparative points of view, we may distinguish three main theories.¹⁰

1. Tort Theory

In the United States, workmen's compensation was first construed as substituting a statutory for a common law tort. Consequently, an act was applied always and only when the injury occurred in the state.¹¹ At present, however, only very occasionally does a court retain the idea that the domestic statute does not include injuries outside the state.¹²

The Restatement (§ 398) forms a presumption to the same effect, viz., that a workman may sue for bodily harm arising out of and in the course of the employment, but restricts this to contracts concluded in the state. Nevertheless, it presumes also (§ 399) the applicability of any

^{7a} *Accord*, EHRENZWEIG, Conflict 604 with reference to cases in n. 1.

⁸ Note, 57 Harv. L. Rev. (1943) 242.

⁹ 2 ARMINJON (ed. 2) 344 § 121.

¹⁰ See Restatement, Introductory Note before § 398.

¹¹ See the cases in 15 Am. Dig. 2d Dec. Ed. 86 and 2 LARSON, *supra* n. 1, at 379 ff. § 87.20.

¹² Oklahoma: *Utley v. State Industrial Commission* (1936) 176 Okla. 255, 55 Pac. (2d) 762. The famous previous decisions in Massachusetts and Illinois were abrogated by statute, see STUMBERG (ed. 2) 213 ns. 2-4. The conclusions regarding the American principle in NEUMEYER, 2 Int. Verwaltungs R. 493 are obsolete.

workmen's compensation act when the harm is sustained in the state—a principle conforming to the tort theory and not corresponding with the actual situation, which, however, may suggest a possible equitable supplement to the main rule.

The English Court of Appeal interpreted the now abolished Workmen's Compensation Act, 1906, to the same effect as the tort theory on the ground that acts of Parliament do not extend beyond the territorial limits of the kingdom, unless they so declare.¹³ The Belgian Supreme Court sometimes followed the tort doctrine,¹⁴ which is occasionally also found elsewhere.¹⁵

In France, the tort theory has been developed in a con-

¹³ *Tomalin v. S. Pearson & Son, Ltd.* (1909) 100 L. T. R. 685, *Revue* 1910, 480, per Cozens-Hardy, M. R.; *Schwartz v. India Rubber, Gutta Percha and Telegraph Works Co., Ltd.* [1912] 2 K. B. 299, *Clunet* 1913, 215. See also dictum in *Krzus v. Crow's Nest Pass Coal Co., Ltd.* [1912] A. C. 590, 597—P. C. This absolute doctrine was rejected by the High Court of the Irish Free State, in *Patrick Keegan v. Julia Dawson* [1934] I. R. 232, without indicating the minimum requisites for applying the Act.

Exceptions were made for seamen and persons employed on certain aircraft, and in the case of reciprocal treaties, see 34 HALSBURY (ed. 2, 1940) 800 § 1134.

According to the decision of the Court of Appeal in *Matthews v. Kuwait Bechtel Corporation* [1959] 2 Q. B. 57, the employer's liability for an occupational accident of an employee can also be based on contract. But the liability is no longer a statutory one, because the English Workmen's Compensation Act has been repealed by the National Insurance (Industrial Injuries) Act; see *supra* n. 2 and DICEY (ed. 7) 759 n. 48.

¹⁴ Cass. Belg. (Feb. 21, 1907) and (Nov. 26, 1908) *Revue* 1909, 952, the second also in *Clunet* 1909, 1178.

Other Belgian courts and some Belgian authors have characterized the employer's liability as contractual; cf. Trib. civ. Antwerp (July 30, 1910) *Revue* 1911, 725 and Trib. civ. Mons (Dec. 19, 1902) *Revue* 1912, 429; GRAULICH 65 § 84; SIMONE DAVID, *Responsabilité civile et risque professionnel* (1957) §§ 64 f. For a discussion, see GAMILLSCHEG 259 f. and BINDER, *supra* n. 1, at 427.

¹⁵ Italy: App. Roma (Aug. 18, 1935) *Foro Ital.* 1936.1.159, *Rivista* 1936, 295, criticized by BALDONI, *ibid.* and BALLADORE PALLIERI, 3 *Giur. Comp. DIP.* (1938) 86 No. 36. But the latter author, according to BALDONI, *Rivista* 1932, 440, also advocated the law of the place of the accident. For a recent survey, see VENTURINI, *La disciplina degli infortuni sul lavoro nel diritto internazionale privato*, 3 *Riv. Dir. Lav.* (1951) 17.

In France, 2 ARMINJON (ed. 2) 346 likewise simply concludes for the law of the place of the accident.

struction of the domestic compensation statutes as laws of *securité et police*, involving all professional activity on French soil. Some courts of appeal, taking this theory seriously, have emphasized the fact that the law has not considered where the contract is made or of what nationality the parties are, but only whether the work is done in France.¹⁶ However, the administrative courts and, following them, the Court of Cassation, have adopted this theory with a singular reservation. They use it to assume jurisdiction over all cases of injury occurring in France but, reversing the lower courts, have also assumed jurisdiction under other theories in case of outside injuries.¹⁷

2. Contracts Theory

(a) *Lex loci contractus*. Undoubtedly, the statutes establishing employer's liability for accidents commonly presuppose a contract of employment. It has frequently been concluded therefrom that the statute covers contracts governed by domestic law; and through the usual influence of the *lex loci actus* principle, the thesis is reached that a workmen's compensation act has for its domain accidents occurring anywhere to workers hired by a contract within the state. For practical purposes, several jurisdictions of the United States have adopted this proposition in its pure form or with certain qualifications.¹⁸ Similarly, all contracts of employment made in France were subject to the now

¹⁶ See especially App. Amiens (Dec. 10, 1913) *Antifoul v. Hersant frères*, *Revue* 1921, 501, later reversed, see *infra* n. 17.

¹⁷ Circular of the Garde de Sceaux, of April 22, 1901, see *SUMIEN*, 1 *Répert.* 109 No. 19; Cass. civ. (May 8, 1907) *Revue* 1907, 539; also two decisions in the case, *Antifoul v. Hersant frères*: Cass. civ. (March 10, 1913) S. 1913.1307, *Revue* 1914, 425, and Cass. Chambres réunies (May 26, 1921) *Revue* 1921, 501, reversing the Amiens decision, *supra* n. 16.

Since the French legislation on industrial accidents has been repealed in 1946, see *supra* n. 2, the earlier cases are merely of historic interest. Under the new act the essential test for the application of French law is whether or not the injured employee was insured with the French social security; see *GAMILLSCHEG* 259 and Cass. soc. (Dec. 9, 1954) *Revue Crit.* 1956, 462.

¹⁸ For details, see 2 *LARSON*, *supra* n. 1, at 376 f. § 87.11.

repealed French statute of 1898 according to the Court of Cassation, irrespective of alien nationality of the parties, although at the same time accidents occurring in France formed another ground for application.¹⁹

An influential Italian doctrine follows the legal prescription of *lex loci contractus* in the cases where the working place is outside the country, so that the Italian accident statute is applicable, as well when the work is done in Italy as when the contract is made in Italy.²⁰

It is noteworthy, however, that in this matter even the Restatement has felt compelled to concede special treatment to a worker hired through an employment agency in, e.g., Pennsylvania, where the worker is sent to enter his occupation in, e.g., California. In that case, it is agreed, the compensation act of the state where the workman reports for duty governs compensation.²¹ Why not recognize generally that it is not the making of the contract but the starting of the work that is essential?

(b) *Proper law*. In a few cases, American courts have preferred the law of the place of performance.²² On the other hand, the Indiana court, in an obviously just denial of compensation to a worker hired in Michigan to cut timber in Michigan, who was injured doing transitory work in Indiana, believed that this case constituted an exception to the rule of *lex loci solutionis*.²³

In particular, the argument "that the rights and duties

¹⁹ See GAMILLSCHEG 258 and BINDER, *supra* n. 1, at 424.

²⁰ BALDONI, *Rivista* 1932, 442; *Rivista* 1936, 298; followed by SCERNI 128; App. Milano (Dec. 12, 1930) *Rivista* 1932, 438 applied Italian law to a contract made in Italy between Italian parties for working abroad, but in this case both parties were Italian.

²¹ § 398 comment a; *cf.* GOODRICH 249.

²² Thus, *Johns-Manville, Inc. v. Thrane* (1923) 80 Ind. App. 432, 141 N. E. 229, the court applies its own act to an occupation considered not temporary.

Similarly, Belgium: Trib. civ. Arlon (July 13, 1904) *Revue* 1905, 539; (July 20, 1904) *id.* 543.

²³ *Elkhart Sawmill Co. v. Skinner* (1942) 111 Ind. App. 695, 42 N. E. (2d) 412.

under the Workmen's Compensation Act are contractual and the provisions of the Act binding only as part of the employment contract," was invoked in a series of decisions restricted to "optional" acts. That is, since the effect of these acts depends upon election or a presumed agreement, which may be excluded by voluntary act of one or both of the parties, as the case may be, it has been thought that the liability rests upon consent of the parties, whereas a compulsory act applies by operation of the law.²⁴

Thus, in Iowa quite recently the domestic act was applied because it was elective and the contract made in the state, though for work in Oklahoma.²⁵

The contracts theory has been pushed to the farthest point by some French writers and decisions in France and Louisiana (whose act is optional). They directly invoke party autonomy to the effect that the law chosen or presumed to be chosen by the parties for governing the employment contract also includes the respective compensation statute.²⁶ It does not need much argument²⁷ to refute this

²⁴ Sheehan Pipe Line Const. Co. v. State Industrial Comm. (1931) 151 Okla. 272, 3 Pac. (2d) 199.

²⁵ Haverly v. Union Construction Co. (1945) 236 Iowa 278, 18 N. W. (2d) 629; the criticism in 31 Ia. L. Rev. (1946) 472 is beside the point.

²⁶ PERROUD, Clunet 1906, 633; 1910, 668; 1912, 389; RAYNAUD, Clunet 1913, 63; SUMIEN, 1 Répert. 110; Cour Paris (March 16, 1925) Revue 1925, 348; Clunet 1926, 346; cf. J. DONNEDIEU DE VABRES 592; McKane v. New Amsterdam Casualty Co. (La. App. 1940) 199 So. 175; Hunt v. Magnolia Petroleum (La. App. 1942) 10 So. (2d) 109, reversed by the Supreme Court of the United States on the grounds discussed below; cf. Note, 5 La. L. Rev. (1943) at 357.

Particularly strange, Belgian Trib. civ. Mons (May 30, 1925) *Pasicrisie* 1925.3.121 applying *lex loci contractus* in adding that even though *lex loci delicti* (French law) were applied, a deviation in favor of the *lex fori* would be assumed according to the presumable intentions of the parties.

²⁷ See GOODRICH 240, 241, and in France, NIBOYER, Recueil 1927 I 21, n. 1.

However, a recent American decision has recognized without restriction a party stipulation for the applicable law. *Duskin v. Pennsylvania-Central Airlines Corp.* (C. C. A. 6th 1948) 167 F. (2d) 727, 730; noted, 16 U. of Chi. L. Rev. (1949) 157. For further cases passing on party autonomy in the field of workmen's compensation, see 2 LARSON, *supra* n. 1, at 395 ff. § 87.70; COWAN, "Extraterritorial Application of Workmen's Compensation Laws—A Suggested Solution," 33 Tex. L. Rev. (1955) 917; WELLEN, "Workmen's Compensation, Conflict of Laws and the Constitution," 55 W. Va. L. Rev. (1953) 131, 233, 251-256.

transformation of a law applicable to a contract into a law selected by the parties. Where an "optional" compensation act is not dependent on adoption by the parties but only permits either party to exclude its application by declaration in contracting, the choice has been said to be usually merely on paper.²⁸ At any rate, the law does not base its own force, in the absence of a declaration, on the agreement of the parties. Even though both parties may contribute to a fund covering the liability, the law governs as it is at the time of the award, changes of the law not being prevented by constitutional protection of contractual obligations, and the parties are without power to modify its effects.

(c) *Contracting and residence required.* Certain American statutes restrict the jurisdiction of their boards to the case where, in addition to the making of the employment contract, the residence of employer or employee²⁹ or both³⁰ is in the state. A sound instinct has driven these legislators away from purely contractual reasoning. But better formulations have been found in the third group.

3. Law of the Place of Employment

(a) *In general.* Some American compensation statutes define their territorial sphere with reference to the place where the worker is regularly employed. This is sometimes the only test.³¹ In other statutes it is an alternative to the law of the place of contracting,³² or the working place and the employer's residence must both be in the state.³³

It may be recalled, moreover, that the employer's place of business or residence is an additional requisite to the

²⁸ STUMBERG (ed. 2) 217.

²⁹ California, Florida, Georgia, Michigan; see 2 LARSON, *supra* n. 1, at 376 f. § 87.11.

³⁰ North Carolina, South Carolina, Virginia; *id.* at 377.

³¹ Arizona, Colorado, New Mexico, Oregon, Utah, West Virginia; *id.* at 377.

³² Nevada; *id.* at 377.

³³ Delaware, Maryland, Pennsylvania; *id.* at 377.

domestic place of contracting in some states.³⁴ And more important, when the place of the making of the contract is emphasized, following the beaten path of the doctrine, coincidence with the really important place of work is very largely the rule.³⁵

This slow trend to a method away from the inadequate terms of tort and contract, though not yet carried to a settled conclusion,³⁶ is unmistakable and effective. The resulting localization patently agrees with the European theories converging from the doctrines in older and newer types of liability to practically consonant delimitations. The Canadian laws,³⁷ German³⁸ and Swiss³⁹ courts, the Italian writers,⁴⁰ and probably many other national systems⁴¹ refer to the place where the work is regularly to be done within the employer's business organization.

It is still impossible to extract a precise common idea from these regulations. But two basic concepts have emerged; whether applied alternatively or in combination these con-

³⁴ *Supra* n. 29.

³⁵ *Cf.*, e.g., for Georgia, *McDonald-Haynes v. Minyard* (1943) 69 Ga. App. 479, 26 S. E. (2d) 138.

In New York, in the case of nonhazardous employment it is usually said that it suffices for application of the act (e.g., to traveling salesmen) that "the employment contract" is made in the state. See *Wagoner v. Brown Mfg. Co.* (1937) 274 N. Y. 593, 10 N. E. (2d) 567; *Roth v. A. C. Horn Co.* (1941) 262 App. Div. 922, 28 N. Y. Supp. (2d) 808, *aff'd* (1941) 287 N. Y. 545; *Lepow v. Lepow Knitting Mills* (1942) 288 N. Y. 377, 43 N. E. (2d) 450; *cf.* CRONIN, Note, 28 Cornell L. Q. (1943) 206 n. 4, 209 n. 19.

³⁶ GOODRICH, "Five Years of Conflict of Laws," 32 Va. L. Rev. (1946) 295, 319: "So there developed the description of the acts as a regulation of the relation of employer and employee. Enunciation of the theory, however, did not settle all the questions."

³⁷ E.g., Ontario Rev. Stat. 1960, c. 437 s. 6.

³⁸ Germany: Reichsversicherungsordnung §§ 153 ff.; NEUMEYER, 2 Int. Verwaltungen R. 514 and *cit.*; Trib. Arb. Mixte Germano-Belge (April 25, 1924) 4 Recueil trib. arb. mixtes 319; (April 10, 1925) 5 *id.* 348.

³⁹ Switzerland: BG. (March 4, 1892) 18 BGE. 354. See, moreover, Swiss Federal Law of June 13, 1911, art. 61.

⁴⁰ GEMMA, *Dir. Int. del Lavoro* 241 f.; BALDONI, SCERNI, cited *supra* n. 20.

⁴¹ In France, the statute of the normal place of working was advocated by MAHAIM, cited by BALDONI, *Rivista* 1932, 441, n. 6 at 442.

cepts at any rate mark the main tendency and may lead to a final agreement. One idea is that the employer's business to which the employee is attached must be in the state, the other that the worker must do his regular work in the state.

(b) *Place of employment.* The localization rule of Minnesota has acquired some repute, whereby the place of the employer's business prevails rather than his main office even though the worker may be hired at the latter place. Where the work, as for instance the construction of an airport, is carried on, there is the decisive location.⁴² This, in a frequent expression of New York constitutes a "status of employment," more important than the fact of hiring the worker at a particular place.⁴³ The localization of the industry justifies application of the police power of the state to regulate that industry; originally aimed at preventing accidents, it has been extended to provide accident compensation.⁴⁴

Illustration. "Where air route between Minnesota and Illinois was operated by a foreign corporation (a Delaware corporation) from Minnesota where all runs were started, business offices maintained, mechanical work done, payrolls distributed, and pilots and copilots lived and received all instructions, copilot injured in crash was subject to Minnesota Workmen's Compensation Act so as to preclude a common-law negligence action, notwithstanding crash occurred in Wisconsin and regardless of whether contract of employment was made in Iowa, on theory employer's business was 'localized' in Minnesota."⁴⁵

⁴² *De Rosier v. Craig* (1944) 217 Minn. 296, 14 N. W. (2d) 286, Note, 28 Minn. L. Rev. (1944) 335.

⁴³ Note, 10 N. Y. U. L. Q. (1933) 518, 522.

⁴⁴ Minnesota: *Chambers v. District Court* (1918) 139 Minn. 205, 166 N. W. 185; *Ginsburg v. Byers* (1927) 171 Minn. 366, 214 N. W. 55.

Nebraska: *Watts v. Long* (1928) 116 Neb. 656, 218 N. W. 410.

⁴⁵ *Severson v. Hanford Tri-State Airlines* (C. C. A. 8th 1939) 105 F. (2d) 622, headnote summary. See other airline cases, GOLDBERG, "Jurisdiction and Venue in Aviation Accident Cases Including Workmen's Compensation Claims," 36 Cal. L. Rev. (1948) 41, 50 n. 33.

Other statutes approach this conception. But it appears useless to look for an absolutely unequivocal localization. Provided that both the contract is made and the business located in the state, the employment is sure to be considered domestic.

(c) *Regular work in the state.* The bulk of discussion in the American practice concerns the distinction between the case where the employee works regularly and where he does only transitory, "incidental," "occasional," or "temporary" work in a state.

There seems to exist agreement that a claim otherwise founded is not prejudiced by the fact that the injury occurs in transitory work outside the state. This maxim is often applied, since usually the transitory nature of out-of-state work is liberally affirmed.

The cases of multiple claims of employees are thereby even more increased than in the other systems. It would seem logical and equitable to accord optional compensation also when an employee is hired by a firm for out-of-state work but suffers an accident within the state while temporarily employed there.⁴⁶

Some statutes have, however, limited the time of outside employment to ninety days⁴⁷ or required that the injury should not happen six months or more after leaving the state⁴⁸ or set up additional requirements for awarding compensation for outside injuries.⁴⁹

The 1948 Supplement to the Restatement § 400 recognizes that a state may confer a right of action within the terms of its statute even though it is not the place of injury or place of contracting. The interest of the state in the employer-employee relationship is considered sufficient to justify such an extraterritorial effect of the statute.

⁴⁶ To this effect, evidently, GOODRICH, "Five Years of Conflict of Laws," 32 Va. L. Rev. (1946) at 320, criticizing *House v. State Industrial Accident Commission* (1941) 167 Ore. 257, 117 Pac. (2d) 611, noted, 5 U. of Detroit L. J. (1941) 67.

⁴⁷ Delaware, Pennsylvania; see 2 LARSON, *supra* n. 1, at 378 § 87.12.

⁴⁸ Colorado, New Mexico, Utah; *id.*, at 378. See also Ontario Rev. Stat. 1960, c. 437 s. 6 (1).

⁴⁹ Note, 57 Harv. L. Rev. (1943) 244.

Similar provisions are to be found in the Treaty between France and Great Britain, of July 3, 1909,⁵⁰ and many subsequent treaties.

On the other hand, great variety or doubt exists as to work regularly divided between two state territories and work prevailing done out of the state which, viewed from the standpoint of the employer, is incidental to his business. It has been maintained that the New York courts have reached a system covering the entire ground, as summarized in the footnote.⁵¹

(d) *Self-sufficiency of the test.* However the "place of employment" may be understood, it can obviate additional requirements. Considering the strong effort to extend workmen's compensation to employees in domestic business who are not primarily employed outside the state, it is not strange that § 400 of the Restatement, asserting that "No recovery can be had under the Workmen's Compensation Act of a state if neither the harm occurred nor the contract of employment was made in the state," was amended (1948) by adding "unless the Act confers in specific words, or is

⁵⁰ See Int. Labour Code 1951, *supra* n. 3, at 634 n. 420.

⁵¹ Mr. WILLIAM SPRAGUE BARNES, in agreement with the Note, 28 Cornell L. Q. (1943) 206, submits the following statement:

The New York statute contains no provision as to extraterritorial effect. The courts have followed a consistent approach in recent cases. The nature of the work in the course of which the employee was injured is the decisive factor.

If the "employment" is of a fixed or permanent nature at a definite location outside the state, recovery under the New York Act is denied, regardless of such New York contacts as the principal office of the employer, the residence of the employee, or the place of hiring; *Copeland v. Foundation Co.* (1931) 256 N. Y. 568, 177 N. E. 143; *Amaxis v. Vassilaros, Inc.* (1932) 258 N. Y. 544, 180 N. E. 325; *Zeltoski v. Osborne Drilling Corp.* (1934) 264 N. Y. 496, 191 N. E. 532; or compensation insurance in New York, *Bagdalik v. Flexlume Corp.* (1939) 281 N. Y. 858, 24 N. E. (2d) 499; all these claims were dismissed, reversing the lower court on the ground of the decision in *Cameron v. Ellis Construction Co.* (1930) 252 N. Y. 394, 169 N. E. 622.

The place of "employment" is located in New York as a matter of law, if the injury-producing work is confined to a definite location in the state regardless of foreign residence or hiring, *Bauss v. Consolidated Chimney Co.* (1945) 270 App. Div. 70, 58 N. Y. Supp. (2d) 717, even though there is no office in New York and no New York compensation insurance. *Adams v.*

interpreted to confer, a right of action because of the extent of the activities of the employer or employee within the state." We may take it, just to the contrary of the original rule, that both tests included are undesirable for a main rule and as such antiquated by the current development. As the Wisconsin court said, "Where the employer under the act engages a person to perform services in this state under a contract of hire, express or implied, no matter where or when such contract may have been engendered, such employee is under our act and is entitled to its benefits, and this is so even though he is injured while outside of the state, rendering services incidental to his employment within the state. Whether the employee be a resident of this state is not material. The controlling and decisive factor is whether he had a status as an employee within this state."⁵²

This is an unusually clear formulation of the modern tendency.⁵³

Max Solomon Co. (1943) 265 App. Div. 427, 39 N. Y. Supp. (2d) 492; Grasso v. Donaldson-Reynolds, Inc. (1938) 279 N. Y. 584, 17 N. E. (2d) 449.

If the work is not fixed at a definite location but is temporary, *Berman v. Hudson Amer. Corp.* (1946) 271 App. Div. 847, 65 N. Y. Supp. (2d) 676, or transitory in nature, *Alexander v. Movietonews, Inc.* (1937) 273 N. Y. 511, 6 N. E. (2d) 604 (cameraman), a place of business in New York to which employee is attached is sufficient to allow New York recovery even though he is injured outside the state. *White v. H. J. Heinz Co.* (1936) 248 App. Div. 654, 287 N. Y. Supp. 951.

The courts will also allow claims under the New York law on the ground that the work outside is: under the supervision of the New York headquarters, *Farrigan v. Babcock & Wilcox Co.* (1945) 269 App. Div. 872, 56 N. Y. Supp. (2d) 103; incidental to New York business, *Rendt v. Gates* (1945) 269 App. Div. 1007, 58 N. Y. Supp. (2d) 438; based on New York union wage scale, *Carp v. Gladstone Raines, Inc.* (1942) 264 App. Div. 962, 37 N. Y. Supp. (2d) 146.

If the employee of a foreign business is injured while working in the state, claims under New York law are precluded where the New York work is incidental to foreign "employment," *Eurbin v. Prud. Ins. Co. of Amer.* (1937) 250 App. Div. 868, 295 N. Y. Supp. 247; or temporary, *Proper v. Polley* (1932) 259 N. Y. 516, 182 N. E. 161; or transitory, *Whitmire v. Blaw-Knox Constr. Co.* (1934) 263 N. Y. 675, 189 N. E. 753.

⁵² *McKesson-Fuller-Morrisson Co. v. Industrial Commission of Wisconsin* (1933) 212 Wis. 507, 512, 250 N. W. 396.

⁵³ See also HANCOCK, *Torts* 212.

4. Social Insurance System

The German pattern of insurance⁵⁴ under public law is based on a network of regulations, including duties of the employer to report on employments, to contribute premiums on his own and the worker's account, and many other obligations facilitating administrative control. The natural criterion determining the connection with the state in this system is the situation of the employer's establishment involved, viz., the place where he carries on that independent part of his undertaking to which the worker is attached (*Betriebsort*). Nationality and domicil of the employer and the employee are immaterial except in a few special situations. The place of the undertaking, thus, is decisive for enrollment of the parties to the insurance as well as for claims for benefits. Consequently, when workers are sent to work in another country, it depends on the nature of the foreign establishment, whether a new undertaking is formed subject to the territorial statute or the occupation of the individual worker is only incidental, temporary, or accessory, a so-called "radiation" of the domestic undertaking. Examples of the latter category have been the sending of employees to install machines, to construct a bridge, to give theatrical performances, to load vehicles, and the various activities of interstate transportation.

The Canadian pattern exemplified by the Ontario statute includes temporary work outside Ontario for less than six months where the residence and usual place of employment of the workman are in Ontario; temporary work, if only his residence is out of Ontario; and work for some casual or incidental purpose outside the province, if the employer's place of business or chief place of business is outside, but

⁵⁴ For Germany, see NEUMEYER, 2 Int. Verwaltungs R. 514 ff.; STIER-SOMLO, 2 Kommentar zur Reichsversicherungsordnung (1916) 31 ff., 988.

the worker's place of employment is within Ontario.⁵⁵ The text underlines the rule that no compensation shall be payable where the accident to the workman happens while he is employed elsewhere than in Ontario.

The present Italian view is not known to me. But in 1939 it was agreed that application of the workmen's compensation statute, having territorial character, should be based either on the place of the accident, or that of the enterprise, or that where the work is done, with the accent on the last test.⁵⁶ It would seem that the German doctrine eliminates this doubt.

5. International Treaties

Article 2 of the above-mentioned Equality of Treatment (Accident Compensation) Convention, 1925, expressed the following recommendation:

"Special agreements may be made between the members concerned to provide that compensation for industrial accidents happening to workers whilst temporarily or intermittently employed in the territory of one Member on behalf of an undertaking situated in the territory of another Member shall be governed by the laws and regulations of the latter Member."⁵⁷

The influential Treaty between Germany and Austria, of 1926/1930⁵⁸ decided that the law of the state where the head office of an employer is situated is applicable to a temporary employment in the other state for a period of one year. The provisions of the same law relating to other claims on account of the same accident are also applied.

⁵⁵ Ontario Rev. Stat. 1960, c. 437 s. 6 (1), (3), and (4).

⁵⁶ See MARMO, Note to Cass. (Jan. 1, 1939) *Foro Ital. Mass.* 1939, 67 in 8 *Giur. Comp. DIP.* (1942) 179 No. 99, summarizing a book by VENTURINI.

⁵⁷ *Int. Labour Code 1951, supra* n. 3, at 631, art. 817.

⁵⁸ League of Nations, Leg. Ser. 1930—Int. 10, reproduced in *International Labour Code, id.* at 636 f.

Another model Treaty, concluded between Denmark and the Netherlands, of October 23, 1926,⁵⁹ follows the general rule that the insurance law of the country in which the work is performed shall apply. But the legislation of the state where the undertaking carries on its main operation extends to work of short duration and performed in a subsidiary manner in the other country by workers not permanently domiciled there. It is likewise applicable when workers are sent out to perform inspection or supervision or any other special duties.

In the absence of such treaty agreements, the International Labour Office is of opinion that according to Article 1 of the Convention, the laws and regulations of the country in which the accident occurred should be applied.⁶⁰

IV. CONCURRENCE OF CLAIMS

We shall first deal with the conflicts rules irrespective of the United States Constitution.

I. Compensation and Tort Actions

It seems settled in this country that if the state of injury in its compensation act has barred alternative remedies based on common law tort no other state will allow the employee to avail himself of such remedies.⁶¹ Since the *lex loci delicti* refuses a tort action, there is none anywhere,

⁵⁹ League of Nations, Leg. Ser. 1926—Int. 6; Int. Labour Code *ibid.* notes that it contains the fullest provisions of date subsequent to 1925 which are not based on the Austro-German model.

⁶⁰ Answer to the Japanese Government (10th Session, Int. Labour Conference (1927) Report of the Directors, vol. 2, 99) Decennial Report (1937) 27.

⁶¹ Mr. Justice Brandeis in *Bradford Elec. Light Co. v. Clapper* (1932) 286 U. S. 145, 154 takes this for granted.

The 1948 Supplement to the Restatement § 401 confines this doctrine to the place of injury recognizing that the place of contracting cannot deprive a victim of his right of action if the place of injury finds such a provision obnoxious to its public policy.

whether at the court of the place of contracting⁶² or at the court of the place of employment.⁶³ This thesis thus disregards the possibility that these latter courts interpret their own compensation statutes as not exclusive. On the other hand, it is regarded as settled that replacement of common law suits by the statute of the state where suit is brought, does not bar tort actions flowing from injuries received in another jurisdiction.⁶⁴ The latter theory acknowledges that the substitution of statutory workmen's compensation for tort has exclusive effect only for the awards made in the state, whereas extraterritorial effect is given to the similar foreign provision of another state. Apparent logic has once more misled the lawyers. Both propositions are mistaken. The reason why in many jurisdictions liability without fault, though with a limited measure of damage, exclusively replaces unlimited tort liability based on intentional, or at least unintentional fault,⁶⁵ is simply that a broader scope of liability is balanced by a milder compensation standard. Additionally, the employer, in the thought of some legislators, should not be sued twice. A state reasoning thus within its own compensation system does a strange thing in allowing suits for foreign tort beyond its domestic awards of workmen's compensation, although it has no interest in restricting cumulations of claims in the case of foreign awards. The result, hence, should be just opposite to that commonly accepted. Whether an award of accident compensation without fault may be supplemented by other remedies ought to be determined by the

⁶² *Pendar v. H. & B. American Mach. Co.* (1913) 35 R. I. 321, 87 Atl. 1; *Wasilewski v. Warner Sugar Refining Co.* (1914) 87 Misc. 156, 149 N. Y. Supp. 1035; *Magnolia Petroleum Co. v. Turner* (1933) 188 Ark. 177, 65 S. W. (2d) 1.

⁶³ Restatement § 401; GOODRICH 244 and n. 90.

⁶⁴ *Reynolds v. Day* (1914) 79 Wash. 499, 140 Pac. 681.

⁶⁵ The German *Versicherungs O.* § 636, as amended, leaves standing the ordinary action in excess of the compensation award when the employer has caused the accident intentionally.

legal system of which the workmen's compensation is a part. Exactly to the analogous effect, the prementioned Austro-German Treaty provides that the law of the state whose insurance statute is applied has to decide whether additional rights arise out of the same accident.^{65a} It is inconsistent with the policy of a workmen's compensation act, barring common law suits, that a common law suit should be brought under a foreign tort law in respect of the same injury. Where, on the other hand, workmen's compensation is granted pursuant to a statute combining statutory restricted liability without fault and full liability under common law for fault, there is no reason why the tort law of the place of injury should not be applied, although it would not be available to increase workmen's compensation of the state of injury. Objections to these claims until they are satisfied or waived, should only arise insofar as the employer is subrogated into the claim against the tortfeasor, or his liability is reduced by the latter's payment. The North Carolina court in a case involving injury in Tennessee, finding the common law action forbidden by the Tennessee Workmen's Compensation Act, allowed recovery in tort under the common law of North Carolina.⁶⁶ The court should have applied the Tennessee tort law, abrogated in workmen's compensation cases only for the use of Tennessee, not North Carolina courts.

Curiously, in a recent Ontario decision, the court found it against public policy that the dependents of a Michigan

^{65a} The same result has rightly been reached in *Stacy v. Greenberg* (1952) 9 N. J. 390, 88 Atl. (2d) 619. In *Ohlhaber v. Narron* (C. C. A. 4th 1952) 195 F. (2d) 676 the court also seems to approve the principle advocated above, but the law of the forum barred the action as well as the law under which compensation had been awarded; hence, no real conflict existed. For a discussion, see FORD, "The Liability of Nonemployer Tortfeasors Under State (1958) 54.

Workmen's Compensation Statutes: A Choice-of-Law Problem," 68 Yale L. J.

⁶⁶ *Johnson v. C. C. & O. R. Co.* (1926) 191 N. C. 75, 131 S. E. 390; *HANCOCK, Torts* 218 n. 3 cites a similar decision of a Quebec court, *Johansdotter v. Canadian Pac. R. Co.* (1914) 47 Que. S. C. 76.

employee killed as a passenger in an airplane crash near St. Thomas, Ontario, could have a remedy against the wrongdoer in one state, and workmen's compensation against his employer in another.⁶⁷

2. Several Compensation Acts

Before the Supreme Court of the United States committed itself to a novel application of the Full Faith and Credit Clause with regard to workmen's compensation, the Constitution did not preclude a workman from obtaining compensation in two states up to the higher amount granted by either statute⁶⁸ where the statutes made this possible. The Restatement, § 403, maintains this proposition, which has been adopted by the courts with very few exceptions, although rarely confirmed by statutes.⁶⁹ The plaintiff may choose freely which statute seems proper and according to some of the authority, he may switch even after an award.⁷⁰ But apart from the constitutional issues, some courts denied compensation proceedings when an award was given in another state.⁷¹

3. American Constitution

(a) *Legislative power.* The Supreme Court of the United States, in a decision formulated by Mr. Justice Brandeis,

⁶⁷ *Scott v. American Airlines Inc.* (Ont. High Ct.) [1944] 3 D. L. R. 27. The decision should have been based on the fact that all rights were terminated by release. Compare the recent decision in *Texas Indemnity Ins. Co. v. Henson* (Tex. 1943) 172 S. W. (2d) 113, stating that the claim of an injured person in one state and that of his dependents after his death in another state are two separate actions. *Cf.* Note, 22 Tex. L. Rev. (1944) 246.

⁶⁸ GOODRICH 243 n. 88; Restatement §§ 398, 399.

⁶⁹ See Note, 57 Harv. L. Rev. (1943) 246.

Canada: The independence of the provincial statute is emphasized in *Desharnais v. C. P. R.* [1942] 4 D. L. R. 605.

The amendments in the 1948 Supplement to the Restatement except the case where the act of the state of award precludes recovery under any other act. *Magnolia Petroleum Co. v. Hunt* (1943) 320 U. S. 430.

⁷⁰ GOODRICH 238.

⁷¹ HANCOCK, Torts 228 n. 5.

extended the Full Faith and Credit Clause of the Constitution to legislative state acts, and applied this thesis to workmen's compensation statutes. The decision is generally understood as recognizing the power of only one state to regulate compensation for accidents in the case of a specific contract of employment. The contract was made between residents in Vermont, which has an optional statute; the employee was killed while working temporarily in New Hampshire. On these facts it was held that the statute of New Hampshire was excluded by the statute of Vermont.⁷²

Opinions may be divided on the problem whether for humanitarian reasons an injured worker should have free option among compensation statutes offering him redress, or whether the parties should have foreknowledge of the applicable statute, so as to be able to ascertain the risks to be covered or the fund to which contributions should be made. The above-mentioned decision, in its effect rather than its reasoning, favors the latter view and joins the modern efforts to give the main employment place preference over an accidental work assignment. Nevertheless, the circumstances of employment and the policies of the different states are too heterogeneous for efficient regulation of power from the standpoint of a superstate. Although a federal compensation law, of course, would be feasible in its sphere and with its own policy, it is inconvenient to weigh critically the legitimacy of territorial connections which state legislatures may find sufficient. In addition, Mr. Justice Brandeis borrowed the test of legitimate power from the mechanical conflicts rule of *lex loci contractus* instead of emphasizing mainly the work in Vermont.

This decision was too radical to stand. The theory of an exclusively controlling workmen's compensation statute was

⁷² Bradford Electric Light Co. v. Clapper (1932) 286 U. S. 145. The optional character of the Vermont Act emphasized by the defendant was not urged.

soon "tactfully explained away,"⁷³ and the criterion was radically changed by Supreme Court decisions influenced by Mr. Justice Stone.⁷⁴ The ancient conflicts rule was replaced by an appraisal of the legitimate public interest which a state has in granting workmen's compensation. In a leading case, California was approved for having applied its act, although the parties had stipulated for Alaskan law and all facts except the place of hiring pointed to Alaska. The main ground was equitable; it would have been a great hardship for the worker to seek compensation in the far-away territory, and he might have become a public charge to California.

The California statute was again permitted to operate in the inverse case where the injury happened in that state, though the work was temporary and Massachusetts law governed the employment.⁷⁵ Furthermore, the legitimate interest has been declared not to turn on the fortuitous circumstance of the place of work or injury.⁷⁶ "Rather it depends upon some substantial connection" between the jurisdiction and the particular employment relationship. Finally, the state of injury has been allowed to disregard a bar to common-law actions against general contractors embodied in the law under which the injured employee has received compensation, if the law of the state of injury does not immunize general contractors.^{76a}

⁷³ CHEATHAM, "Stone on Conflict of Laws," 46 Col. L. Rev. (1946) 719, 723 n. 16.

⁷⁴ *Alaska Packers Ass'n v. Industrial Commission* (1935) 294 U. S. 532.

⁷⁵ *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1939) 306 U. S. 493.

The 1948 Supplement amends § 401 of the Restatement by omitting the power of the place of making the contract of employment to abolish tort actions extraterritorially.

⁷⁶ *Cardillo v. Liberty Mutual Ins. Co.* (1947) 330 U. S. 469 at 476.

^{76a} *Carroll v. Lanza* (1955) 349 U. S. 408; see Note, 23 U. of Chi. L. Rev. (1956) 515. This, of course, does not imply that by disregarding the foreign bar the forum follows a sound conflict-of-laws rule; for a discussion of this problem, see *supra* pp. 229-232 and Note, Harv. L. Rev. (1962) 355.

Much effort has been spent in the American literature to evolve fragments of a legal system out of these incoherent pieces. Perhaps it will be finally conceded that Stone's idea is no more conclusive than that of Brandeis.

In no event, however, should we be influenced by the numerous authors who seem to hope for better conflicts rules to be gained from these decisions. From the point of view of conflicts law, it is a plainly illusory proposition to hold that the state where a worker is injured in temporary business, as in the case of New Hampshire, has no "interest" sufficient to apply its own law, while California has an interest sufficient to exclude the Alaskan law. It is also immaterial that in the first case, New Hampshire seemed not necessarily to refuse giving effect to the Vermont act under conflicts principles,⁷⁷ and that in the other case, Massachusetts assumed exclusive applicability of its own law.⁷⁸

When two states make their administrative or judicial machineries available to an injured workman, this may be done for different reasons, but never really without some reasonable consideration. Apart from the nature of a federal state, there is neither occasion in such cases to supervise their judgment in taking jurisdiction nor, much less, to select a contact and impose it on all states.

Co-ordination and equitable treatment of the employer must be secured through interstate, if not federal, arrangement. Models are contained in the numerous international treaties. That an employer should have to pay the same damages twice, as happened once in European practice,⁷⁹ is a rare occurrence also in this country.⁸⁰

⁷⁷ Mr. Justice Stone based his concurrent vote on this fact; see FREUND, "Chief Justice Stone and the Conflict of Laws," 59 Harv. L. Rev. (1946) 1210, 1220.

⁷⁸ This Mr. Justice Stone himself declines to consider for conflicts law, see CHEATHAM, *supra* n. 73, 722, 723 n. 16.

⁷⁹ See NEUMEYER, 2 Int. Verwaltungs R. 726.

⁸⁰ See SCHNEIDER'S Workmen's Compensation, *supra* n. 1, 470.

(b) *Force of awards*. In the Magnolia decision, rendered by a five to four majority,⁸¹ it was held that a final award of Texas, equivalent by statute to the judgment of a court of competent jurisdiction, is under the protection of the Full Faith and Credit Clause, irrespective of any "interest" of other states. The state in which the contract was concluded was forced to give the award of the state of injury exclusive force, and to reject the claim of the employee for additional compensation. This theory treated workmen's compensation on the footing of a transitory tort action, and failed to evaluate precisely the particulars of the Texas procedure.⁸² Although this decision has sometimes been praised, the Supreme Court itself has recently reduced its bearing to the least possible scope. It has been stated recently that to be exclusive the award must be final and conclusive, intended to preclude another judgment not only in the state but also under the laws of other states; and such an interpretation was held not readily to be reached.⁸³

V. CONCLUSIONS

The development of conflicts law in workmen's compensation cases has amply demonstrated that the tests borrowed from the general rules regarding tort and contracts are equally impracticable. The choice of the applicable law lies among the places with which the work rather than the

⁸¹ *Magnolia Petroleum Co. v. Hunt* (1943) 320 U. S. 430.

⁸² CHEATHAM, "Res Judicata and the Full Faith and Credit Clause etc.," 44 Col. L. Rev. (1944) 330; FREUND, *supra* n. 77, 1229.

⁸³ *Industrial Commission of Wisconsin v. McCartin* (1947) 330 U. S. 622. In this case, the first awards under the Illinois workmen's compensation statute stipulated that "this settlement does not affect any rights that applicant may have [in] Wisconsin." But the majority of the Supreme Court seems to have modified its general proposition, *cf.* DEAN, in 1947 Annual Survey of American Law 61 f. However, in *Buccheri v. Montgomery Ward & Co.* (1955) 19 N. J. 594, 118 Atl. (2d) 21 the Supreme Court of New Jersey has given full faith and credit to a New York award, although this was considered to be not exclusive. The rules of the Magnolia case and the McCartin case are profoundly discussed by 2 LARSON, *supra* n. 1, at 358-367 § 85.

conclusion of the contract or the accident is connected. Furthermore, European and international efforts suggest that decisive influence should be accorded the place of the employer's business supervising the employee's work. This result entirely agrees with the most desirable principle governing labor contracts.

If the contract is made at the headquarters of the firm, it has been claimed in the United States that with respect to optional compensation statutes the parties are presumed to agree on the law of that place. In Europe, a similar preference for the law of the headquarters has been based on the integration of the worker into the employer's organization. It would seem that the more closely the state takes the indemnization of the workers in hand, especially by making it a public or semipublic institution of social insurance, the more distinctly attention is turned to the mere territorial connection of the business place to which the workman is attached.

In the United States, this leading idea, more or less consciously living, might well be generalized and achieve uniformity. Even so, competition among the state laws would remain unchecked in the various cases of temporary employment in a state other than where the controlling business place is situated. Whether a total elimination of such an overlapping jurisdiction is desirable, except in the interest of the employer, is uncertain. If complete unification is wanted, the agreements made on the basis of the Geneva Convention would be a natural model. So long, however, as no uniform statute or agreements among the states with federal support are in existence, past experience eventually ought to teach that judicial interference in order to define the proper spheres of state legislation on this subject has not proved helpful.

Maritime Transportation of Goods

I. INTRODUCTION

1. Conflicts and Unification

UNTIL the nineteenth century, the ancient modes of carrying persons and goods on the seas and on the highways did not cause many problems of conflict of laws; carriage by sea because universal conceptions had achieved a general maritime law, and carriage on land because territorial boundaries separated the laws. In modern times, this situation has changed. The transformation of marine commerce by powerful and costly vessels, by the enormous increase of traffic, and the many modern innovations in communication, just when the policies of national seclusion segregated the laws of the various countries, has multiplied and aggravated the conflicts of law.¹ Equally cumbersome were the legal complications arising from interstate and international operation of railways. Sensitivity to these obstacles to commerce has been such that the unification of laws concerning carriage has been accomplished more readily than in most other fields. Railroad transportation has been unified in the United States by federal statutes and in almost all states of Europe by the Bern Convention on international carriage of goods, which upon its revision in 1924 was accompanied by a convention concerning carriage of persons and luggage. In the maritime and aeronautic fields, the technical rules of navigation have been in

¹ See BERLINGIERI, *Verso l'unificazione del diritto del mare*, seconda serie (1933) 20.

great degree unified; the almost universally enforced Convention of Brussels,^{1a} that of Warsaw, and the Rome Conventions of 1933 and of 1952 all mark a vigorous impulse towards uniform private law. These and other significant efforts await final success.

Conflicts law remains awkwardly married to a worn-out scheme of *lex loci contractus* and *lex loci solutionis*, which, at least apparently, does not differentiate between the manifold means of transportation, its objects, and the types of related agreements. Similarly, the writers, as a rule, do not attempt to consider such distinctions, despite their indulgence in various opinions regarding the most appropriate single local connection for this whole congeries of contracts. In fact, the most recent enactments have served to destroy rather than to foster international uniformity.

Most discussion, judicial and literary, has been devoted to carriage of goods in maritime cases. For this reason we commence with this topic.

2. Types of Contracts Involved

In the various systems of transportation, contracts are classified differently, and even analogous types are often given different names. If all such categories were decisive for "characterization" in conflicts law, the rules would be illusory.

Fortunately, there are favorable influences: traditions inherited from a past more satisfactorily unified, similarity of habits in the international trade, and the support afforded by the prevalence of British shipping. Only recently have the codes begun to recognize the main types of contracts created by a long development. The following kinds of

^{1a} For the status of ratifications of, and accessions to, the Convention, as of Jan. 1, 1962, see *Revue Crit.* 1962, 368 f. In addition, see for details MARKIANOS, *Die Übernahme der Haager Regeln in die nationalen Gesetze über die Verfrachterhaftung* (1960).

contracts must be distinguished, in order to be adequately classified in conflicts law.

(a) *Lease of vessel*. The Roman jurists distinguished the hiring of a ship, viz., of a thing, a *locatio conductio rei*, from the contract of carriage, that is, for doing a job, *locatio conductio operis*.² In the first case, there is no contract of transportation, and opinion is divided whether it is a maritime contract at all.

Demise. In the Anglo-American countries, the hiring of a vessel, termed the demise charter, has been defined for certain purposes, such as fixing the liability of the shipowner for the acts of the master and crew, or the statutory limitation of liability. In a demise, the owner agrees to transfer possession and control of the vessel to the charterer.³ The former remains only the "general owner" for the period of the charter, during which the charterer, who is to "man, victual and navigate" the vessel, is deemed to be the owner *pro hac vice*.⁴ This may be the case, even though the general owner appoints and pays the wages of the master and crew. This type of agreement is never presumed to have been made; it is less frequent in peacetime, though not extinct.⁵ It would seem to transcend the ordinary scope

² In SCAEVOLA, Dig. 19,2,62 § 11, when a vessel was hired for a voyage from Cyrenaica to Aquileja and was retained after loading at the port of dispatch for nine months, the rent for this time had to be paid by the lessee (*conductor rei*). In LABEO-ULPIAN, Dig. 19,2,13 § 1, the skipper assumed transportation of a cargo by voyage charter (he is the *conductor*, i.e., *operis*). The latter type included carriage of goods (*eod.* 13, § 2) and of persons (*eod.* 19, § 7).

³ SCRUTTON, *Charterparties* (ed. 16) 4; WILLISTON, 4 *Contracts* 3001, 3003 § 1074; *Guzman v. Pichirilo* (1962) 369 U. S. 698, 699 f.

⁴ United States: Rev. Stat. § 4286, 46 U. S. C. (1958 ed.) § 186.

To the same effect, Canada: Shipping Act 1934, 24 & 25 Geo. V., c. 44, p. 245, s. 653. In its present form, the Canada Shipping Act, Rev. Stat. of Canada 1952 vol. I c. 29 s. 661, which replaced the original s. 653 of the act, does not confine itself to a charterer to whom the ship is demised, but rather applies to "any charterer of the ship."

⁵ *Banks v. Chas. Kurz Co.* (D. C. E. D. Pa. 1946) 69 F. Supp. 61, 66 in the case of the usual oral demise of lighters without motive power. It is not at all so "very rare" as the often repeated words of Vaughan Williams, L. J., in *Herne Bay Steam Boat Co. v. Hutton* [1903] 2 K. B. at 689 would indicate. Cf. the Indices to American Maritime Cases.

of the usual conflicts rules respecting "transportation" or "carriage." The parties are not in the relation of carrier and shipper.

Bareboat lease. The same is true of the transaction, well known in civil law, where a ship is leased so as to give the lessee full nautical as well as commercial control. In the simplest case, the vessel is not equipped for transportation of goods, or it is delivered without master and crew, in consideration of compensation for a term or a voyage. Such bareboat charter, services to be furnished, is certainly a contract alien to transportation. In the German doctrine, it was formerly sometimes contended that all contracts giving the charterer control of navigation should be excluded from the category of maritime contracts,⁶ while most French writers and their followers include them under affreightment.⁷

In any case, as between the two parties to a demise or bareboat charter, the applicable law is more appropriately determined by the conflicts rules concerning leases of movable chattels than by those concerning transportation. Of course, if the law of the flag is invoked to cover all contracts regarding the use of a vessel, as in recent Italian notions, it operates also here.⁸

(b) *Charter party (affreightment by charter).* Under a traditional type of agreement, the shipowner furnishes the

⁶ German *Schiffsmiete* in contrast with *Frachtvertrag*, see WÜSTENDÖRFER, *Seehandelsrecht* (ed. 2) 116 ff.; SCHAPS-ABRAHAM, 2 *Seerecht* (ed. 3) 134 § 510 n. 5; pp. 267 ff. before § 556.

The new Swiss Shipping Act of Sept. 23, 1953, distinguishes clearly between bare-boat-lease (arts. 90 ff.), charter (arts. 94 ff.), and contracts of affreightment (arts. 101 ff.).

⁷ DANJON, 2 *Droit Marit.* §§ 744 ff.; RIPERT, *Droit Marit.* (ed. 4) 245 ff. §§ 1341 ff.

LYON-CAEN et RENAULT 533 § 622 distinguished this *affrètement-louage* from *affrètement-transport*, but in the treatment starting in § 627 the comprehensive concept of affreightment is underlying.

Belgium: 1 SMEESTERS and WINKELMOLEN § 272.

⁸ C. Navig., Disp. Prel. art. 10.

ship as a whole, with master and crew. He agrees to deliver the cargo in good condition, dangers of the sea excepted, and assumes the marine risk as to the ship; the charterer determines the ports for loading and discharging the cargo to be delivered by him to the ship. The essentials of all charter parties are full control of navigation by the owner and directions for proceeding by the charterer. Although oral contracts are not excluded by usage and the codes, there is normally a written contract, originally a deed, a *carta partita* (whence the name comes), at present one of the printed standard forms of English origin. Constructive analysis of these forms has finally led to the assumption that they combine elements of hiring of things and hiring of services in a "mixed" contract.⁹

The use of the ship and equipment may be granted for a time (time charter)¹⁰ or for a voyage. A promise of a proportional part or specific quarters in the vessel is sometimes included in this category, where the other characteristics of charter parties are present. It is so classified in the German Commercial Code, § 557, because charter party documents are usual in such cases. But these cases seem to have become rare. In the United States, usually "charter" carriage is distinguished from common carriage by the fact that the charterer engages the whole of the ship's capacity.¹¹

Charter parties are in wide use in many branches of trade for reasons of organization and geographical considerations. Thus, for instance, American steel concerns shipping

⁹ For certain purposes of mercantile law, analysis is required for ascertaining which element prevails; see PAPPENHEIM, 3 Seerecht 87; SCHAPS-ABRAHAM, 2 Seerecht (ed. 3) 266 f.

¹⁰ German: (*Eigentlicher*) *Zeitfrachtvertrag*, e.g., "Baltic Time Charter"; similar names in Scandinavian and Dutch languages; French: *affrètement a temps*; Italian: *noleggio a tempo*. Explicit distinctions between time charter and voyage charter are made in the Swiss Shipping Act of Sept. 23, 1953, arts. 94 ff.

¹¹ ROBINSON, Admiralty 593 § 83; GILMORE & BLACK 170 § 4-1.

ore from remote South-American ports commonly enlarge their fleets by chartering "tramp" vessels.¹²

(c) *Carriage by general ship (Stückgüter-Frachtvertrag; affreightment with bill of lading)*. Under the ordinary contract of marine transportation, the shipmaster is under the exclusive control of the carrier, whereas the shipper has merely a right similar to that in rail transport of merchandise. The contract may include conditions obligating the carrier to load the goods in certain types of compartments, but though stowage is not necessarily at the discretion of the vessel, it is always under its responsibility.

The Netherlands Code, in treating this type of contract, distinguishes tramp and line steamers,¹³ while the recent Italian law, apart from charter parties, somewhat obscurely differentiates transport of shipload or partial shipload from that of identified objects. In the Russian Law of 1929 (art. 73) charter parties are contracts in which the whole vessel, or a part of it, or identified spaces in it, are put at the disposal of the charterer, in contrast to contracts without such conditions.^{13a}

(d) *Purpose of the distinction*. Many further types can be differentiated.¹⁴ However, thus far except for time charters, differentiation of all the variants included in groups (b), charter party, and (c), bill of lading, has been slow and somewhat difficult.¹⁵ This fact may have caused the remarkable phenomenon that in the common law and in the

¹² Other articles are sugar, wheat, rice, potash, bauxite, lumber, coal, oil etc. See C. D. MACMURRAY and MALCOLM M. CREE, *Charter Parties of the World* (1934) 4 ff.; JOHNSON-HUEBNER-WILSON, *Principles of Transportation* (1932) 467 ff., 560, 569 ff.

¹³ C. Com. arts. 517e-517y (special rules for carriage in line shipping); 520g-520t (for carriage not by line boats).

^{13a} See Law in Eastern Europe (edited by SZIRMAY), Vol. 4, *The Merchant Shipping Code of the Soviet Union* (1960) p. 39.

¹⁴ This regards especially the peculiarities in the services of privately operated or industrial carriers and the contracts, not of agency but of transportation, made by the United States Shipping Board for government-owned vessels.

¹⁵ PAPPENHEIM, 3 *Seerecht* 103.

Latin laws, charter parties and other forms of transportation have been prevailingly treated together under the general term of affreightment or carriage of goods, while German commercial law doctrine has consistently distinguished the two above groups, the technical name of *Stückgütervertrag* (contract relating to single packages)¹⁶ being employed for group (c). The Brussels Convention on bills of lading also distinguishes this latter contract although it extends its effects to negotiated bills of lading issued under a charter party.¹⁷

In conflicts law, however, the two groups are quite commonly merged without any discrimination. This is true of the United States¹⁸ as well as of France¹⁹ and Germany.²⁰ By way of exception, the Dutch Law of 1924, in the absence of a contrary intention of the parties, applies to time charters the law of the flag, instead of the usual law of the place of contracting.²¹

Under these circumstances, it would not be suitable further to divide the materials relating to carriage of goods by sea. Ultimately, it will nevertheless be easy to see that such failure to discriminate is improper. Not only must the lease of vessels be excluded but neither time nor voyage charters can be brought simply under the criteria appropriate to ordinary carriage by liners.

3. Carrier

"Carrier" includes the owner of the vessel and the charterer who enters into a contract of carriage with the shipper.²²

¹⁶ Germany: HGB. § 556 No. 2.

¹⁷ Art. 1 (b), see *infra* n. 27.

¹⁸ Cf. MINOR § 169; BEALE § 346.7; see also DICEY (ed. 7) Rules 158, 159.

¹⁹ BATIFFOL 257 § 284 implies this; cf. BATIFFOL, *Traité* (ed. 3) 660 § 607.

²⁰ 2 FRANKENSTEIN 573; NUSSBAUM, D. IPR. 281; SCHAPS-ABRAHAM, 2 *Seerecht* (ed. 3) 277 ff.; KEGEL, *Kom.* (ed. 9) 564.

²¹ The Netherlands: C. Com. art. 518g.

²² Convention of Brussels on bills of lading, art. 1 (a).

Private carrier. The important common law distinction between common and private carriers has some bearing on the application of the Harter Act and more recent federal legislation in American courts.²³ But no consequence is known to have been drawn in conflicts law from the distinction.

Forwarding agent (French "commissionaire," German "Spediteur"). The services of independent merchants operating as intermediaries in effectuating transportation are brought under very different categories in the various systems. Moreover, doubts exist almost everywhere concerning their treatment insofar as the rules of agency and the rules on carriage conflict. It would be disastrous if the conflicts rule should follow the variety of these domestic characterizations.

A model of international characterization may be found in the simple words of Scrutton, L. J., interpreting the concept of "carrier" for the specific narrow purpose of the Convention as one which "might include a freight agent or forwarding agent or carriage contractor in cases where by issuing a bill of lading he enters into a contract of carriage with the shipper."²⁴

Whenever, we might say, any person, not a servant of either party, contracts with the shipper for carriage, whether by his own or another's services, the conflicts rules involving contracts of transportation ought to apply exclusive of those regarding agency inasmuch as they lead to different results.

4. Transportation Contract and Bill of Lading

It is elementary to distinguish between the contract of

²³ On this difficult subject, see as to the Harter Act, AUSTIN T. WRIGHT, "Private Carriers and the Harter Act," 74 U. of Pa. L. Rev. (1926) 602; and with respect to the Carriage of Goods by Sea Act of 1936, ROBINSON, Admiralty 506 f.; Note, 54 Harv. L. Rev. (1941) at 667 and n. 33; KNAUTH, Ocean Bills of Lading (ed. 4) 176-179.

²⁴ SCRUTTON, Charterparties (ed. 16) 466.

affreightment and the obligations flowing from a bill of lading. In theory, the relationships in the two sets of obligations are so differently shaped that two entirely different conflicts rules seem to be required. In practice, however, the picture appears modified. In the great majority of cases, there is either a written contract or a bill of lading, but not both. The former in almost every case involves a charter party, while in the modern conveyance of goods bills of lading are almost unfailingly used and usually incorporate the contract of carriage.²⁵ The Hague Rules adopted in the Brussels Convention of 1924²⁶ illustrate the situation. They envisage in the first place the rights based on bills of lading issued in connection with ordinary carriage but also include, in the case of a charter party, bills issued to a charterer and endorsed to a holder. They exclude the relationship created by the charter party itself.²⁷

Although the systems vary in the details of the protection granted to an innocent holder, as for instance, whether the bill of lading constitutes *prima facie* or conclusive evidence, the bill everywhere dominates the relation between the carrier and a consignee who is a holder in due course. It follows that the bill of lading must prevail also for the purpose of conflicts law. Instinctively, the American and many other courts, as we shall see, are anxious to subordinate the law of the affreightment contract to that of the

²⁵ Cf. PAPPENHEIM, 3 *Seerecht* 221: failure to issue a bill of lading may occur when goods are shipped on the account of the shipowner, in case of urgent dispatch and in coastwise shipping; 1 VAN HASSELT 363 f.

²⁶ Hague Rules, art. I (b); in the United States, Carriage of Goods by Sea Act, 1936, 46 U. S. C. A. § 1301 (b). The same exclusion of charter parties in the relation between shipowner and charterer was assumed for the Harter Act, see ROBINSON, *Admiralty* 506; GILMORE & BLACK 175 f. § 4-2. This subject does not include of course the common phenomenon that charterers issue bills of lading to their customers.

²⁷ On this situation, cf. the cases cited by POOR, *Charter Parties* (ed. 4) § 25, and in England, *The Njegos* [1936] P. 90, 155 L. T. R. 109. See also GILMORE & BLACK 193 f. § 4-10.

port where the bill of lading is issued. They endeavor also to eliminate such conflicts as may arise.

Transfer of title in goods by transfer of the bill of lading is not in question here. In regulating this function, the law governing the creation and effect of bills of lading is subordinate to the law of the situs of the goods but never to the law governing the contract.

II. MAIN SYSTEMS OF CONFLICTS LAW

I. Choice of Law by the Parties

Remarkably, apart from restrictions on stipulations exonerating the carrier from liability,²⁸ the usual attempts to restrict the efficacy of party autonomy in the determination of the general law of the contract, are all but absent. Probably due to the age-old conceptions of maritime intercourse, an appropriate stipulation or, in the absence of express agreement, the so-called presumable intention of the parties, universally justifies application of foreign law.²⁹ Even the Soviet Maritime Law expressly states the right of the parties to modify the normal conflicts solutions; although the imperative Soviet rules are excepted, this ex-

²⁸ Vol. II (ed. 2) p. 423.

²⁹ See e.g.:

United States: The Ferncliff, *infra* n. 35; Roland M. Baker Co. v. Brown (1913) 214 Mass. 196, 100 N. E. 1025 (express clause, in contrast with the law governing the endorsement). Compare Restatement (Second), Tent. Draft No. 6 (1960) § 346n and note on p. 156.

Belgium: 1 SMEESTERS and WINKELMOLEN 391 § 277.

England: Lloyd v. Guibert (1865) L. R. 1 Q. B. 115, 13 L. T. R. 602.

Denmark: Trib. marit. Copenhagen (May 17, 1889) 16 Rev. Autran (1900-01) 249.

France: LYON-CAEN et RENAULT 785 § 844; RIPERT, 2 Droit Marit. (ed. 4) 347 f. § 1432.

Germany: 68 RGZ. 209; 122 RGZ. 316; SCHAPS-ABRAHAM, 2 Seerecht (ed. 3) 277 ff.

Greece: 2 STREIT-VALLINDAS 254 and n. 42.

Italy: C. Navig. Disp. Prel. art. 10; C. C. (1942) Disp. Prel. art. 25; SCERNI 193.

Código Bustamante, art. 185 *cf.* 285; *cf.* BUSTAMANTE, Der. Int. Priv. (ed. 3) 332 § 1449.

press permission was in contrast to the general Soviet legislation at the time when the Merchant Shipping Code of 1929 was adopted.³⁰

This result is exactly the opposite of what the adversaries of party autonomy expect of a contract bound to such stringent provisions as those contained in the Harter Act and the Hague Rules.

2. United States

Not the law of the flag. The vast majority of American cases involving carriage are concerned with interstate transportation by rail or water. The simultaneous treatment of land and maritime shipments, therefore, serves to explain why the law of the flag has never been stressed.³¹ The fact that American ports were prevailingly served by foreign vessels may have contributed to this same result that in no case has the law of the flag been decisive. The most influential decision of the Supreme Court investigated the law of the flag in the light of a thorough review of the English cases and flatly rejected it.³²

General maritime law? In two significant cases of old standing, the federal courts resorted to the general maritime law as administered in the United States, in each case on the ground of the presumed intention of the parties. In

³⁰ See art. 5 Merchant Shipping Code, *supra* n. 13a; FREUND, *Das Seeschiffsrecht der Sowjetunion* (1930) 39, 58. As to the efficacy of party autonomy under Soviet conflict of laws in general, see Vol. II (ed. 2) p. 375 n. 61 and 1 LUNZ 166 ff.

³¹ The decision in *The Titania* (D. C. S. D. N. Y. 1883) 19 Fed. 101, 103, is nominally based on the English law of the flag, but at the same time shipment in England is emphasized.

The ground on which British law would have been applied in *Franklin Fire Ins. Co. v. Royal Mail Steam Packet Co.* (D. C. S. D. N. Y. 1931) 54 F. (2d) 807, if it had been proved, is unknown. The cases cited in 2 WHARTON 1067 n. 14 for occasional application of the law of the flag are exclusively English.

³² *Liverpool etc. Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397, 449-453. See also *The Brantford City* (D. C. S. D. N. Y. 1886) 29 Fed. 373, 381, 384 (defending general maritime law against the law of the flag).

the first case, the domicil of the shipowner in Baltimore was expressly discarded; it was deemed of no importance since local connections of the carriage were at a considerable distance.³³ In the second case, the fact that the contract was concluded in New Orleans was declared immaterial because the contract was between an American and an Englishman for an ocean voyage of an English ship (to Europe).³⁴ In other decisions extending to a recent date, "our general maritime law" or "mercantile law" has been applied in lieu of foreign law recognized as governing, but not proved in the suit.³⁵ This is but another name for the *lex fori*.³⁶ No other use seems to have been made of this device, although admiralty jurisdiction covers a very large field³⁷ and commonly is said to imply federal law.³⁸

Evidently, the above-mentioned old decisions are no longer authoritative. As the editor of Wharton has noted, whereas once the courts resorted to general maritime law in order to eliminate foreign law, it is now possible for the law of the place of contracting (or what they so term) to govern, since all matters of public policy are being taken care of by the growing body of Congressional statutes on maritime law.³⁹

Lex loci contractus. Although the Harter Act and the Carriage of Goods by Sea Act (1936) apply to inward as well as outward maritime carriage, this extension of scope

³³ Naylor v. Baltzell (C. C. Md. 1841) 17 Fed. Cas. 1254 No. 10,061.

³⁴ Watts v. Camors (1885) 115 U. S. 353.

³⁵ The Ferncliff (D. C. Md. 1938) 22 F. Supp. 728, 1938 Am. Marit. Cas. 206; Blumenthal Import Corp. v. Brocklebank (C. C. A. 3d 1945) 148 F. (2d) 727, 1945 Am. Marit. Cas. 635; The President Monroe (1935) 156 Misc. 432, 286 N. Y. Supp. 990.

³⁶ The President Monroe (1935) 286 N. Y. Supp. 990.

³⁷ James Richardson & Sons v. Conners Marine Co. (C. C. A. 2d 1944) 141 F. (2d) 226. On the discretionary jurisdiction on a charter party between foreigners made abroad, see The Wilja, Dreyfus v. Wipu (C. C. A. 2d 1940) 113 F. (2d) 646, and for nonadmiralty cases, Kaufman v. John Block & Co. (D. C. S. D. N. Y. 1945) 60 F. Supp. 992.

³⁸ ROBINSON, Admiralty 27 § 5; GILMORE & BLACK 43 ff. § 1-17.

³⁹ 2 WHARTON 1069 f.

does not affect the problem of what law governs a contract of transportation in general. Characteristically, the Pomereene Act of 1916 has never been applied to bills of lading issued abroad for transportation to the United States. In fact, apart from the questions of liability imperatively regulated by the Acts of 1893 and 1936, it is commonly recognized that the law of the place of contracting has fundamental force in all contracts of transportation according to the great majority of American decisions.^{39a} However, more accurate inquiry is necessary. Just how strong is the rule? And if the ancient approach through a general contracts rule is no longer attractive, is the rule in this particular field supported by special considerations? No direct answer can be expected from the decisions; they are seldom articulate on policy.⁴⁰

The original authority for the application of *lex loci contractus*, it is submitted, is a decision dating from 1843, which justifies itself merely by the allegedly well-settled general rule, citing three cases not involving transportation.⁴¹ Since then, this test constantly appears as the normal connection, sometimes as a "strong presumption," not easily rebuttable.⁴² But close investigation reveals additional factors. Attempts at such an analysis have already been made by Wharton, whose result, however, that the true criterion adopted by the courts was the domicile of the shipowner, has been refuted by the editor of his own work, Parmele.⁴³ The latter suggested the importance of the commencement

^{39a} See Note, "Ocean Bills of Lading and Some Problems of Conflict of Laws," 58 Col. L. Rev. (1958) 212, 216 f.; SINCLAIR, "Conflict of Law Problems in Admiralty," 15 Sw. L. J. (1961) 1, 207, 214 ff.

⁴⁰ As BATIFFOL 240 n. 1 notes, the cases, excepting two named by him, even express their solutions as though they were simply applicable to any kind of contract.

⁴¹ Hale v. New Jersey Steam Navig. Co. (1843) 15 Conn. 538, 546, 39 Am. Dec. 398.

⁴² Grand v. Livingston (1896) 4 App. Div. 589, 38 N. Y. Supp. 490 (the case belongs to group (i) *infra*).

⁴³ 2 WHARTON 1055.

of the voyage.⁴⁴ Reviewed at present, the decisions of the last hundred years demonstrate that in the opinion of the courts the presumable intention of the parties governs and that this normally points to the place where, in the usual phraseology, "the contract was made." More accurately, the applicable law depends upon one of the following four situations:

(i) In most leading cases, the place of contracting is identical with the port of dispatch.⁴⁵ Statements of American courts may be found purporting to apply a supposedly well-settled rule: "The contract of carriage was entered into in Roumania and performance began there, but was to be completed in this country, and therefore the contract is governed by the law of Roumania."⁴⁶

(ii) In some cases, the law of the flag coincides with the above law.⁴⁷

(iii) In others, the law applied was that of the port of dispatch alone, expressly without reference to the *lex loci contractus*.⁴⁸

(iv) In a few decisions, other points of the journey are

⁴⁴ 2 WHARTON 1063, 1072.

⁴⁵ Liverpool etc. Steam Co. v. Phenix Ins. Co. (1889) 129 U. S. 397; The Majestic (C. C. A. 2d 1894) 60 Fed. 624; O'Regan v. Cunard Steamship Co. (1894) 160 Mass. 356, 35 N. E. 1070; China Mutual Ins. Co. v. Force (1894) 142 N. Y. 90, 36 N. E. 874; M. & T. Trust Co. v. Export S. S. Corp. (1932) 143 Misc. 1, 256 N. Y. Supp. 590 (still stressing only the place of contracting); The Iristo (D. C. S. D. N. Y. 1941) 43 F. Supp. 29, 1941 Am. Marit. Cas. 1744, aff'd (C. C. A. 2d 1943) 137 F. (2d) 619, 1943 Am. Marit. Cas. 1044, cert. denied, 320 U. S. 802.

Interstate: The Henry B. Hyde (D. C. N. D. Cal. 1897) 82 Fed. 681.

⁴⁶ The Constantinople (D. C. E. D. N. Y. 1926) 15 F. (2d) 97, 98, concerned with a passenger's contract but citing the Liverpool Case, *supra* n. 45.

⁴⁷ The Carib Prince (D. C. E. D. N. Y. 1894) 63 Fed. 266; The Titania (D. C. S. D. N. Y. 1883) 19 Fed. 101; The Frey (D. C. S. D. N. Y. 1899) 92 Fed. 667. The first two decisions apply English law, the third, French (though restricted by the Harter Act). The Dartford, Warren v. Britain S. S. Co. (C. C. A. 1st 1938) 1938 Am. Marit. Cas. 1548, applied English law to a bill of lading issued to the charterer; in addition the English form of a charter party was used.

⁴⁸ The Pehr Ugland (D. C. E. D. Va. 1921) 271 Fed. 340; The Cypria (D. C. S. D. N. Y. 1942) 46 F. Supp. 816, 1942 Am. Marit. Cas. 985, aff'd,

relied upon, these being regarded as places where performance occurs.

(a) In such connection, the place where the goods are damaged or lost appears decisive in several cases.⁴⁹ In one case, expressly, in others presumably, the court was anxious to reach the law of the forum. This view ought to be entirely abandoned; it is due to a confusion between contract and tort.

(b) In one case,⁵⁰ a vessel went from India to New York; part of the cargo was shipped in Colombo, Ceylon, and part in British India. Under the circumstances, the court discarded the Indian Carriage of Goods by Sea Act and without further motivation applied American law, i.e., the law of the forum, which was also the law of the port of destination.

(c) Apart from federal or New York public policy at the American port of destination with respect to clauses limiting carriers' liability,⁵¹ certain special problems have been considered, here as in other countries, as most closely attached to the port of arrival.⁵²

137 F. (2d) 326, 1943 Am. Marit. Cas. 947,—both expressly rejecting the foreign *lex loci contractus*. In the *Cyria Case*, the court could, however, rely on the express incorporation of the American Carriage of Goods by Sea Act.

⁴⁹ Most remarkable was the decision of the Pennsylvania Supreme Court in *Hughes v. Pennsylvania R. Co.* (1902) 202 Pa. 222, 51 Atl. 990 invalidating a New York exemption clause under the law of the forum, a decision strongly criticized by PARMELE in 2 Wharton 1056 n. 1, 1060 n. 2, 1063 n. 6, but followed in a railway case, *Zahloot v. Adams Exp. Co.* (1912) 50 Pa. Super. Ct. 238, where an exemption clause of Pennsylvania was declared valid under the law of New York, the place of loss of the goods by negligence in delivery.

Analogous, *Carstens Packing Co. v. Southern Pacific* (1910) 58 Wash. 239, expressly applying *lex fori*; *The Steel Inventor* (D. C. Md. 1940) 35 F. Supp. 986 under the peculiar circumstance that the bill of lading referred to the Indian Act (as of dispatch) as well as to the United States Act (as of destination); the court chose the latter, for a loss by unloading in Baltimore. *Louis-Dreyfus v. Paterson Steamships, Ltd.* (C. C. A. 2d 1930) 43 F. (2d) 824 reaches a similar result by adopting the splitting theory of the Restatement. This view is in the minority; cf., e.g., *The Miguel di Larrinaga* (D. C. S. D. N. Y. 1914) 217 Fed. 678. It is expressly rejected in *Carpenter v. U. S. Exp. Co.* (1912) 120 Minn. 59, 139 N. W. 154.

⁵⁰ *Duche v. Brocklebank* (D. C. E. D. N. Y. 1929) 35 F. (2d) 184. Against this argumentation, see *infra* p. 271.

⁵¹ Treated at length, Vol. II Ch. 33. In addition, see YIANNPOULOS, *Negligence Clauses in Ocean Bills of Lading* (1962).

⁵² See *infra* Ch. 44 n. 94.

3. Great Britain

For a long time, numerous Continental writers have been accustomed to point to an English rule that carriage is governed by the law of the flag the vessel flies.⁵³ They still regard this as an important confirmation of their analogous postulate. But the English authors who have contributed to this mistake have been more cautious.⁵⁴

In fact, the English decisions have applied the law of the flag to the extent of the authority given by the shipowner to the master so as to subject the shipowner as well as the cargo owner to liability.⁵⁵ Apart from this, there is only one case of somewhat doubtful bearing. In its famous decision of 1865, the Court of Exchequer Chamber extended the law of the flag to the question whether the charterer and cargo owner who had paid the deficiency amount on a bottomry bond burdening ship, freight, and cargo, could recover from the shipowner.⁵⁶ This not only involved the master's authority to issue a bottomry bond on the cargo but concerned also the liability to bear the burden so caused in the internal relationship between the owner and the cargo. It seems, therefore, a little optimistic for English judges subsequently to reduce the precedent of *Lloyd v. Guibert* to "such contracts as the master may be driven to

⁵³ This same mistake also happened to Duff, J., in the Canadian Supreme Court, in *Richardson v. "Burlington"* [1930] 4 D. L. R. 527, [1931] S. C. R. 76, while the majority emphasized the *lex loci contractus* and the domicile of the parties, the result being the same. 3 JOHNSON 475 hence should not have made an exception from the *lex loci contractus* prescribed in art. 8 of the Quebec C. C.

⁵⁴ Especially, FOOTE 429 and DICEY (ed. 7) 823 Rule 159.

⁵⁵ *The Karnak* (1869) L. R. 2 P. C. 505, and *The Gaetano and Maria* (1882) 7 P. D. 1, 137. Formerly, *Duranty v. Hart* (1863) 2 Moo. P. C. Cas. (N. S.) 289, (1864) B. & L. 253, 260, 272, invoked "the ordinary maritime law," in the Privy Council "the General Maritime Law."

⁵⁶ *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 128. Under the French law of the flag, the shipowner was freed by abandon of the vessel; under the other laws involved, he was not.

make by necessity in the course of the voyage."⁵⁷ In addition, the decision of the Exchequer Chamber proclaimed a far-reaching rule subjecting all liability for sea damage and its incidents to the law of the flag, and an advocate of this solution has contended that it could not be overruled by a decision of the Court of Appeal.⁵⁸

Nevertheless, it is quite obvious that the English courts do not feel bound by the rash pretensions of this old decision. This has been formally stated by Lord Merriman: "As regards the contract of affreightment as a whole, there is no necessary presumption that the law of the flag applies."⁵⁹ Thus, not even the often alleged presumption, easily displaced by counterinferences,⁶⁰ exists. This result is also amply supported by the cases, as pointed out by the Supreme Court of the United States as early as 1889.⁶¹ From the time when general maritime law was replaced by conflicts law, the English courts in reality have never considered any basic test other than the intention of the parties. It was most emphatically invoked in *Lloyd v. Guibert* itself and despite this precedent in all later cases.⁶² And in the other celebrated carriage case, *In re Missouri*, where the English law of the flag was applied, this was regarded as expressly intended, being supported by the

⁵⁷ Lord (then Sir Boyd) Merriman, in *The Njeges* [1936] P. 90 at 107, on the ground of the distinction made by the Court of Appeal in *The Industrie* [1894] P. 58. The opinion on the proper law is given, although the parties did not expressly request it (p. 107) "in case it may be of assistance" to them. In *The Assunzione* [1953] 1 W. L. R. 929, 937 f. Willmer J. also was inclined to take the position that the principle of the law of the flag only applies to said contracts of the master; *contra*: Hodson L. J. in the same case, see *The Assunzione* [1954] 2 W. L. R. 234, 261 ff. For comments, see KAHN-FREUND, 17 *Mod. L. Rev.* (1954) 255; CHESHIRE, 32 *Brit. Year Book Int. Law* (1955-6) 123.

⁵⁸ I forget the name.

⁵⁹ *Supra* n. 57.

⁶⁰ M. WOLFF, *Priv. Int. Law* (ed. 2) 435 § 416.

⁶¹ *Liverpool etc. Steam Co. v. Phenix Ins. Co.* (1889) 129 U. S. 397 at 449-453.

⁶² See esp. Lindley, L. J., in *Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.* (1883) 10 Q. B. D. 521 at 540.

terms of the contract and of the bill of lading as well as by the English port of destination; the Court of Appeals confirmed the decision on these grounds only.⁶³ The lack of preference for any fixed criterion has occasioned the complaint of an English admiralty judge that "there is abundance of authority for practically every proposition that has been put forward."⁶⁴ Nevertheless, there is a certain pattern in the prevailing decisions.

Courts have relied:

(i) On the English forms used in the charter party or the bill of lading.⁶⁵ Some decisions have expressly rejected inferences from the flag⁶⁶ and disregarded the place of contracting.⁶⁷ Others have mentioned only the English language or English documents in connection with the English port of destination.⁶⁸ It is recognized in England as well as everywhere else that language itself is no useful criterion. Such references presumably meant and at least today would have to be understood to mean the English style of maritime affreightment.

At least in one case the English form alone seems to have been decisive.⁶⁹

A judge of the Exchequer Court of Canada has applied

⁶³ *In re Missouri Steamship Co.* (1889) 42 Ch. D. 321.

⁶⁴ Langton, J., in *The Adriatic* [1931] P. 241 at 244.

⁶⁵ *The Industrie* [1894] P. 58, 73; *Aktieselskab August Freuchen v. Steen Hansen* (1919) 1 Ll. L. Rep. 393; *The Adriatic* [1931] P. 241; *The Njegos* [1936] P. 90, 106 f.

⁶⁶ *The Industrie and Adriatic cases*, *supra* n. 65.

⁶⁷ *The Adriatic and Aktieselskab etc. cases*, *supra* n. 65. In *The Assunzione* [1953] 1 W. L. R. 929, 938 f. the judge emphasized rightly that the place of contract in many cases is quite fortuitous.

⁶⁸ *The Wilhelm Schmidt* (1871) 1 Asp. Marit. Cas. (N. S.) 82; *The San Roman* (1872) L. R. 3 A. & E. 583, 592; *semble, Woodley v. Mitchell* (1883) 11 Q. B. D. 47, 51. The first two decisions have been criticized insofar as they involve agency of the master by necessity, which should have been determined by the flag, see editors of SCRUTTON, *Charterparties* (ed. 16) 25.

⁶⁹ *Aktieselskab etc.*, *supra* n. 65. But in *The Metamorphosis* [1953] 1 W. L. R. 543, 549 Karminski J. rejected the argument that the use of the English language in a charterparty or in a bill of lading is of specific significance; he regarded it as one of the matters which a judge has to consider.

American law, that is, the Harter Act, to a carriage of grain shipped from Buffalo, N. Y., to Montreal on a Norwegian ship on the ground that the contract was made in the United States and contained the "Jason Clause" necessary in this country but not necessary under Canadian or English law.⁷⁰

(ii) On the law of the place of contracting, either because the contract was made in England between domiciled parties or agents,⁷¹ or simply because the bill of lading was issued in an English port.⁷²

The preceding review of leading and other cases may show a certain preference for the application of English law, but they favor the *lex fori* even less than most other countries. They do not justify in the least the astounding pronouncement of Dicey that a contract for the carriage of persons or goods from or to England or by a British ship is *prima facie* governed by English law,⁷³ a statement that may have stimulated much particularism in other countries. In the light of a comparison with other courts, the English follow policies remarkably analogous to the general habits of courts elsewhere.

⁷⁰ *Bunge North American Grain Corp. and Fire Ass'n of Philadelphia v. SS. Skarp* [1932] Ex. C. R. 212. In regard to the (plaintiff) fire insurance association, it is added that its insurance certificates contain an express reference to the Harter Act. The law of the flag is eliminated.

⁷¹ *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 10 Q. B. D. 521 (English port of dispatch and English parties); *The Industrie* [1894] P. 58, 72 (charterparty made in London between an English broker of the German shipowner and a London charterer, in the usual form of English charterparties); *The Njegos* [1936] P. 90 (charterparty made in London in the "Centrocon" form between the English agent of a Yugoslav steamship company and the English branch of a French firm, agent of an Argentinian skipper); the bill of lading follows the presumable law intended in the charterparty.

⁷² *The St. Joseph* (1933) 45 Ll. L. Rep. 180, 28 *Revue Dor* (1933) 180: the shipowner contracts by accepting the goods against the bill of lading. Hence where this operation occurs, there the contract is made.

Canada: Melady v. Jenkins S. S. Co. (1909) 18 O. L. R. 251 (standard of pounds contained in a bushel).

⁷³ DICEY (ed. 5) 686 ff.; no statement of this kind can be found in DICEY (ed. 7) 822 ff.

4. France and Belgium

Many decisions of the Court of Cassation and the lower courts have with unusual consistency applied the law of the place of contracting.⁷⁴ This covers not only the form of charter parties and bills of lading but also the performance of the contract.⁷⁵ Originally this rule was declared imperative,⁷⁶ but it persists as a regular conflicts rule, susceptible of being replaced even by a presumable intention of the parties.⁷⁷

In a series of older cases, it is true, in France and still more so in Belgium, the law of the port where the goods arrive or should arrive, has enjoyed a more or less wide application.⁷⁸ It seems certain, however, that this tendency has been overcome, and the place of performance has significance merely as a device for special problems.⁷⁹

The reasons for emphasizing the place of contracting are inarticulate in the decisions, since the rules directly derive from the inherited general contracts principle. But the writers are conscious that this place is usually identical with the place where the goods are dispatched. If in rare cases

⁷⁴ Cass. civ. (Feb. 23, 1864) D. 1864.I.166 S. 1864.I.385; Cass. civ. (June 12, 1894) D. 1895.I.161, Clunet 1894, 806, 10 Revue Dor 147; Cass. req. repeatedly; Cass. civ. (Dec. 5, 1910) S. 1911.I.129, Revue 1911, 395, Clunet 1912, 1156 (on principle); for the many decisions of lower courts, see RIPERT, 2 Droit Marit. (ed. 4) §§ 1428 ff.; 5 LYON-CAEN et RENAULT 785 ff. §§ 843 ff.; 1 Répert. 275-278; VAN SLOOTEN 17-22. Recently, Trib. com. Seine (Jan. 22, 1942) Nouv. Revue 1943, 77 applied the French law of the place of contracting as a matter of course. In addition, see BATAIFFOL, Traité (ed. 3) 660 § 607 and recent cases cited there.

Belgium: App. Bruxelles (Feb. 6, 1900) 16 Rev. Autran (1900-01) 694; Trib. com. Antwerp (July 2, 1906) Jur. Port Anvers 1906.I.307; (Jan. 30, 1907) *id.* 1907, 180 etc.

⁷⁵ See BATAIFFOL § 284.

⁷⁶ Cass. civ. (Feb. 23, 1864) *supra* n. 74; *cf.* BATAIFFOL 258.

⁷⁷ Cass. civ. (Dec. 5, 1910) *supra* n. 74.

⁷⁸ The law of the port of actual discharge was proclaimed as a rule governing performance in Antwerp (Jan. 14, 1891) Jur. Port Anvers 1893.I.19; App. Gent (May 2, 1901) Clunet 1902, 390, 16 Rev. Autran (1900-01) 842 (as dated April 27, 1901); a very faulty decision, 2 FRANKENSTEIN 515 n. 66; Trib. com. Antwerp (Jan. 7, 1903) 18 Revue Autran (1902-03) 901.

⁷⁹ See *infra* Ch. 44 pp. 289-290.

the two places differ, the courts have been divided, but in the opinion of the lawyers expert in commercial law, the port of lading has been preferred.⁸⁰ The contrary choice of law is not supported by a decision of 1885,⁸¹ although it declared that the contract was completed in Norway by acceptance of an offer; in fact, Norwegian law was also indicated by the Norwegian flag and, above all, because the vessel was chartered for a transport from Norway to England.

The only significant doubt concerns the case where the parties are of common nationality. This the older writers were inclined to emphasize.⁸² But the practical inconveniences of discriminating among customers according to their nationality are particularly pronounced when goods are shipped by the same vessel or on the same voyage.⁸³ There is no case supporting such exceptional treatment.⁸⁴

5. Germany

In this field, the German courts have rarely employed their theory of splitting the contract.⁸⁵ But they have deduced from their principle of *lex loci solutionis* the rule that maritime affreightment contracts of all kinds are governed by the law of the port of destination. This rule has been claimed to possess the widest possible scope.⁸⁶ Nevertheless,

⁸⁰ FROMAGEOT, 18 *Revue Autran* (1902-03) 754 f.; 5 LYON-CAEN et RENAULT 792 § 850; RIPERT, 2 *Droit Marit.* (ed. 4) 345 § 1429.2; VAN SLOOTEN 30. *Contra*: CROUVÈS, 1 *Répert.* 268 n. 18 for the sake of the "general principle."

⁸¹ App. Douai (Nov. 10, 1885) 1 *Revue Autran* (1885-86) 360.

⁸² 1 FOELIX §§ 83, 96; 1 FIORE § 114; WEISS, 4 *Traité* 355, and others.

⁸³ Thus the experts on the subject, FROMAGEOT, 18 *Revue Autran* (1902-03) 749; 5 LYON-CAEN et RENAULT § 848.

⁸⁴ Of no concern in this connection is Trib. com. Rouen (April 23, 1888) 4 *Revue Autran* (1888-89) 31, cited by CROUVÈS, 1 *Répert.* 267 § 13, where the parties also signed a bill of lading in their country.

⁸⁵ Such a case is RG. (May 22, 1897) 39 RGZ. 65.

⁸⁶ ROHG. (May 30, 1879) 25 ROHGE. 192; RG. (March 21, 1883) 9 RGZ. 51; (May 25, 1889) 25 RGZ. 104, 107; (Oct. 24, 1891) 49 *Seuff. Arch.* No. 36; (May 2, 1894) 34 RGZ. 72, 78; and other old decisions; RG. (July 8, 1933) IPRspr. 1933, 51 (principle).

after the practice of the Reichsgericht had been subjected to stringent criticism,⁸⁷ experience also considerably modified this questionable theory. At present, the force of the principle may be regarded as seriously challenged, despite repeated contrary assertions in the German and interna-

This does not include, of course, the application of special laws to certain problems, e.g., of the law of the port of tional literature.

dispatch to questions connected with lading, but is the result of actual replacement of the official criterion. Often enough, the contract has been subjected to a law other than that of the port of destination:

(i) Contracting by ship brokers or other agents in London who use an English charter party form has consistently been recognized as indicating submission to English law,⁸⁸ quite as in the English case of *The Industrie*. This is not controverted by the fact that a contract of carriage made in London by the London branch of a Hamburg firm with the London broker of another Hamburg firm was determined under the German law. The form employed was printed in Hamburg, though in English, without references to English law, as was the usual document of the steamship agent in Hamburg whose name was carried at the head.⁸⁹ In one case, where a German form of a Nitrate charter party was used in a contract made in Germany, German law was applied, with the excuse that the port of destination, to be determined by the charterer, was uncertain.⁹⁰

⁸⁷ 2 BAR 219 n. 82; *id.*, Int. Handelsrecht 439; RIPERT, 2 Droit Marit. (ed. 4) 348 § 1432; 2 FRANKENSTEIN 517 f.

⁸⁸ RG. (Jan. 5, 1887) 19 RGZ. 33 (English law); OLG. Hamburg (Jan. 30, 1893) 14 Hans. GZ. 1893 HBL. 301, 4 Z. int. R. (1894) 353 (English law); RG. (April 4, 1908) 68 RGZ. 203, 209 (form of the Rio Tinto Company, Ltd. in London for its usual ore shipping from Huelva, Spain); RG. (Nov. 24, 1928) 122 RGZ. 316 (English law, intended by public policy based on HGB. § 614).

⁸⁹ RG. (Oct. 27, 1904) Hans. GZ. 1905 HBL. No. 28, 15 Z. int. R. (1905) 293-297.

⁹⁰ RG. (May 6, 1912) Leipz. Z. 1912, 548.

In another case, a charter party made in Germany concerning a voyage starting in Germany was regarded without hesitation as subject to German law.⁹¹

(ii) When persons of common nationality contract in their own country, the Reichsgericht is satisfied with their intention to have such country's law applied.⁹²

(iii) When an English ship was chartered in a German port for a voyage to Vladivostok, German law was applied.⁹³ The place of contracting and dispatch thus prevailed over the port of destination. In another case, the place of contracting and the nationality of the shipowner were theoretically mentioned as criteria.⁹⁴

(iv) Other exceptions have been unavoidable when the port of destination is uncertain. In the very frequent case where the port of destination is indicated optionally so as to include several places situated in different countries, such as a port in the United Kingdom or on the Continent between Le Havre and Hamburg, or on the North American and Canadian coast, not less than six solutions have appeared.⁹⁵ No port of destination is given in time charter contracts; the port of dispatch or the flag must substitute.

Forwarding agents. German law accentuates the particu-

⁹¹ RG. (Jan. 2, 1911) 75 RGZ. 95. The ship was English and the destination Vladivostok.

⁹² RG. (Sept. 27, 1884) 13 RGZ. 122 (German law); (April 29, 1903) Hans. GZ. 1903 HBl. Nos. 102, 229, 231, 20 Revue Autran (1904-05) 80 (English law; also the flag was English; English law implicit, although the right of the German holder of the bill of lading is distinguished); (Dec. 14, 1910) JW. 1911, 225, 22 Z. int. R. (1912) 182; 24 *id.* (1914) 319 (German law; also the port of destination was German); (Oct. 5, 1932) 137 RGZ. 301 (German law; German parties, through bill from a German place to another German place via Holland).

⁹³ RG. (Jan. 2, 1911) 75 RGZ. 95, 96, affirming OLG. Hamburg (Feb. 10, 1910) Hans. GZ. 1910 HBl. No. 76, correctly commented on by BATIFFOL 253 n. 2 against 2 FRANKENSTEIN 514.

⁹⁴ OLG. Hamburg (Feb. 13, 1934) Hans. GZ. 1934 Part B, 303 No. 94, IPRspr. 1934, 82 No. 38.

⁹⁵ SCHAPS-ABRAHAM, 2 Seerecht (ed. 3) 281 n. 39 before § 556 rejects connection with five advocated places, viz., the presumable port of destination, the port of distress, the order port, the place of contracting, and the domicile of the debtor, and accepts the law of the flag.

lar nature of freight agents contracting with carriers in their own name, in contrast with selling and buying agents or carriers. It is noteworthy that again the application of *lex loci solutionis* raises doubt. For the place where a *Spediteur* is to perform his duties to the shipper is in one view where he accepts and dispatches the goods,⁹⁶ and in another his commercial domicil.⁹⁷

6. The Netherlands^{97a}

The Law of 1924 amending the Commercial Code on the occasion of introducing the Hague Rules sought to enlarge and assure its own force.

The law declares a great number of its provisions as compulsory for all ships leaving a Dutch port and with a certain exception regarding clauses of exemption, even for ships destined for Dutch ports.⁹⁸ In addition, charters are subjected to certain provisions if the ship flies the Dutch flag even though they carry freight entirely outside of the Kingdom.⁹⁹ Only time charters are allowed to change this effect by selecting a foreign law.¹⁰⁰ This attitude exceeds even the maritime reservations of the United States laws, and in its extraterritorial scope covers duties newly imposed by the law.

Nevertheless, even this exercise of public policy is an exception and not the main rule involving carriage.¹⁰¹ So far as can be seen, the courts have quietly continued to apply

⁹⁶ RG. (Dec. 5, 1896) 38 RGZ. 194; Warn. Rspr. 1925, No. 33; RATZ in 5 RGR. Kom. HGB. (ed. 2) 118 § 407 n. 24 (where also two opinions are reported on the question concerning the place where the goods are redeliverable on request of the shipper).

⁹⁷ OLG. Kolmar (Feb. 12, 1914) 39 Els. Loth. J. Z. 603 as cited in LEWALD 220. LEHMANN in Düringer-Hachenburg § 383 n. VII.

^{97a} See OFFERHAUS, "Netherlands Maritime Law and the Conflict of Laws," 2 Arkiv for Sjørett (1954-57) 599.

⁹⁸ C. Com. (Wetboek van Koophandel) arts. 517d, 517y, 520t. One of these provisions, art. 517y, has been repealed by the Law of Aug. 15, 1955.

⁹⁹ Arts. 518g, 520f.

¹⁰⁰ Art. 518g.

¹⁰¹ Informative: Rb. Amsterdam (June 19, 1931) W. 12410, N. J. 1932, 177; I VAN HASSELT 414.

the customary principles of conflicts law.¹⁰² If the parties have not expressly agreed on an applicable law, their so-called intention is sought. The foremost theoretical criterion has remained the place of contracting, which, however, is used in at least two combinations, viz., (i) when the parties are of the same nationality and contract in their country,¹⁰³ or (ii) when a charter party is signed in London by the parties or their authorized agents, with English forms, the forms being more important than other criteria.¹⁰⁴

7. *Código Bustamante*

The Código Bustamante distinguishes between two types.

Contracts concluded by a carrier under his own conditions which the customer may only "accept totally" fall under the rule that "contracts of adhesion" are subject to the law of the carrier (art. 185).

¹⁰² See the long lists in I VAN HASSELT 361 ff.

¹⁰³ Rb. Rotterdam (March 15, 1922) N. J. 1923, 245, 248: bill of lading, the cargo was received in the United States on a United States-owned vessel, American law. Rb. Rotterdam (Feb. 23, 1932) *The Aslang*, W. 12537, 28 *Revue Dor* (1933) 370: charterparty concluded in Paris between the Paris agent of the Danish shipowner and a French company, French law; Rb. Amsterdam (Dec. 23, 1932) N. J. 1933, 953: English insurance company suing a Dutch carrier for damages is barred by Dutch limitation of action because the insured shipper was a Netherlander, evidently contracting in Holland. In Rb. Amsterdam (June 19, 1931) *supra* n. 101, Dutch law applied, as the Dutch parties contracted in the Netherlands for a Dutch vessel destined for a Dutch port.

¹⁰⁴ Hof s'Gravenhage (Nov. 14, 1913) W. 9615, N. J. 1914, 429; *id.* (June 19, 1914) N. J. 1914, 1256; Rb. Rotterdam (Dec. 14, 1928) N. J. 1930, 622: only the carrier was English, the charterer being the Soviet Corn Export Co., Ltd. in Moscow, but the ship was English and both charter and bills of lading were in English style. Rb. Rotterdam (Jan. 14, 1929) N. J. 1929, 1361, reversed on other grounds, App. Hague (April 25, 1930) N. J. 1930, 1111: the captain of a United States-owned vessel letting it while in Antwerp harbor to an Antwerp firm for a voyage from Antwerp to a British port; the parties must have had the English law in view, as the charter party was in the typical English maritime contract form; Rb. Rotterdam (Oct. 29, 1930) W. 12729, N. J. 1934, 631, I VAN HASSELT 423: voyage charter, a German coal concern hiring from an Italian shipowner, through London brokers, the vessel shall take the coal in Rotterdam and carry it to Ancona. Contrarily, Rb. Rotterdam (Oct. 16, 1935) N. J. 1936, No. 59 correctly discards American law but fails to justify why Dutch rather than English law should govern the charter party.

An affreightment not being of this category is governed by the law of the place from which the goods are dispatched (art. 285). But "acts of performance" are placed under the law of the intended place of performance (art. 285 par. 2).

Local laws and regulations are reserved (art. 199).

8. Latin-American Public Policy

Law of the place of performance compulsory. In important codes, the idea that a contract performable in the territory must be treated under the domestic law,¹⁰⁵ has been repeated¹⁰⁶ for special application to contracts of transportation.¹⁰⁷ The place of making the contract¹⁰⁸ and the nationality of the ship are immaterial for this purpose, although the texts strangely speak only of "foreign" ships, which could mean that contracts involving domestic ships are all under an imperative *lex fori*. In the prevailing view, the parties can not validly agree on a foreign court.¹⁰⁹

Law of the place of contracting compulsory. In Chile, the domestic law is forcibly applied to affreightment "on foreign ships" made in a port of the Republic although the master be a foreigner.¹¹⁰

¹⁰⁵ Vol. II (ed. 2) p. 423.

¹⁰⁶ Thus, art. 1091 of the Argentine Commercial Code is only a special application of art. 1209 C. C. (new 1243); MALAGARRIGA, 7 Cód. Com. Coment. 137.

¹⁰⁷ Argentina: C. Com. art. 1091; S. Ct. (Nov. 5, 1870) 9 Fallos 492, 495.

Brazil: C. Com. art. 628.

Paraguay: C. Com. art. 1091.

Uruguay: C. Com. art. 1270.

¹⁰⁸ Brazil: Sup. Trib. Fed. (July 23, 1930) 16 Arch. Jud. 5, 99 Rev. Dir. 287 (foreign bill of lading).

¹⁰⁹ Argentina: The majority of the Cám. Fed. Cap. (June 6, 1906) Sáens v. Mala Real, affirmed the right of prorogation, although a dissenting vote allowed it only where delivery and payment are agreed to be made abroad. But S. Ct. (Nov. 16, 1936) 36 Revue Dor (1937) 100 has decided for the prohibition.

Brazil: Not allowed, Sup. Trib. Fed. (May 6, 1925) 83 Rev. Dir. 327 No. 269.

¹¹⁰ Chile: C. Com. art. 975 par. 1.

Maritime Carriage of Goods: Comparative Conflicts Law

I. THE CONTACTS

1. Obsolete Connections

(a) *General maritime law*. The modern English cases no longer mention general maritime law with respect to transportation of goods. In the United States its only remaining role seems to be to substitute for foreign law that is not proved; so the term is just another word for *lex fori*.¹

(b) *Place of accident*. Another connecting factor no longer seriously to be considered is the place where the goods are lost, destroyed, or damaged. This local connection enjoyed some favor in American² and other³ courts, but has nothing to recommend it with respect to a voyage contractually assumed by one carrier on one vessel. Only by confusion of tort and contract could such a view originate in actions sounding in contract.

The following local connections are used in the absence of a law agreed upon by the parties which is respected everywhere, at least in principle (*supra* p. 247).

¹ *Supra* Ch. 43 pp. 248, 253.

² *Supra* Ch. 43 p. 252 at n. 49.

³ Belgium: Trib. Antwerp (April 26, 1939) Rechtskund. WB. 1939, c. 409 No. 82: a stipulation limiting to 10 centimes per kilogram the liability of the carrier, cannot be applied in case of negligent maintenance of the ship according to the Dutch C. Com. art. 470 (applied through reference in art. 748), the Belgian law being replaced by the law of the country where the damage occurred.

2. The Flag

The often-assumed preference of English courts for the law of the flag to govern affreightment contracts, if it ever existed, disappeared long since.⁴ Much less has it been a feature of American⁵ and other laws until very recently. Even the reference to the nationality of the ship as an additional clue to the presumable intention of the parties, once popular,⁶ has practically vanished.

It is difficult for me to ascertain to what degree the stipulations in bills of lading for the law of the flag flown by the ship have remained in usage. Such clauses may be reasonable and useful to a certain extent, although courts have to view the problem under quite different considerations in the absence of a party agreement.

Nevertheless, it is remarkable that the principle abandoned by the courts has encountered increasing favor with writers of various countries.⁷ They had restricted success in the Dutch law reform of 1924, but quite recently two Italian writers advocating the law of the flag⁸ scored a full victory in the present Code of Navigation (1942) providing that "contracts of hire, charter, or transport are governed by the national law of the vessel or the aircraft, in the absence of a different intention of the parties."⁹

⁴ *Supra* pp. 253-256.

⁵ *Supra* p. 248 n. 32. But see for Denmark, BORUM and MEYER, 6 *Répert.* 225 No. 91.

⁶ England and the United States: See *supra* pp. 251 n. 47, 254, *infra* p. 266. Canada: *Moore v. Harris* (1876) 1 App. Cas. 318: bill of lading made in England and English ship.

Germany: RG. (April 14, 1920) 98 RGZ. 335.

⁷ France: FROMAGEOT, 18 *Revue Autran* (1902-03) 742, 766 f.; RIPERT, 2 *Droit Marit.* (ed. 4) 347 § 1468; J. EYNARD, *La loi du pavillon* (1926) 164; BATAIFFOL 247 f.

Germany: BAR, *Int. Handelsrecht* 439; 2 FRANKENSTEIN 518, 523.

Italy: See next note.

⁸ SCERNI 208; MONACO 135.

⁹ Art. 10, Disp. Prel. to the Codice della Navigazione of 1942. See MAKAROV, "Das internationale Recht der See- und Luftschifffahrt im italienischen Schiffahrtsgesetzbuch von 1942," 15 *RabelsZ.* (1949/50) 50, 59 f.

The arguments advanced for this view have always culminated in two incontestable advantages. In the first place, this principle avoids differentiating goods delivered to the same ship on one voyage according to the nationality or domicile of each shipper, or to the individual places of shipping or arrival. In the second place, the law indicated by the flag, besides being uniform, is easy to recognize for all persons interested and usually regarded as the only one familiar to the master. This assuredly means superiority over the many uncertainties connected with the place of destination. For the Italian solution, it has been added that this principle secures each of the national maritime laws its application in exact proportion to the respective country's participation in the world traffic—an argument truly reminiscent of the ideals once proclaimed by Mancini's theory of the national law. Would Italy, without this antecedent, have been converted to the law of the flag?

However, if the virtues of this device are so obvious, how could they have escaped the attention of the courts in practically all countries? Why did the Anglo-American judges desert this temporarily much-considered rule? One answer was given as early as 1886 by an American admiralty judge. "Practically," he said, "the extreme rule (of the law of the flag) would require all merchants to acquaint themselves, at their peril, with all the details of the municipal law of every nation with whose ships they might deal, even in ordinary commercial transactions; certainly a most onerous, if not impracticable, requirement."¹⁰ This, it is true, has only the merit of making us aware that every test, including that of the flag, burdens some of the parties involved with the dangers of ignoring the applicable law. Why the courts prefer the law of the port of dispatch to that of the flag,

¹⁰ Brown, J., in *The Brantford City* (D. C. S. D. N. Y. 1886) 29 Fed. 373, 385.

is a matter of guessing but the fact itself shows that the nationality of the vessel is not regarded as eminently important. With the modern expansion of shipping, the major ports have a constant stream of incoming and outgoing vessels; great uniformity of conditions and tariffs prevails in the shipping pools; and nautical skill appears in comparable equivalence. The date and place of sailing, adequate space facilities, and personal acquaintances are of greater weight than the registration of the ship. Freight may be handled by a broker without naming a ship or even a line. A maritime agent may announce to his clientele the next outgoing vessels and their destination but issue the bills of lading on his own form for an unnamed shipowner.¹¹ Or, acting for a shipping pool, he may accept the goods without determining which line will take care of the carriage.¹² All this confirms an insight taught by the history of commercial law. In our time, by a complete change from ancient economic organization, an enterprise of transportation on the sea is an entity almost independent from the individual ships and the persons performing navigation and carriage. If a particular vessel is agreed upon at all, providing the vessel has become a collateral rather than a principal duty.¹³

These may be speculative reasons for an irrefutable phenomenon. But there is one certain disadvantage of applying the law of the flag in foreign countries, which the courts must have felt in some way. If the law of the ship governs the contract and the bill of lading as a whole, its provisions are added to the imperative prescriptions of the *lex fori*. Moreover, prohibitions such as those directed against

¹¹ The *Iristo* (D. C. S. D. N. Y. 1941) 43 F. Supp. 29 at 35, *supra* Ch. 43 n. 45, calls this a "haphazard manner of conducting such a large business."

¹² See for the same situation in air carriage, LEMOINE, *Traité de droit aérien* (1947) 396.

¹³ See the forceful summary of development by GARRIGUES, *Curso de derecho mercantil*, II, 2, esp. 740.

clauses of exemption from liability have to be applied internationally if they are the law in the country of the port of dispatch. In the United States and a few other countries, a court would also have to observe, in addition to the law of a foreign place of dispatch and the law of the flag, large portions of its own law if the goods are deliverable in the country. Business and courts do not even consider complicating the situation in such a manner. The simplicity imagined by the advocates of the flag does not materialize.

Except for its lighthearted adoption in the hasty Italian compilation of 1942, the law of the flag is positively pertinent only by express agreement and in such problems as the authority of the master¹⁴ and the limitations on the shipowner's liability.¹⁵ It has been deliberately disregarded in the Brussels Convention on bills of lading, with the result that shipping in foreign trade even in vessels registered in the United States is not subject to the law of the flag.

3. Domicil of the Shipowner

Some writers have expressed sympathy with the personal law of the carrier, that is, his domicil, rather than that of the ship.¹⁶ The shipping companies, it is argued, are vitally interested in a uniform legal treatment of their affreightments, and uniformity cannot be guaranteed except by the law of their headquarters. This view has been adopted by some German decisions and writers,¹⁷ and the Swiss Federal

¹⁴ England: *The Industrie*; *The Njegos*; and for other countries, see *supra* p. 150.

Denmark: Trib. marit. and com. Copenhagen (Dec. 23, 1931) 28 *Revue Dor* (1933) 215 applies the Greek law of the flag simply to the authority of the master in deciding how to protect the cargo.

¹⁵ France: 5 LYON-CAEN et RENAULT § 268.

¹⁶ 2 MEILI 369; BAR, 2 *Int. Handelsr.* 438 (as to the carrier's duties). ROLIN, 3 *Principes* 259 § 1243; RAAPE, *IPR.* (ed. 5) 479 f.; *cf.* on land transportation, the unanimity of the European doctrine, BATIFFOL 104 § 118. *Inst. of Int. Law*, 22 *Annuaire* (1908) 291, art. 2 (j).

¹⁷ See NUSSBAUM, *D. IPR.* 231 and n. 2.

Tribunal.¹⁸ The same opinion, in the terms of the theory of *contrats d'adhésion*, appears in the *Código Bustamante*¹⁹ and in the Yugoslav Maritime Law of 1959.^{19a}

The logic of this theory is challenged as usual by the American antimonopolistic tendency. Above all, it is true for affreightment what in 1841 Judge Taney said with less foundation about the law governing the authority of a master to make a charter.²⁰ He refused to take into consideration that the shipowner resided in Maryland, for one thing because Baltimore had no part in the conclusion of a charter in Chile for carriage to England, and again, because the domicil of one party is not competent to determine his own rights and duties in a contract. As in this case, the main office of the owner or carrier may be far distant from the scene envisaged by the acting persons. With what justification can a contract made in Argentina with the Argentine agent of a French shipping company be subjected to French law?²¹ The courts in Argentina are certain not to follow this law.

These objections are avoided by the international commercial Treaty of Montevideo, of 1889, article 9, making affreightment dependent on the domicil of the maritime agency that concludes the contract. If, however, the maritime agency is situated at the port of dispatch, or in the same country as this port, the result is adequate not because of the location of the agency but because the port is situated there. For if, on the other hand, the provision should mean that

¹⁸ BG. (July 12, 1922) 48 BGE. II 281 f.; cf. OSER-SCHOENENBERGER 1608 n. 11; 2 SCHNITZER (ed. 4) 725; BG. (Jan. 20, 1948) 74 BGE. II 81, 85.

¹⁹ Código Bustamante, art. 185.

^{19a} According to this statute (art. 132 par. 2) the law of the carrier's domicil applies to a contract of affreightment provided that it is an adhesion contract; other contracts of affreightment are governed by the *lex loci contractus*. See CICOJ, "Jugoslawische Kollisionsregeln des Seefrachtvertrages," 6 Osteuropa-Recht (1960) 97, 103 f.

²⁰ Naylor v. Baltzell (1841) 17 Fed. Cas. 1254 No. 10,061.

²¹ This remark is borrowed from LEMOINE 395.

Argentine law governs when an agent in Buenos Aires contracts for transportation from Montevideo to Brazil, this does not make sense.²²

The section is remarkable only in the fact that in this instance the Treaty of Montevideo abandons its tenaciously predicated *lex loci solutionis*.

4. Place of Contracting

The law of the place of contracting is the prevailing principle in the American courts,²³ the declared French rule,²⁴ and probably the favorite approach in many countries,²⁵ including Italy until its recent legislation.²⁶ It is also sometimes resorted to in individual embarrassing cases.²⁷

Yet, the familiar objections to the mechanical *lex loci contractus* are increased in this special application by the absurdity of a maritime contract naturally governed by the tradition of the seafaring nations, depending on the law of an inland shipper who happens to be in the role of accepting the offer sent by a shipping agent.²⁸ On the other hand, in the inverse case where a carrier through his local agent

²² BUSTAMANTE, Manual 372.

²³ *Supra* pp. 249-252.

²⁴ *Supra* pp. 257-258.

²⁵ E.g., Belgium: *Supra* p. 257 n. 74.

Brazil: Implication of C. Com. art. 628, *cf.* Sup. Trib. Fed. (May 6, 1925) 83 Rev. Dir. 326.

The Netherlands: C. Com. art. 498 (old), changed from former systems, see VAN SLOOTEN 15; at present prevailing rule of the courts, see *supra* p. 261 f.

²⁶ Italy: Cass. (Oct. 15, 1929) Riv. Dir. Com. 1930 II 529; Cass. (June 8, 1933) Rivista 1933, 492; App. Genova (June 17, 1932) Monitore Trib. 1932, 860, 9 Z. ausl. PR. (1935) 217; App. Trieste (May 30, 1933) Rivista 1933, 250; Trib. Livorno (March 29, 1941) Dir. Int. 1941, 275 (expressly against the law of the flag).

²⁷ England: *Supra* p. 256.

Germany: *Supra* p. 259 f.

²⁸ LYON-CAEN et RENAULT 793 § 850 and, following them, authors who advocate the law of the flag, have availed themselves of this convincing argument by illustrating it with Swiss shippers not having any maritime law. During the last war, however, Switzerland used a fleet of its own and provided it with an emergency legislation drawn from the international conventions and usages. This legislation has been replaced by the Swiss Shipping Act of Sept. 23, 1953; see *supra* Ch. 43 ns. 6, 10.

in the usual course of business accepts applications for transport written on his own standard form, the law of his country is favored not because his agent there completes the contract by signing, but because he will dispatch the goods therefrom.

5. Port of Destination

Under the guidance of Savigny's *lex loci solutionis*, the German courts proclaimed the law of the port of destination for charter parties as well as ordinary affreightments.²⁹ This doctrine, as seen above, could not be maintained,³⁰ and with the exception of Greece, has only sporadically been followed in other countries.³¹ The Treaty of Montevideo has repudiated it.³²

Under a one-sided public policy, it is true, certain Latin-American codes impose themselves on foreign-governed carriages to domestic ports.³³ The motives are very similar to the true background of the German practice. This, either in the result³⁴ or by intention,³⁵ protects the German consignees in overseas trade against foreign rules less favorable to innocent holders of bills of lading.

Technically, the alleged rule has often been criticized as impracticable whenever the ship sails with optional or uncertain orders or when it does not reach its destination. From a commercial point of view, the situation should not differ for a particular ship's journey, possibly for the same

²⁹ *Supra* Ch. 43 p. 258.

³⁰ *Supra* Ch. 43 pp. 258-261.

³¹ E.g., Belgium: App. Gent (May 2, 1901) Clunet 1902, 390 (*lex fori*) and other cases; *supra* p. 257 n. 78.

Greece: See 2 STREIT-VALLINDAS 252 n. 38.

The Netherlands: C. Com. art. 498 (old); Rb. Rotterdam (Jan. 23, 1907) Clunet 1912, 291.

³² Actas de las Sesiones 560, allegedly because there is no one place of performance, cf. SEGOVIA, El derecho internacional privado y el Congreso sudamericano de Montevideo (1889) 78.

³³ Vol. II (ed. 2) p. 422 n. 123; *supra* Ch. 43 n. 107.

³⁴ NUSSBAUM, D. IPR, 283.

³⁵ RAAPE, IPR. (ed. 5) 480.

shipper, according to the various foreign places to which the goods are sent. Although the intended place of delivery may have importance in certain respects for the rights of the consignee or holder of the bill of lading, it certainly does not deserve to qualify the entire contract.

6. Port of Dispatch

Much of our preceding survey has shown the sound tendency of practice to localize carriage in the port where the goods are brought into the custody of the carrier and the bill of lading is issued.³⁶ The introduction of the Hague Rules has furnished an important, though scarcely noticed, support to this theory. To illustrate the attitude taken by most member states of the Brussels Convention, the British Carriage of Goods by Sea Act, 1924, section 1, applies the Hague Rules to "the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland." Since the Rules themselves are restricted to "contracts of carrying covered by a bill of lading or any similar document" (article I b), the English Act is applicable under two conditions, viz., that carriage starts in England and that it is covered by a bill of lading. It is immaterial at what place the contract of affreightment may legally be regarded as concluded. This method of viewing affreightment is just what the courts must have in mind when they emphasize the place of contracting in the same breath with the port of dispatch.

Furthermore, the Dutch law demands application of numerous provisions to carriage from Dutch ports rather than to affreightments made in Holland.³⁷ And a strange provision of the Soviet law is only explainable by the same

³⁶ *Supra* Ch. 43 ns. 45 ff., 71 f., 80, 93, 98; Código Bustamante, art. 285; Restatement (Second), Tent. Draft No. 6 (1960) § 346 n.

³⁷ The Netherlands: C. Com. arts. 470, 517d, 520t.

idea. The Maritime Code applies (in the absence of party agreement for a foreign law) to all transports from Russian ports, but to those from foreign to Russian ports only in suits before Soviet courts.³⁸ This means evidently that foreign judgments applying the law of the port of dispatch, if no party is a Soviet national, will be recognized.

Sometimes this same port has been fitted into the conventional pattern by terming it the place where, in addition to the contracting, the commencement of the performance by the carrier occurs.³⁹ In other cases, doctrinal appearances were saved by emphasizing the beginning of transportation as the most important part of the performance. On the other hand, legal construction seems to have helped some writers to prefer the port of dispatch to the place of contracting if situated in different countries; they have followed the theory reminiscent of the Roman *receptum nautarum*, which conceived the contract of affreightment as a kind of real contract, requiring for its formation the delivery of the goods to the carrier.⁴⁰ All these overly technical considerations are beside the point. The administrative provisions of all kinds imposed on outgoing vessels also affect the business of shipping and the activities of maritime agents. The stricter policy of the maritime states has been implemented by imperative rules of private law such as those restraining exemption clauses in carriage from their ports. This is the background on which the entire operation is deemed to be centered at the place where the goods are delivered for carriage by sea and the all-important bill of lading, or possibly a bill of receipt for lading, is issued.

The most serious objection to this solution might be borrowed from the old argument against the law of the

³⁸ See Merchant Shipping Code, *supra* Ch. 43 n. 13a, art. 4 (b); FREUND, *Das Seeschiffahrtsrecht der Sowjetunion* (1930) comments that probably the port of dispatch is thought to be usually identical with the place of contracting.

³⁹ E.g., *The Pehr Uglund* (D. C. E. D. Va. 1921) 271 Fed. 340.

⁴⁰ Thus, probably 5 LYON-CAEN et RENAULT 792 § 850.

place of contracting: goods loaded on the same ship in several ports should not be subjected to different laws. But this disharmony is easily remedied by a clause in the bills of lading stipulating for the same law. Furthermore, dispatch is at least an indisputable fact, whereas the place of contracting is not, and it is in the nature of a sea voyage touching several countries that the law under which goods are accepted may vary.

7. Subsidiary *Lex Fori*

The Soviet Maritime Law resorts to the law of the forum in the absence of an express party agreement on the applicable law in any of the following cases: whenever the transport is between Russian ports or from Russian to foreign ports; if both or even only one of the parties is a Soviet citizen or juristic person, even though the transport may run between foreign ports; and if the suit is decided in a Soviet court, with respect to transport from a foreign to a Russian port.⁴¹ The last provision gives the foreign law of the port of dispatch a slight concession.⁴²

8. Public Policy

The law of the forum is prescribed for certain problems with respect to outgoing vessels everywhere; with respect to outgoing and incoming vessels in the United States,⁴³ Holland,⁴⁴ and Belgium;⁴⁵ for the entire contract with respect to outgoing vessels in Chile;⁴⁶ and to incoming vessels in Argentina and Brazil.⁴⁷ This list is not exhaustive, of

⁴¹ Merchant Shipping Code, *supra* Ch. 43 n. 132, art. 4 (b); *cf.* FREUND, *Das Seeschiffsrecht der Sowjetunion* (1930) 59, 70.

⁴² *Supra* n. 38.

⁴³ Carriage of Goods by Sea Act, 1936, § 13, *cf.* Vol. II (ed. 2) p. 422.

⁴⁴ C. Com. art. 517d, *cf.* Vol. II (ed. 2) p. 422 n. 122.

⁴⁵ C. Com. art. 91, *cf.* Vol. II (ed. 2) p. 422 n. 119.

⁴⁶ C. Com. art. 975 par. 2.

⁴⁷ Argentina: C. Com. art. 1091.

Brazil: Introd. Law, art. 9; C. Com. art. 628. and see *supra* p. 263 n. 107.
Treaty of Montevideo on Navigation (1940) art. 26.

course.⁴⁸ The climax is reached by the Maritime Code of French Morocco; all its provisions concerning the rights and duties of the parties to a carriage "apply to every transport destined to or originating in the ports of the French zone of Morocco," even though the bill of lading or document of carriage is issued abroad, between foreigners, or the parties stipulate that the contract of transport should be governed by a foreign law. Any stipulation of this kind is null and void.⁴⁹

9. Conclusion

Comparative observation results in some positive conclusions on the subject.

(a) *Ordinary carriage*. In the first place, the legislative situation of the maritime countries and the circumstances of the modern line steamers have promoted a universal tendency of the courts towards a conflicts rule that gives prevalence to the law of the port of dispatch. The law of the flag is no longer important, even in England. In Germany the law of the port of destination has been practically abandoned as the general law of the contract. The few remains of the mechanical conception of *lex loci contractus* can easily be assimilated to the really significant rule.

(b) *Charter parties*. In the second place, it follows that all conflicts rules of the world used on this subject are wrong when they are applied as in the current theories to all con-

⁴⁸ For the normal application of the Hague Rules, in case of outgoing vessels, see Vol. II (ed. 2) p. 422 n. 119. The scope of application of these Rules is comprehensively discussed in YIANNPOULOS, *supra* Ch. 43 n. 51; GÖRTZ, "Der zwingende Geltungsbereich der Haager Regeln nach anglo-amerikanischem Recht," 121 Z. Handelsr. (1958) 47; NECKER, *Der räumliche Geltungsbereich der Haager Regeln* (1962); SIESBY, "What Law Governs Carrier's Liability According to a Bill of Lading?" 5 Arkiv for Sjørett (1961) 417.

⁴⁹ French Morocco: Dahir of March 31, 1919, art. 267; LOUIS RIVIÈRE, 3 *Traité des codes et lois du Maroc* (1925) 880. After obtaining their independence, the former French territories in Africa with the sole exception of Morocco adopted new Maritime Codes; see BOBOLZA, "Aperçus sur le Code de commerce maritime tunisien," 14 D. M. F. (1962) 760.

tracts of transportation, if not even to demises. The above assumed rule has justification only when a bill of lading or "a similar document" is issued. It does not have any bearing on charter parties.

The question of the law adequate to charter parties has in fact given rise to most of the litigation reviewed above. Actually, the method regularly followed by the courts, American, English, German, and others, is always the same, the so-called method of cumulating connecting factors. Frequently, the courts indulge in another common tendency, the inclination toward the *lex fori*. But we also encounter a common preference for the English law when the parties are represented in the great center of vessel chartering in London, and the contract is made there on a standard form of the trade.

It would seem that in otherwise doubtful cases it is again the formulary from which the charter has been printed that decides to which country's legal environment a charter party belongs. But when the same blank form is uniformly used in several countries, or throughout the world, as has been achieved by successful efforts for unification in our time, this argument loses its value.⁵⁰

Negatively, it is also certain that in a charter party the ports are totally immaterial,⁵¹ except when a vessel lying in a foreign port is let by the master to a local charterer. Indeed, if an English firm in Calcutta charters a Norwegian ship lying in the port of Calcutta for a voyage from the Straits Settlements to San Francisco, the latter locations

⁵⁰ This point of view would justify, for instance, the Appeal Court of Memel (Oct. 11, 1934) 10 Z. ausl. PR. (1936) 142, applying the law of the forum to a charter party concluded in Memel on the "Baltwood" form of 1926 between a Danish and a French firm, both represented by a local broker with loading and dispatching to be in Memel.

⁵¹ "While bills of lading are ordinarily given at the port of loading, charterparties are often made elsewhere," Willes, J., in *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 127.

do not support conflicts consideration; the place of contracting ought to prevail.

A new problem arises when a charter party is governed by a law other than that of the country in which a bill of lading is issued. In this case we shall see that if possible the former law is deemed to extend to the bill.

II. SCOPE OF THE LAW OF THE CONTRACT

I. In General

On principle, the law governing any maritime transportation of goods covers conclusion, effects, and termination of the contract. These include such problems as the common law presumption that a charter party is not a demise, the nature of warranties and conditions, the liability of the shipowner and of the charterer for delay in delivery, damage and loss of the goods, the exemption clauses, the obligation to pay freight, the remedies for breach or recovery accorded by law or agreement, and the question whether an action is in rem or in personam.⁵² "Particular average" is nothing else than damages, subject to the law of the contract.⁵³

The most important of all clauses, the stipulation eliminating or lessening the carrier's legal liability, as earlier

⁵² Treaty of Montevideo on Int. Com. Law (1889) art. 22.

That limitation of liability, so differently organized at present, should be classified as substance, but is unfortunately treated as a procedural incident, has been indicated in the discussion of torts, Vol. II (ed. 2) pp. 352 ff. For a case demonstrating the monstrous effects of the procedural theory, see KNAUTH, "Renvoi and Other Conflicts Problems in Transportation Law," 49 Col. L. Rev. (1949) 3. A most recent example of this theory in a non-maritime tort case is provided by *Kilberg v. N.E. Airlines* (1961) 9 N. Y. (2d) 34, 172 N. E. (2d) 526; the true basis of the case is a strong public policy of the forum, see *Davenport v. Webb* (1962) 11 N. Y. (2d) 392, 230 N. Y. Supp. (2d) 17 and *Gore v. N. E. Airlines* (D.C.S.D.N.Y. 1963) 222 F. Supp. 50.

⁵³ Cf. *The Constantinople* (D. C. E. D. N. Y. 1926) 15 F. (2d) 97, 98 regarding a passenger's suit for breach of contract).

discussion of this subject has shown, is also subordinated to the law governing the contract in general.⁵⁴

Illustration. Cotton was shipped on an English vessel from New Orleans to Le Havre. The bill of lading contained a clause that delivery of the goods should be taken by the consignee along side board. When fire destroyed a part of the goods piled on the quay, the effect of the clause was tested under American and French law.⁵⁵ In the prevailing and correct view, the American law alone should have been decisive.

This liability of the shipowner based on the contract and covered by the law of the contract, as may be recalled, is concurrent with his liability for tort.⁵⁶

The following applications deserve discussion.

2. Formalities of Contracting

Although the charter party derives its name from the deed on which it was written, neither this contract nor an agreement of carriage need be in writing to have legal existence. But writing is often required for evidence⁵⁷ and as such is subject to the conflicts rules on form, mainly the rule *locus regit actum* in its various shades.

In the absence of recognized usages, however, the governing law alone decides whether the shipper is entitled to

⁵⁴ Vol. II (ed. 2) pp. 420 ff.

Cf. United States: Liverpool etc. Steam Co. v. Phenix Ins. Co. (C. C. E. D. N. Y. 1889) 129 U. S. 397; HERZOG, "Validity of Contracts Exempting Carriers in Interstate and Foreign Commerce From Liability," 11 Syracuse L. Rev. (1959-60) 171, 185 f.

France: Cass. civ. (June 12, 1894) S. 1895.1.161; 5 LYON-CAEN et RENAULT 791 n. 1.

⁵⁵ Trib. Le Havre (April 18, 1899) 15 Revue Autran (1899-1900) 101.

⁵⁶ Vol. II (ed. 2) pp. 290 ff.

See especially RG. (May 28, 1936) 151 RGZ. 296.

⁵⁷ E.g., France: C. Com. art. 273, *cf.* 5 LYON-CAEN et RENAULT 553.

Italy: Cass. (July 14, 1938) 40 Revue Dor 354; C. Navig. (1942) arts. 377, 385, 420.

Peru: C. Com. art. 665: form of the "póliza de fletamento."

Soviet Russia: Merchant Shipping Code, *supra* Ch. 43, n. 13a, arts. 75, 121, *cf.* FREUND, Das Seeschiffsrecht der Sowjetunion (1930) 37.

demand a bill of lading (as in the United States and Germany);⁵⁸ how many parts a set of bills should have; whether the costs of the bill are common or whom they burden. Significantly, the German courts, contrary to their main rule calling for the law of the port of destination, are forced to determine by the law of the port of dispatch whether the master has to issue a bill of lading.⁵⁹

In the Soviet Union it is prescribed that affreightment contracts must be registered; if they are made abroad, they have to be registered with the Soviet consul. This provision is sanctioned not by nullity of the contract but by the prohibition for the vessel to enter or leave a Russian port.⁶⁰ Hence, this is no formality; failure may be a cause of non-performance.

3. Interpretation of the Contract

“Construction” of the contract as a whole, of course, is subject to the law governing the latter.⁶¹ For example, the frequent clause in an English charter party saying that the master will sign the bill of lading as presented by the shipper without prejudice to the charter party, has been construed in a German court according to English law.⁶²

But also in respect to certain terms, courts have developed detailed presumptions which apply in connection with and apart from usages. Thus, the French doctrine expounds that the law of the place of contracting which governs the contract also determines what is meant by “tons,” although if freight is measured by “tons delivered,” the law of the

⁵⁸ United States: Harter Act, § 4; Carriage of Goods by Sea Act, 1936, § 3 (3).

Germany: HGB. § 642.

⁵⁹ RG. (Dec. 5, 1887) 20 RGZ. 52, 61; cf. SCHAPS-ABRAHAM, 2 Seerecht (ed. 3) pp. 562 ff.

⁶⁰ FREUND, Das Seeschiffahrtsrecht der Sowjetunion (1930) 13, 67 f.

⁶¹ SCRUTTON, Charterparties (ed. 16) 20 ff., art. 7, treats the conflicts law under this denomination.

⁶² OLG. Hamburg (Feb. 9, 1910) 26 Revue Autran (1910-11) 215.

port of destination is competent to complete the meaning.⁶³ As to usages, apart from the local customary rules for loading, unloading, and delivery, customs of trade are continuously admitted to "explain ambiguous mercantile expressions"⁶⁴ under the general conditions for reading them into the contract. We may repeat that the universal use of English clauses is not a reference to English law.⁶⁵

Illustration. A charter between German parties held to be governed by German law contained the familiar English cesser and lien clauses. What the combination of these two clauses means, was investigated by the German Reichsgericht⁶⁶ under the rule of the BGB., § 133, prescribing search for the true meaning of terms, although the result conformed to the interpretation of the clause found in Carver's Carriage of Goods by Sea.

4. Rights Flowing from a Bill of Lading

The relationship between an affreightment and the bill of lading is rarely examined in conflicts law, perhaps because the subject is not all too clear in most municipal systems. Attention is focused if not exclusively on the general doctrine of negotiable instruments, preferentially on the function of commercial instruments in the transfer of title in the goods rather than their obligatory aspect. Our solution can merely be tentative.

(a) *Formalities* of issue and endorsement are undoubtedly governed by the rule, *locus regit actum*. Whether the bill is special, to order, or to bearer should simply be determined on the same principle; but this is a controversial matter of more general nature.

(b) *The authority of the master.* It is universally settled

⁶³ App. Rouen (Dec. 30, 1874) Clunet 1875, 430; 5 LYON-CAEN et RENAULT 790 n. 2; for the term "management," see Trib. com. Marseille (May 6, 1892) Clunet 1892, 1149; cited by all writers.

⁶⁴ SCRUTTON, Charterparties (ed. 16) 26.

⁶⁵ Vol. II (ed. 2) p. 536.

⁶⁶ RG. (Dec. 14, 1910) JW. 1911, 225.

that the master's power to determine the conditions for a bottomry on the cargo, or even to pledge the credit of the cargo owner, etc. are subject to the law of the flag. But does this law also decide who is bound by the master's signing the bill of lading?

Illustration. A New York corporation, time charterer of a Norwegian vessel, let it under subcharter to the Canadian Ocean Dominion Corporation. The vessel took cargo in Halifax, N. S., and later in St. Joseph, N. B., and the master signed bills of lading by a formula causing litigation on the question who was obligated by them, the shipowner, the charterer, or the subcharterer. The American court held, correctly, that Canadian, not Norwegian nor American, law decided and therefore under the circumstances only the shipowner was liable to the holder.⁶⁷

(c) *The effects of endorsement* are determined by the law of the place of endorsement, according to the principles of negotiable instruments.⁶⁸ When a bill of lading was issued and endorsed in blank in Czarist Russia, and so sent by the shipper to the buyer in France, the French court recognized that under the then Russian law a blank endorsement did not protect any holder against defenses which the carrier could oppose to the shipper.⁶⁹

(d) *Remaining problems.* What law, however, decides the main body of questions, such as the conditions of holding in due course? Or the extent to which the right of an innocent holder, or the right of the carrier for the payment of the freight, stipulated in the bill, is independent of a preceding contract between consignor and carrier not referred to in the bill? What law determines the effect of the much-employed abbreviated references in the bill to a charter party? Is it the law of the contract? The problem is not the same as in the case of a bill of exchange or promissory note.

⁶⁷ The Iristo (D. C. S. D. N. Y. 1941) 43 F. Supp. 29.

⁶⁸ E.g., Greece: App. Athens (1925) No. 418, 37 Themis 378.

⁶⁹ App. Bordeaux (Jan. 24, 1880) Clunet 1881, 358.

The rights embodied in a bill of lading are nowhere regarded as independent of the consideration given therefor; at most, as in German law, they are isolated from the affreightment by the formal writing, and in many jurisdictions even this theory is not accepted.⁷⁰

Law of the port of destination. For a court presuming that the law of the port of destination is intended by the parties, a part of the problem is removed. The most justifiable feature of the German port of destination doctrine⁷¹ is the argument that the rights of the holder ought to be safeguarded by the law of the country where he is entitled to request delivery of the goods. In a French appreciation of this doctrine,⁷² it has been observed that the successive parties not involved in the original transaction are interested only in the place of prospective delivery. The effects of the instrument on transfer of title and the right of obtaining physical possession of the goods, are thus united under the same law.

Likewise, if the right of the carrier against the receiver for payment of the freight, is assigned to the law of the port of destination, it may simultaneously be based on the bill of lading and on the contract or the acceptance of the goods. The Reichsgericht needlessly construed the rights of the carrier towards the consignee as flowing from the acceptance of the goods rather than from the contract and therefore as subject to a separate conflicts rule.⁷³ However, the

⁷⁰ For recent treatment in Italy, see MESSINEO, 2 I titoli di credito 173; SCORZA, 2 La polizza di carico (1936) 218 § 265.

⁷¹ Last decision (according to the "General Register," vols. 161-170) 169 RGZ. 257, 259, with the understanding that the bill of lading may refer to another law such as that agreed upon in the affreightment contract.

Also the Greek practice before the Code of 1940 shared this doctrine, see 2 STREIT-VALLINDAS 253 f. n. 41, on the basis of *lex loci solutionis*.

Since World War II the former Reichsgericht's doctrine has been corroborated by the highest West German court; see BGH. (Sept. 26, 1957) 25 BGHZ. 250, IPRspr. 1956-57 No. 57a) at 208 and cases cited there.

⁷² BATIFFOL 255 § 281.

⁷³ RG. (April 29, 1903) Hans. GZ. 1903 Hbl. No. 102, 20 Revue Autran (1904-05) 80.

criticism that the right of the carrier, flowing from acceptance according to § 614 of the German Commercial Code, is not independent of but substantially identical with the right created between the original parties, is a domestic-minded theory.⁷⁴ The conflicts rule should cover any rights accruing to and against third beneficiaries, however the municipal theory construes them.

It may be appreciated that by such method the same law will control the effects of both contract and bill of lading, in defining the position of a person who is consignee and holder. But the unity of law so gained is lost in another respect.

For it has admittedly been impossible to extend the law of the port of destination to the creation of bills of lading. Even the German courts determine the substantive conditions for the formation of such bills under the law of the place where the instrument is issued.⁷⁵ The Reichsgericht has also admitted that the laws of the contract and of the bill may differ on the ground of the intention of the parties.⁷⁶ But this is true under any theory.

Law of the port of dispatch. When the governing law of the affreightment is taken from a place where the contractual relationship begins, the solution is less easy. American decisions do not answer the question squarely, but it is safe to assume that they apply the same law, termed *lex loci contractus* in affreightment, also to the creation and effects of bills of lading. The Italian practice before the new Code of Navigation was outspoken to this effect.⁷⁷

It was again the odious privilege of the German Reichs-

⁷⁴ 2 FRANKENSTEIN 523, arguing on the German HGB. § 614.

⁷⁵ SCHAPS-ABRAHAM, 2 Seerecht (ed. 3) 563; WÜRDINGER in 4 RGR. Kom. HGB. (ed. 2) 194 Vorbem. vor § 373 n. 180a.

⁷⁶ RG. (Nov. 24, 1928) 122 RGZ. 316.

⁷⁷ Cass. (May 25, 1926) Rivista 1927, 112 (limitation of action); App. Trieste (May 30, 1933) Rivista 1933, 250 (validity of clause of jurisdiction).

gericht to deviate from this natural idea. In an old case,⁷⁸ a bill of lading was signed by the master of an English ship at Bombay, himself and the shippers being Englishmen. There was no question but that English law governed the contract. The bill stated the loading of a certain cargo and promised to deliver it in Hamburg. But through a fraud for which one of the shippers subsequently was jailed, the goods were not brought on board. The court refused to apply the English rule that the master cannot bind the ship-owner by signing bills of lading for goods that were never shipped at all,⁷⁹ and other English defenses of the owner. It asserted the German protection of an innocent purchaser of the bill, whenever the destination is a German port. This result was precariously based on the old fiction of the debtor's spontaneous submission to the law of the foreign place of performance, simply by his agreeing to perform at that place. But the court went farther and placed the German rule under a compulsory public policy, namely the rule that the bill of lading constitutes, as between the owner and the holder in good faith, obligations independent of the carriage contract and unconditionally performable, whenever delivery is due in Germany.⁸⁰ This one-sided policy, though approved by certain authors,⁸¹ and not overruled,

⁷⁸ RG. (May 2, 1894) 34 RGZ. 72. No such preoccupation is visible in the earlier decisions of ROHG. (March 28, 1879) 25 ROHGE. 93 (English law for the charter party because of the form used; fire exemption clause in both the charter party and the bill of lading, but English construction prevails over (old) German HGB. art. 659). But ROHG. (May 30, 1879) 25 ROHGE. 192 in a case of goods in fact not shipped, rejected an alleged usage in Wilmington, N. C., allowing the signing of bills of lading before embarkation of the goods on the ground of German law; RG. (Dec. 5, 1887) 20 RGZ. 52, in view of an analogous usage of New Orleans, held it pertinent whether the holders acquiring the bill knew that in fact it was only a bill received for shipment.

⁷⁹ SCRUTTON, *Charterparties* (ed. 16) 70 and n. (c). The contrary German rule prevails also in the United States, *Uniform Bills of Lading Act, 1909*, § 23; *Pomerene Act, 1916*, § 22, *cf.* KNAUTH, *Ocean Bills of Lading* (ed. 4) 174 f.; and e.g., in Italy, see Cass. (March 22, 1934) *Foro Ital.* 1934 I 929.

⁸⁰ 34 RGZ. at 79; RG. (Sept. 24, 1910) 74 RGZ. 193, 194.

is an erratic element in the recent practice of the German courts.⁸²

Rationale. For the holder of the bill of lading, the goods are of primary concern. Where the goods will be, or ought to be, when discharged from the vessel and delivered at the end of the maritime voyage, is eminently important for him. But consignees and holders of the bill are not the only interested persons. In the eyes of the insurance company in the country of dispatch and of the banker financing the seller, the port of arrival may be a very far distant place, often an uncertain one, and ordinarily not a familiar contact.

At any rate, the law governing the contract of carriage should extend to the bill of lading in the following cases:

(i) An express reference in the bill of lading to a specific law takes care of the question for everyone concerned.

(ii) Where the bill of lading refers to the conditions in use by the carrier, or to a charter party, concluded either between the parties to the bill or between the shipowner and the carrier, it is natural that one law ought to govern the entire relationship. Such a reference effectively lessens the independence of the instrument, allowing the holder to oppose defenses outside the bill of lading. The problem has arisen in the English cases.

An English decision of 1933, though strangely complicated, shows the tendency to subject a charter party and the ensuing bill of lading to one law, "in deviation from the law where the goods were exchanged against the bill of lading," which would normally have governed the relationship between the shipowner and the holder.⁸³

⁸¹ Lastly, NUSSBAUM, D. IPR. 284 n. 1.

⁸² In RG. (Nov. 24, 1928) 122 RGZ. 316, 319 embarrassment is recognizable.

⁸³ The St. Joseph (1933) 45 Ll. L. Rep. 180, 28 Revue Dor (1933) 180. As far as I understand, Belgian law, in principle, as the law of the port of dispatch and issuance of the bill of lading, would govern the relationship between the Norwegian shipowner and the holder, the Guatemalan government. But the charter party between the owner and the French charterers

A thorough study, however, was given to the question by the admiralty counsel and judges in *The Njegos*.⁸⁴ The charter party was clearly subject to English law—made in London by agents of the parties (Yugoslav shipowners and a French company) in English on the Chamber of Shipping River Plate (“Centrocon”) form, and in addition containing the usual English arbitration clause. The bills of lading, in English form and English language, were issued in Buenos Aires for destinations in Norway and Denmark. The bills incorporated “all the terms, conditions, and exceptions” of the charter party, “including the negligence clause,” but were not deemed to include the arbitration clause. The receivers of the goods, Norwegian or Danish nationals, acquired the bills. The President, Sir F. B. Merriman, speaking for the court, held that “the sensible business man must be assumed to intend that the contract shall be read with the English interpretation which admittedly attaches to the charter party as such, though that interpretation is nowhere expressly stated, but it is to be inferred from several indications. . . .”⁸⁵

A recent Italian writer, Scerni, has given attention to the subject. He also thinks that where the parties enjoy full freedom in selecting the law, their intention is that the reference in a bill of lading to a charter party includes the applicable law.⁸⁶

did not refer to Belgian law and the bill was declared nonnegotiable; the Hague Rules were not even implicitly referred to in the bill, therefore the Belgian limitation of the shipowner's liability (Hague Rules) was not applied.

⁸⁴ *The Njegos* [1936] P. 90.

⁸⁵ *Id.* at 105.

⁸⁶ SCERNI 219. Assuredly, SCERNI denies party autonomy to the then Italian commercial law (art. 58 C. Com.), a wrong thesis in my opinion, and inadequately requires an express stipulation for the applicable law in the charter party or the model bill of lading printed in the charter.

A relevant argument is to be found in a Dutch decision, *Rb. Rotterdam* (Oct. 16, 1935) N. J. 1936, No. 59, upholding an obligation of the holder of the bill to pay the freight at the value of gold dollars before the American depreciation. The charter party made in London with a clause for arbitration

Where the bill of lading fails to refer to a previously written document, so as equitably to justify extension of the law concerned to the bill, it is logical to keep the choice of law for both sources of obligation separate. The parties may easily remove this by any clause admitting uniformity.

5. Distance Freight

Under English and American basic conceptions, the carrier has to perform an entire undertaking for a specific sum.⁸⁷ Freight is owed only on proper delivery. Consequently, in case of disaster at sea, if no goods are salvaged, no freight is due. Of course, more recently, usual clauses, such as "freight to be deemed earned, ship or goods lost or not lost," reverse the situation.⁸⁸ In most civil law countries, on the contrary, at least the part of the freight proportional to the voyage accomplished at the place of loss, is regarded as earned.⁸⁹ This distinction is very well

in London evidently was governed by English law. But the bill of lading issued in a Dutch port by a Dutch line to an American corporation referred merely "to all the conditions and exceptions and liberties contained in the charter-party"; this was not to be extended either to arbitration or to English law, and Dutch law applied. The court, however, argued on the basis of the presumable intention of the parties.

⁸⁷ Blackburn, J., in *Appleby v. Myers* (1867) L. R. 2 C. P. 650 at 661, as used by SCRUTTON, *Charterparties* (ed. 16) art. 146.

⁸⁸ On the broader meaning of this clause in a case including all freight due at destination, see *Pope & Talbot, Inc. v. Guernsey-Westbrook Co.* (C. C. A. 9th 1947) 159 F. (2d) 139, 141.

⁸⁹ E.g., France: C. Com. art. 296 par. 3.

Italy: C. Com. (1882) art. 570; C. Navig. (1942) art. 436 is interpreted to the same effect by BRUNETTI, *C. Navig. Marit.* (1943) 2057 n. IX. Cf. Trib. Livorno (March 29, 1941) *Dir. Int.* 1941, 275 (applying the Italian *lex loci contractus* on the ground of the former art. 58 C. Com. against the different German law stipulated.

Spain: C. Com. art. 623.

Argentina: C. Com. art. 1088.

Mexico: C. Com. art. 737, etc.

Germany: C. Com. §§ 630, 631, 641.

Japan: C. Com. art. 613; new C. Com. (1938) art. 760.

Sweden: *Marit. Law*, art. 129, the measure of the freight conditioned by the circumstances.

recognized and has been a subject of drafts of unification from 1907.⁹⁰ It has been unanimously understood in the courts of the world that the solution depends on the law governing the contract of affreightment which is prevailingly the law of the "place of contracting."⁹¹

This is a perfect example of universal agreement.

6. Right of Payment for Freight after Delivery

Whether a lien on the cargo should be regarded as a property interest remains subject to the *lex situs* or depends on the law of the flag, according to theories not to be discussed here. But commercial liens in favor of the freight are always based on obligatory rights. A case in the Italian courts furnishes an excellent illustration.

An Italian firm, subsequently in bankruptcy, chartered by contract made in London a ship of the Italian shipping company "Garibaldi." The cargo was unloaded on the dock in Genoa. According to Italian law (C. Com., 1882, art. 580), the captain was not entitled to retain the goods but could enforce a claim for the freight. Under English law, however, a master waives the lien by delivering the goods without requiring payment. The Appeal Court⁹² and the Supreme Court⁹³ did not hesitate to apply English law as the *lex loci contractus*. The Italian ship should hence have retained the goods contrary to the Italian legal provision, considered imperative in municipal law. It was also imma-

⁹⁰ BERLINGIERI, *Verso l'unificazione del diritto del mare* (1932) 142.

⁹¹ United States: *China Mutual Ins. Co. v. Force* (1894) 142 N. Y. 90, 36 N. E. 874.

England: *The Industrie* [1894] P. 58; *The Adriatic* [1931] P. 241.

France: App. Douai (Nov. 10, 1885) 1 *Revue Autran* (1885-6) 360; 5 LYON-CAEN et RENAULT § 849.

Germany: RG. (April 4, 1908) 68 RGZ. 203, 209.

Anglo-German Mixed Arb. Trib. (Oct. 14, 1927) 7 *Recueil trib. arb. mixtes* 432, 434.

⁹² App. Genova (June 17, 1932) *Monitore* 1932, 860, 9 Z. ausl. PR. (1935) 217.

⁹³ Cass. (June 8, 1933) *Foro Ital.* 1933 I 938, *Rivista* 1933, 492, 28 *Revue Dor* (1933) 349.

terial that the act in question was closely connected with delivery.

III. SPECIAL LAWS

1. Port Regulations

There seems to be universal agreement that local provisions and usages in both the port of dispatch and that of arrival are determinative of the rights of the parties with respect to the technical operations of loading and unloading.⁹⁴

This rule extends to the formalities to be fulfilled with the authorities;⁹⁵ the beginning, interruption, and speed of loading and unloading,⁹⁶ in particular the lay days, when the contract is not specific;⁹⁷ the method of stowage;⁹⁸ the computation of weighing expenses and allowance of expenses, when loading is difficult;⁹⁹ the procedure for formal ascer-

⁹⁴ United States: *The Dartford* (C. C. A. 1st 1938) 1938 Am. Marit. Cas. 1548, 1555 (whether Saturday is a half holiday in Boston), citing *Holland Gulf S. S. Co. v. Hagar* (D. C. E. D. Pa. 1903) 124 Fed. 460, 463; *Pool Shipping Co. v. Samuel* (C. C. A. 3rd 1912) 200 Fed. 36.

England: *The Thortondale, Hick v. Tweedy* (1890) 63 L. T. R. 765—C. A., 6 *Revue Autran* (1890-91) 474, 7 *id.* (1891-92) 327; *lex loci contractus* governs, but the usages of the port where the charter party ought to be performed determine such questions as at what moment a vessel is ready for loading, provided that the usages are recognized also by the foreigners using the port.

France: 5 LYON-CAEN et RENAULT § 851.

Germany: SCHAPS-ABRAHAM, 2 *Seerecht* (ed. 3) 280 n. 33 before § 556.

Italy: DIENA, 2 *Dir. Com. Int.* 358 § 167; SCERNI 209.

The Netherlands: C. Com. art. 517d par. 2 *cf.* art. 458 (old) of the C. Com.

⁹⁵ CROUVÈS. 1 *Répert.* 269 No. 24; Cass. civ. (April 12, 1938) D. H. 1938, 369.

⁹⁶ Quebec: C. C. art. 2460.

⁹⁷ Belgium: Trib. com. Antwerp (Nov. 15, 1905) 22 *Revue Autran* (1906-07) 537; whether the excuse of torrents of rain is allowed for delayed action; 25 *id.* (1909-10) 404.

France: FROMAGEOT, 18 *Revue Autran* (1902-03) 742; 5 LYON-CAEN et RENAULT § 851; 2 DE VALROGER § 690; but see as to certain citations of cases, VAN SLOOTEN 23 f.

Germany: OLG. Hamburg (Nov. 11, 1889) 45 *Seuff. Arch.* 258; (March 27, 1913) *Hans. GZ.* 1913, HBL. 181 No. 86.

⁹⁸ 5 LYON-CAEN et RENAULT § 851.

⁹⁹ Italy: Cass. (Oct. 15, 1929) *Riv. Dir. Com.* 1930 II 529, *cf.* RHEINSTEIN, 5 *Z. ausl. PR.* (1931) 845.

tainment of damage, etc.¹⁰⁰ The local standards also govern the rights of the carrier against a shipper who fails to deliver the goods to the vessel on time.¹⁰¹ Such rights to demurrage¹⁰² do not depend on the question whether the duty to pay for delay in loading or unloading beyond the permitted period is construed as a supplement to the freight (as in the French courts) or as damages (according to the prevailing conception).¹⁰³

Since, however, the contract may dispose of all these questions, it may also, under certain circumstances, be deemed to refer these to the law governing the contract in general.¹⁰⁴

2. *Lex Loci Solutionis*

(a) *Modalities of performance.* According to its usual role, the law of the place of performance governs modalities of delivery of the goods¹⁰⁵ and of payment of the freight.¹⁰⁶ The currency of payment is also included.¹⁰⁷ Whether the master has to give notice before unloading¹⁰⁸ and in what manner the bill of lading has to be tendered¹⁰⁹ belong to the same category.

The law in force at the port of arrival thus serves as *lex loci solutionis* to the same effect as in its function just

¹⁰⁰ Trib. com. Bordeaux (April 19, 1888) 4 *Revue Autran* (1888-89) 299; see VAN SLOOTEN 30.

¹⁰¹ Germany: *Handelsg. Hamburg* (July 24, 1872) HGZ. 1872 HBL. No. 226.

¹⁰² In *U. S. v. Ashcraft-Wilkinson Co.* (D. C. N. D. Ga. 1927) 18 F. (2d) 977, reversed on other grounds (1929) 29 F. (2d) 961, the suit involving demurrage is decided without hesitation under American law, the vessel, probably Italian, having arrived in Savannah.

¹⁰³ See on the controversy, 5 LYON-CAEN et RENAULT 728 § 797.

¹⁰⁴ Swedish S. Ct. (May 11, 1939) *Nytt Jur. Ark.* 1939, 247 No. 69; charterparty made in Sweden between Swedish parties, lay days in a German port, Swedish law; cf. SCHMIDT, *Revue Crit.* 1948, 430.

¹⁰⁵ Trib. Marseille (March 8, 1838) *Jur. Mars.* 1838.1.246.

¹⁰⁶ 5 LYON-CAEN et RENAULT § 851.

¹⁰⁷ 3. DESJARDIN 658 § 840; Trib. com. Marseille (June 25, 1895) *Jur. Mars.* 1895.1.262, cited 1 *Répert.* 277 No. 89.

¹⁰⁸ 1 VAN HASSELT 364. The question is answered in the negative in England in the absences of stipulation, SCRUTTON, *Charterparties* (ed. 16) 138, 337.

¹⁰⁹ *Rb. Rotterdam* (Oct. 16, 1935) *W.* 1936 No. 59.

mentioned *sub* (1). Other formulations are more doubtful.

(b) *Broader statements*. In one formulation, the law of the port of arrival embraces everything involving discharge of the vessel, receipt of the goods, and measures regarding damage and deficiencies.¹¹⁰ The German Reichsgericht, restricting its old rule of the law of the port of destination, still favors it as a special law for various problems.¹¹¹

The *Código Bustamante* provides that "The acts of performance of the contract (of affreightment) shall be effectuated in conformity with the law of the place where they should be performed." (art. 285 par. 2)

It is uncertain, however, whether this formula really intends to include more than the rules expressed *supra* (1) and (2) (a). But it does not go so far as a new section of the Montevideo Treaties submitting the "contract" to the law of the place of performance if the latter is in a member state.¹¹²

Finally, some writers, followed temporarily by a few decisions, have applied the theory by which the contract is divided into conclusion and performance.¹¹³ Under the former Italian Commercial Code, this was the doctrine of the courts,¹¹⁴ until the Court of Cassation liberally recognized the foreign *lex loci contractus*.¹¹⁵

¹¹⁰ I SMEESTERS and WINKELMOLEN 393.

¹¹¹ Germany: RG. (Nov. 24, 1928) 122 RGZ. 316 defines the scope of the law of the port of destination, when the contract is generally governed by another law, as including: the provisions conforming to the mercantile convenience of holders of bills of lading (thus bowing to 34 RGZ. 72, 80, see *supra* p. 284 n. 78); the modalities of discharge; and the provisions involving the conditions under which rights and obligations accrue between carrier and consignee in the meaning of the German C. Com. §§ 614 ff. It would seem that all these problems are still treated as subject to public policy. Whether this would be the attitude at present, I venture to question.

¹¹² Montevideo Treaty on Navigation (1940) art. 26, *supra* n. 47.

¹¹³ ASSER-RIVIER, *Eléments* § 33; FROMAGEOT, 18 *Revue Autran* (1902-03) 744; 5 LYON-CAEN et RENAULT § 851; 1 *Répert.* 269 No. 21.

Belgium: Trib. com. Antwerp (Jan. 14, 1891) *Jur. Port Anvers* 1893.1.19; and App. Gent (May 2, 1901) *Clunet* 1902, 390. In both cases, loss on the open seas, law of the Belgian port of destination or discharge, respectively; Trib. com. Antwerp (Jan. 7, 1903) *infra*.

¹¹⁴ Italy: C. Com. (1882) art. 58; App. Trieste (May 31, 1932) *Rivista*

Although the Restatement utilizes the same divisive method, Judge Learned Hand in his well-known judgment in a carriage case¹¹⁶ has been less outspoken in defining the scope of the law of the place of performance. Repeating the alleged rule that the initial validity and interpretation of a contract are governed by the law of the place of making the contract, but that any breach or nonperformance is governed by the law of the place of performance, he nevertheless started his own investigation by the observation that "the boundaries of this doctrine are not easy to find." The issue, moreover, was whether a grain shipment from Duluth to Montreal with transshipment in Pt. Colbourne was subject to American law with respect to the entire distance or was governed by the Canadian Water-Carriage of Goods Act with respect to a loss occurring in the Canadian port. The decision derives the latter answer from the fact that the carrier¹¹⁷ was in the course of performing his duty in Canada when the negligence of his servant occurred. But this formalistic language reveals the idea that the carrier, by promising transportation to be made first in the United States and then in Canada and stipulating for exoneration from negligence was subject to the American public policy invalidating the clause only so long as the goods were moving to the border. This idea is certainly not far from the intentions of the carriers in through routes, as we shall observe. Personally, I think the decision, as to the result, is right.

Of course, from such a point of view, the contrary construction is not excluded, viz., to the effect that the entire

1934, 583, 28 Revue Dor (1933) 349: maritime carriage from France to Italy; notice of damage in Italy has to observe Italian C. Com. art. 415.

¹¹⁵ Cass. (June 8, 1933) *supra*.

¹¹⁶ *Louis-Dreyfus v. Paterson Steamships, Ltd.* (C. C. A. 2d 1930) 43 F. (2d) 824, 826, *cf.* Vol. II (ed. 2) pp. 467, 541 n. 80.

¹¹⁷ The second ship, carrying the goods from Pt. Colbourne was chartered by the defendant's agent, and therefore the defendant carrier was liable for the ship "as for his own."

contract is subject to the American law because it was centered here. This conclusion would be nearer to the tendency of the great majority of American decisions applying the *lex loci contractus* to every problem.

However, which construction to prefer is evidently a matter of interpretation of the contract, and this *interpretation* is a legal matter belonging without doubt to the law governing the contract or, in the language of the American judges, including Judge L. Hand, to the law of the place of contracting.

Unfortunately, no such justification can be furnished for a subsequent decision of the Second Federal Circuit Court,¹¹⁸ which comprises within the scope of "performance" the question whether the carrier's misdelivery of the goods is a breach, and whether this excuses the cargo owner from giving notice of nondelivery within five days after discharge, as stipulated. The court assigns these questions in the instant case to German law, a decision that is in all too perfect harmony with the ill-reputed German doctrine. The effect of a contractual clause in the case of events not foreseen by the parties is a problem of contractual construction and has nothing to do with the place of performance. In this case the rules and regulations of Hamburg properly determined only the conduct of the carrier's agent for the purpose of delivery; no question of this sort was involved.

A firmer grip on these exceptions to the general law of the contract is urgently needed.

The overwhelmingly prevailing conception extends the unitary law of the contract to the existence, excusability, and effects of nonperformance. It would seem also that a stipulation exempting the carrier from damages under certain circumstances on the ground of misdelivery belongs to this scope.¹¹⁹

¹¹⁸ *Bank of California, N. A. v. International Mercantile Marine Co.* (C. C. A. 2d 1933) 64 F. (2d) 97.

¹¹⁹ To this effect, *M. & T. Trust Co. v. Export S. S. Corp.* (1932) 256

(c) *Custody in case of refused acceptance.* A case decided by the German Supreme Court is a good illustration. A German, having sold 2000 pairs of bicycle pedals to a buyer in Birmingham, England, contracted with an agent in Hamburg for their carriage which was performed through the Hamburg agent of the General Steam Navigation Company by steamer to Norwich, from there by the Great Eastern Railway to the station at Curzon Street. The buyer refused to accept the goods, and the railroad notified shipper and consignee that the goods were stored at the sender's risk at the railway depot. Delivery was finally delayed by servants of the railway. The Court, applying English law, stated that the duty of custody owed by the carrier on the ground of the affreightment contract was terminated when the buyer refused to accept the goods in a reasonable time, and hence the Hamburg agent was not liable for subsequent events.¹²⁰

(d) *As imperative law.* We have encountered the law of the place of performance as necessarily governing the liability of carriers in transports to the ports of the United States, Belgium, and, conditionally, the Netherlands;¹²¹ the entire contract in Argentina and Brazil;¹²² and various problems in Germany.¹²³

Chile, where affreightments made in a Chilean port are subject to the *lex fori*, moreover, imposes its domestic law "as to everything regarding the unloading or any other act that should be done on Chilean territory." (C. Com. art. 975 par. 2)

None of these last three extravagances is compatible with international reciprocity.

N. Y. Supp. 590, reversed, 259 N. Y. Supp. 393, re-aff'd (1933) 262 N. Y. 92, applies American federal law as *lex loci contractus*, as against the law of French Morocco as *lex loci destinationis*. See also *infra* n. 124.

¹²⁰ RG. (April 10, 1901) 48 RGZ. 108.

¹²¹ *Supra* p. 274.

¹²² *Supra* pp. 263, 274 n. 47.

¹²³ *Supra* n. 111.

IV. LOSS OF RIGHTS OF THE CONSIGNEE

I. Failure to Give Notice of Loss or Damage

Legal provisions. Before the introduction of the Brussels Convention concerning bills of lading, an informative controversy arose in France on the application of article 435 (par. 1) of the French Commercial Code which barred all actions against the master and the insurers for damage done to the goods if the goods have been accepted without protest. In one view, this provision was classified under the incidents of discharging, governed by the law of the port of arrival, and therefore applied to all ships arriving in French ports.¹²⁴ But the Court of Cassation always adopted the opposite theory that the law intended by the parties, or other general law of the contract, includes time and formalities to be observed by the consignee.¹²⁵ This certainly is the sounder view. To the contrary, an Italian decision regarded the analogous provisions of the former Italian Commercial Code, article 415, as pertaining to the incidents of delivery; yet this rested on the construction of the then conflicts rule of the same Code, article 58.¹²⁶

The Brussels Convention has been less rigorous. If the notice of loss is not given at the time when the goods are removed into the custody of the person entitled to delivery, only *prima facie* evidence of acceptance is constituted.¹²⁷ Rebuttal by proof to the contrary being possible, the notice is no longer a necessary prerequisite to suit.¹²⁸ In accordance with our view expounded earlier the new rule ought to be applied in all courts when the Convention is adopted in the

¹²⁴ Trib. com. Marseilles (Dec. 29, 1920) 33 *Revue Autran* (1922) 93, *Clunet* 1922, 1011; RIBERT, 2 *Droit Marit.* (ed. 4) § 1430 n. 5 and in 11 *Revue Dor* (1925) 289; 5 LYON-CAEN et RENAULT 793 § 852.

¹²⁵ Cass. civ. (June 19, 1929) S. 1929.1.309. This opinion has been advocated by DIENA, 2 *Dir. Com. Int.* 408.

¹²⁶ App. Trieste (May 31, 1932) 28 *Revue Dor* (1933) 349.

¹²⁷ Art. 3 (6); Carriage of Goods by Sea Act, 46 U. S. C. § 1303.

¹²⁸ The Southern Cross (1940) 1940 *Am. Marit. Cas.* 59.

state of the port of departure.¹²⁹ In the United States, of course, it is applicable also to homeward bills of lading.

The conflicts problem is thereby eliminated in American courts but remains unsettled for shipments to all other countries from those which have not adopted the Rules.

Stipulation limiting the time for claims. Clauses in bills of lading requiring that notice should be given to the carrier and claims brought within a certain period of time, in principle depends on the law of the contract. This has been recognized by American courts.¹³⁰

Under the Brussels Convention, a clause limiting time to less than one year is ineffective.¹³¹ On this ground such clauses have been rejected in American decisions as to both outward¹³² and homeward¹³³ bills of lading. Longer periods are permitted.¹³⁴

Apart from such modification by public policy, the law of the port of departure ought to govern.

It is a different consideration when public law is declared

¹²⁹ See Vol. II (ed. 2) pp. 427 f. and *supra* p. 272.

¹³⁰ Before the introduction of the Brussels Convention, in *The President Monroe* (1935) 286 N. Y. Supp. 990, the clause would have been determined under the expressly stipulated law of the Strait Settlements, if this had been proved.

In *The Carso* (1937) 1937 Am. Marit. Cas. 1078, it seems that the governing law was English, but the court did not find a reason for distinguishing English and American authorities holding the clause to be valid.

The decision in *M. & T. Trust Co. v. Export S. S. Corp.* (1932) 256 N. Y. Supp. 590, *supra* p. 251 n. 45, implies the same view.

Recently the clause was upheld in an interstate shipment not considered subject to the Carriage Act of 1936, *Newport Rolling Mills v. Miss. Valley Lines* (1943) 50 F. Supp. 623, 1943 Am. Marit. Cas. 793.

Opposite solutions appeared in *Bank of California N. A. v. Int. Mercantile Marine Co.* (C. C. A. 2d 1933) 64 F. (2d) 97 criticized *supra* n. 118, where, however, American law was substituted, no proof of German law being offered; and in *Duche v. Brocklebank* (D. C. E. D. N. Y. 1929) 35 F. (2d) 184, applying American law as that of the port of arrival.

¹³¹ Convention, art. 3 (6); 49 Stat. 1207, § 3, 46 U. S. C. § 1303.

¹³² *The Argentino, Buxton Limitada S. A. v. Rederi* (1939) 28 F. Supp. 440, 1939 Am. Marit. Cas. 815.

¹³³ *The Zarembo* (C. C. A. 2d 1943) 136 F. (2d) 320, 1943 Am. Marit. Cas. 954.

¹³⁴ *U. S. v. Gydnia American Shipping Lines, Ltd.* (D. C. S. D. N. Y. 1944) 57 F. Supp. 369.

to intervene. In a Canadian through bill, the time for claims after delivery was restricted to four months, and such stipulation was held inoperative after the shipment passed the Canadian border into the United States, because a provision of the Interstate Commerce Act required a minimum period of nine months.¹³⁵

2. Limitation of Actions

The legal provisions restricting the time during which a carrier may be sued for nondelivery or defective delivery, are regarded as substantive in Continental laws. For they affect the right, although only the action is barred.¹³⁶

Although the French writers share this view,¹³⁷ the French Supreme Court disagrees. This court once, precisely in a case of affreightment, announced the theory that the domicile of the debtor governs limitation¹³⁸ and in another such case has reiterated this questionable idea.¹³⁹ Nevertheless, the period of limitation is characterized as substantive.

An American court, however, disregarded the French limitation to one year of the action against a carrier and applied the *lex fori*, when the holder sued upon a bill of lading issued at the French port of departure and stipulating for French law; this follows the usual approach of common law lawyers.¹⁴⁰

¹³⁵ Goldberg v. Delaware etc. Ry. Co. (1943) 40 N. Y. Supp. (2d) 44.

¹³⁶ See Vol. I (ed. 2) pp. 69-72 and *infra* Chs. 52 and 53; for an action against a carrier see, e.g., App. Bologna (June 2, 1913) Riv. Dir. Com. 1914 II 43.

¹³⁷ 5 LYON-CAEN et RENAULT § 854; LEREBOURS-PIGEONNIÈRE (ed. 7) 587 f. § 4761; 1 Répert. 269 § 25; BATIFFOL § 584.

¹³⁸ Cass. civ. (Jan. 13, 1869) D. 1869.I.135, S. 1869.I.49; followed in Trib. com. Anvers (Jan. 7, 1903) 18 Revue Autran (1902-03) 901, under the theory of *lex loci executionis*.

¹³⁹ Cass. civ. (Jan. 9, 1934) S. 1934.I.201, D. 1934.I.22, Revue Crit. 1934, 915, Clunet 1934, 672; Cass. civ. (July 1, 1936) Revue Crit. 1937, 175, Clunet 1937, 302.

¹⁴⁰ A. Salomon, Inc. v. Compagnie Générale Transatlantique (1929) 32 F. (2d) 283.

Other Transportation Contracts

I. MARITIME TRANSPORTATION OF PERSONS

CARRIAGE of persons by sea, because of certain features, has become a separate topic in the more recent municipal enactments.* Conflicts law has not given it much special attention. Some writers, it is true, have urged the significance of the flag, with more insistence than for carriage of goods, because a passenger boards the ship in person, stays under the captain's discipline, and is subject to the national penal jurisdiction of the ship's country.¹ However, not until the Dutch rule for time charters² and the Italian law of 1942³ did any decision or law declare for the law of the flag.

Passenger tickets often refer to the law of the vessel, but this still leaves the subsidiary rule open.

1. *Lex Loci Contractus*

In addition to the usual advocates,⁴ a few American decisions have characteristically employed the law of the place

* A convention on the carriage of passengers by sea was signed at the Brussels Conference of April 29, 1961; see 63 *Dir. Marit.* (1961) 381 (French and English) and 10 *Am. J. Comp. Law* (1961) 445 (English). For a comment on the draft, see PRODROMIDÈS, "La responsabilité du transporteur dans le transport international des passagers et de leurs bagages," 9 *D. M. F.* (1957) 195, 259.

¹ SCERNI 243; BATIFFOL 260 § 287. NUSSBAUM, *D. IPR.* 286, risks the assertion that the law of the flag governs "without doubt." Most plausibly, this view is advocated by TORQUATO GIANNINI, *Il passeggero marittimo istruito* (Milano 1939). Some authors have suggested that the law of the flag should govern only if there is a real contact between the ship and the country of the flag; see SCHAPS-ABRAHAM, 2 *Seerecht* (ed. 3) 815 before § 664 n. 19.

² The Netherlands: *C. Com.* art. 533 p.

³ Italy: *Disp. Prel. C. Navig.* art. 10.

⁴ DIENA, 3 *Dir. Com. Int.* 376 and *cit.* n. 5.

of contracting. A Massachusetts decision before the Harter Act, under the *lex loci contractus*, enforced an English exemption clause to which the Cunard Line referred in the ticket for a voyage from England to the United States.⁵ The same court, however, again sanctioned the application of English law to a voyage from Ireland to Massachusetts, although the passage was booked in Boston. For justification the court construed the contract made in Boston by the passenger's daughter as a mere preliminary to the "contract ticket" received in England.⁶ A better reason would have been that the embarking rather than the booking was decisive. In a more recent case, a ticket was bought in the United States for a voyage from Alaska to Seattle. The passenger, an Indian girl, was attacked, probably in the waters of British Columbia, by two Negroes of the crew. Tort action against the company according to the law of this Canadian province was excluded for procedural reasons. But action for damages according to general maritime law was granted because the carrier had the contractual duty to protect passengers against violence of its own crew.⁷ In this case it would have been immaterial if the ticket had been bought in British Columbia, or if the vessel had flown the Norwegian or the Japanese flag. The only consistent theory was expressed by one court when it applied the law of the place where the journey begins.⁸

In several recent cases the courts had to deal with contractual clauses requiring that suit for personal injuries sustained by a passenger must be brought within a certain limited time. It has been held that the validity of such

⁵ *Fonseca v. Cunard Steamship Co.* (1891) 153 Mass. 553, 27 N. E. 665.

⁶ *O'Regan v. Cunard Steamship Co.* (1894) 160 Mass. 356, 35 N. E. 1070.

⁷ *Pacific S. S. Co. v. Sutton* (C. C. A. 9th 1925) 7 F. (2d) 579; *The Admiral Evans* (1925) 1925 Am. Marit. Cas. 1335.

⁸ *Wiley v. Grand Trunk R. of Canada* (D. C. W. D. N. Y. 1915) 227 Fed. 127, 130.

clauses is governed by the law of the place of contracting.^{8a} But when a ticket contained an express choice of law clause, the law designated has also been applied to the contract limitation period as well as to the problem of whether the defendant waived the defense flowing from that contractual provision.^{8b}

2. Other Contacts

Repetitiously, we may briefly note that a few European writers think that the passenger, subject to the carrier's fixed conditions, must also be under its law,⁹ to which the *Código Bustamante* agrees.¹⁰ The Treaty of Montevideo points to the place of the maritime agency,¹¹ and some German authors to the port of destination.¹²

Soviet law declares itself applicable whenever one party is a citizen.¹³

3. Special Laws

The passenger's coming on board and leaving the ship are subject to local laws, if these are different from the governing law. Thus, the Dutch law provides that the (Dutch) provisions including those applicable before or at embarkation and those applicable at or after disembark-

^{8a} *Jansson v. Swedish American Line* (C. C. A. 1st 1950) 185 F. (2d) 212, 219 f.; *McCaffrey v. Cunard Steamship Co.* (D. C. S. D. N. Y. 1955) 139 F. Supp. 472, 474; *Sundberg v. Aktiebolaget Svenska Amerika Linien* (1955) 163 N. Y. Supp. (2d) 253, 254. It is noteworthy that in each of these cases the pertinent American law, which provides for a minimum limitation period of one year, had been complied with; see 46 U. S. C. § 183 (b) (1958).

^{8b} *Siegelman v. Cunard White Star, Ltd.* (C. C. A. 2d 1955) 221 F. (2d) 189, 194 ff. On the "renvoi" problem involved in the case, see the excellent Note, 5 Am. J. Comp. Law (1956) 120.

⁹ FICKER, 4 Rechtsvergl. Handwörterbuch 481; SCERNI 244 f.

¹⁰ *Código Bustamante*, art. 185.

¹¹ Treaty of Montevideo on Int. Commercial Law (1889) art. 14.

¹² SCHAPS, before § 664 n. 8; *contra*: BAR, Int. Handelsr. 442; 2 FRANKENSTEIN 536.

¹³ Law of June 14, 1929, art. 4 (2), see FREUND, *Das Seeschiffsrecht der Sowjetunion* (1930) 70.

ing, always apply if the embarkation takes place in a Dutch harbor.¹⁴

That many local administrative rules are to be observed by a vessel in leaving and landing and that they have compulsory force are facts which the contracting parties are deemed to contemplate. Emigration laws are not the only ones so to be observed.

4. Conclusion

As American courts correctly see it, it is no convincing argument that the monopoly of a carrier points to the tacit acceptance of his domiciliary law. Nor has the law of the flag any natural claim to regulate the contractual rights and duties of a person alien to the ship's nationality. However, it has been persuasively said that it is more awkward to discriminate among passengers than to differentiate goods on board a vessel. Is there an objective criterion outside the ship for establishing a sound local connection?

The port of destination must be excluded. An American acquiring a ticket for China cannot be considered by any argument to have contracted under Chinese law. But it is no less a mistake to freeze the applicable law at the technical point of completing a legally binding contract. Booking in Rio de Janeiro for a voyage from New York to Southampton, or accepting in Rio a stateroom for such a crossing, offered by cable by a New York travel bureau, does not establish Brazilian law as dominant.

Where the desirable stipulation for an applicable law is missing, the agreed port of departure may be accepted as the important center of the contractual relationship. The objection that the choice of this port is accidental is not true. No passenger regards his point of embarkation as immaterial. He may think that he is allowed to board the ship

¹⁴ Dutch C. Com. art. 533c par. 2.

at a subsequent landing place, in Montevideo instead of Buenos Aires, in Cherbourg instead of Southampton, but he will presume that this makes no difference in his contract, as he also will not expect to recover the price difference if his berth has remained unfilled. Nevertheless, as mentioned earlier with regret,¹⁵ New York applies American law on grounds of public policy where a ticket for passage between two foreign ports is purchased in the United States.

The choice, therefore, is between the port of departure indicated on the ticket and the flag. The latter may be preferable.

II. MARITIME TRANSPORTATION OF BAGGAGE

The Continental literature has expounded that the obligation of carriers to transport baggage, at least when checked for this purpose,¹⁶ is a collateral pact annexed to the contract of passage; but it has been asserted at the same time that the rights and duties flowing from this agreement are analogous to those relating to the carriage of goods.¹⁷ It follows in the municipal field that it does not matter whether the baggage is "free," that is, paid with the ticket, or must be paid separately. In the conflicts field, the consequence is that the rules involving carriage of goods would be correctly applied.

The well-known decision of the British Privy Council of 1865¹⁸ concerning lost luggage has been considered a leading

¹⁵ Vol. II (ed. 2) pp. 423 f.

¹⁶ Baggage taken by a passenger to his stateroom, in a traditional widespread opinion, is not subject to contractual obligation. But analogy to the liability of innkeepers has sometimes been advocated, and more recently the literature definitely prefers contractual liability for any baggage by sea or land. See for France, JEAN IZE, *Responsabilité en matière de transport des bagages* (Paris 1936) 34, 38, 42.

¹⁷ 5 LYON-CAEN et RENAULT § 831; Dutch C. Com. art. 533 par. 1. *Contra*: T. GIANNINI, *supra* n. 1.

¹⁸ P. & O. Steam Navigation Co. v. Shand (1865) 3 Moo. P. C. Cas. (N. S.) 272.

case for maritime and even for all contracts. The English law of the place of contracting was applied, but it happened to agree with both parties' domicile, the flag of both vessels engaged in the carriage, and the port of departure.¹⁹ Under analogous circumstances, an American court, before the Harter Act, declared valid under English common law a clause limiting liability of the vessel to a value of ten pounds. The vessel was English, went from England to the United States, and the ticket was bought in England.²⁰

The law of the flag,²¹ in this case again, has much attraction.

III. FLUVIAL TRANSPORT

The much-needed unification of the law involving international transportation on rivers and canals has failed to materialize despite strenuous efforts before they were temporarily ended by World War II.²² Territorial law has, of course, paramount importance with respect to territorial waters, rivers, lakes, and canals. Nevertheless, many conflicts of laws are possible and should not all be left simply to the state where the waterway is situated.

In the carriage on the great lakes, canals, and rivers between the United States and Canada, the conflicts principles are taken without hesitation from the maritime model; this is an effect of the through bills recognized in

¹⁹ *Id.* at 291.

²⁰ *The Majestic* (C. C. A. 2d 1894) 60 Fed. 624, reversed (1897) 166 U. S. 375, 381 on the same basis of English law, because the clause on the back of the ticket was not a part of the contract.

²¹ Advocated by 2 FRANKENSTEIN 536, SCERNI 244, MONACO 141, adopted by Italian C. Navig. Disp. Prel. art. 10.

²² On developments since the Vienna Congress and the more recent Barcelona Convention and Statute of 1921, which included nationality and registration of vessels, ownership, and collision, see OSBORNE MANCE, *International River and Canal Transport* (1944) 4, 21. Of the older literature: NIBOYET, "Étude de droit international privé fluvial," 5 *Revue Dr. Int. (Bruxelles)* (1924) 333.

both countries. The port of departure furnishes the applicable law.²³

The matters not yet covered by international drafts such as limitation of liability, assistance and salvage, attachment, and documents of transport, deserve unification, and at least an international clarification of the conflicts principle.²⁴

IV. LAND TRANSPORTATION

Carriage of goods is prominent in conflicts discussion, but no material difference attaches to the carriage of persons and baggage.

Interstate commerce legislation in the United States and the Bern convention on the carriage of goods by rail, now accompanied by a convention on the carriage of persons and baggage, in their large scope have practically eliminated the conflicts of laws.^{24a} Universally, some progress has been achieved by the very wide acceptance of through transporta-

²³ *Grammer Steamship Co. v. James Richardson & Sons, Ltd.* (D. C. W. D. N. Y. 1929) 37 F. (2d) 366, 368, *aff'd* (C. C. A. 2d 1931) 47 F. (2d) 186: lake freighters from Ontario to Buffalo, under two charters and bills of lading, Canadian law. (The court speaks only of the Canadian place of making the contract.) See also *Louis-Dreyfus v. Paterson Steamships, Ltd.* (C. C. A. 2d 1930) 43 F. (2d) 824 as to the main governing law, but see *supra* Ch. 44 p. 290 with respect to the law governing performance. As an example of an internal American carriage under the New York Produce Exchange Canal Grain Charter Party No. 1, see *James Richardson & Sons, Ltd. v. Connors Marine Co.* (C. C. A. 2d 1944) 141 F. (2d) 226.

²⁴ See *MANCE, supra* n. 22, at 104; *SEBBA*, "Das Internationale Privatrecht der Binnenschiffahrt," 10 *Mitteilungen dt. Ges. VölkerR.* (1930) 107 ff., and proposals, 173 f.

A Convention on the Contract for the Carriage of Goods by Inland Waterways (C. M. N.) and a Convention on the Carriage of Passengers and Luggage by Inland Waterways (C. V. N.) are now in the drafting process with the International Institute for the Unification of Private Law in Rome; see *Year-Book 1960*, 399 and 89 n. 1.

^{24a} In addition to these treaties, a Convention on the Contract for the International Carriage of Goods by Road (C. M. R.), signed at Geneva on May 19, 1956, is now in force; see *Comunità Internazionale 1956*, 563. An analogic Draft Convention on the Contract for the International Carriage of Passengers and Luggage by Road (C. V. R.) has been adopted by the International Institute for the Unification of Private Law in Rome; see *1960 Year-Book 255*, and the commentary by *HOSRIE, id.* at 87.

tion to the effect that a contract of carriage is considered "one contract" in certain situations involving successive carriers.

The outstanding model for such unity of contract is the case where a carrier undertakes transportation over a distance which he does not intend to reach within his own business. He concludes and signs the only contract to which the consignor is a party. The subsequent carriers are his agents in performing the contract. In the absence of an express provision, he is liable for loss or damage occurring on any part of the journey.²⁵ A situation which is equivalent in many respects arises when the agent dealing with the consignor acts in his own name and as authorized agent for preceding or subsequent carriers or the latter are made liable by law. Where thus all carriers, or the first and the last, are considered liable, usually each carrier is only responsible for losses on his own line,²⁶ but there are exceptions of joint and several liability for the whole carriage.²⁷

In view of the present scarcity of conflicts in the United

²⁵ England: *Great Western Ry. v. Blake* (1862) 7 H. & N. 987; *Thomas v. Rhymney Ry.* (1871) L. R. 6. Q. B. 266; SCRUTTON, *Charterparties* 84 n. (p).

United States: See *infra* n. 79. E.g., Uniform Straight Bill of Lading, issued by a railroad for rail and water carriage from a point in one state to a point in another state, see *Palmer et al., Trustees v. Agwilines, Inc.* (D. C. E. D. N. Y. 1941) 42 F. Supp. 239, 1941 Am. Marit. Cas. 1566; *Lyons-Magnus v. American Hawaiian S. S. Co.* (1941) 1941 Am. Marit. Cas. 1291 (through bill from Italy to New York and by coast to San Francisco).

Belgium: 1 SMEESTERS and WINKELMOLEN § 464.

Germany: HGB. §§ 432 par. 1, 449 ("Hauptfrachtführer" and "Unterfrachtführer"); 137 RGZ. 301.

The Netherlands: C. Com. art. 517v.

²⁶ United States: E.g., Contracts, Terms, and Conditions on the back of the Uniform Through Export Bill of Lading, § 2 (a) (b); and *cf.* *New York Produce Exchange v. B. & O. Ry. Co.* (1917) 46 ICC. 666, 670.

The Netherlands: C. Com. art. 517w par. 2.

Italy: For transport of persons, C. C. (1942) art. 1682; and as to usual clauses, BRUNETTI, *Manuale del diritto della navigazione marittima e interna* (1947) 259.

²⁷ The Netherlands: C. Com. art. 517w par. 1.

Italy: C. C. (1942) art. 1700 *cf.* VIVANTE, 4 *Trattato Dir. Com.* §§ 2102 ff.; ASQUINI, *infra* n. 43, 470 § 180 (as to the former C. Com. arts. 399, 411).

Argentina: C. Com. art. 171; *cf.* *Cám. Apel. La Plata* (May 23, 1947) 47 *La Ley* (1947) 32, 34.

States and Europe, Batiffol has referred to the numerous former American and French decisions.²⁸

1. Carriage of Goods

Law of the place of shipping. The vast majority of the American cases of the time previous to interstate regulation proclaimed the law of the state where the goods were shipped and the contract of carriage was made,²⁹ a duality of premises often stressed in the formulations of the courts. The same has been the constant position of the French courts throughout.³⁰

The revised text of the Montevideo Treaty on commercial law, abandoning the law of the place of destination, which generally governs, applies the law of the place of contracting³¹ to the form, effects, and nature of a unitary contract of through carriage, affecting the territory of several countries. A contract that promises cumulated services of several carriers by a single and direct instrument of transport,³² is recognized as unitary.

Law of the place of loss. In a former minority view, the law of the place where the goods are injured or lost governed. This theory has been favored by some English and Continental writers and some French and American

²⁸ BATIFFOL 233 ff.

²⁹ See the cases in Beale's many notes recorded by BATIFFOL 238 n. 4 and in BATIFFOL 239 f. § 267. For example, see the much cited decisions, *Grand v. Livingston* (1896) 4 App. Div. 589, 38 N. Y. Supp. 490; *Powers Mercantile Co. v. Wells-Fargo & Co.* (1904) 93 Minn. 143, 100 N. W. 735; *Carpenter v. U. S. Export Co.* (1912) 120 Minn. 59, 139 N. W. 154.

³⁰ France: A long series of identical decisions, Cass. (March 31, 1874) S. 1874.1.385; (Aug. 25, 1875) S. 1875.1.426; (Aug. 14, 1876) S. 1876.1.478 etc.; cf. BATIFFOL 243 f. An old decision App. Colmar (June 30, 1865) S. 1866.2.25 considered the (French) place of contracting rather than the Alsatian place of dispatch; but Trib. Céret (April 22, 1921) D. 1921.2.145 is cited to the opposite effect.

Argentine decisions to this effect and 4 VICO 151 § 165, have been superseded, see *infra* n. 37, but the Montevideo Treaty on Int. Com. Terr. Law, art. 14, adopts the law of the place of contracting.

³¹ Montevideo Treaty on Int. Com. Terr. Law (1940) art. 14.

³² *Id.* art. 15. A similar provision in art. 259 of Código Bustamante probably refers to the law of contracts of adhesion, art. 185.

decisions.³³ It was approved by Minor because the result achieves identity of solutions for tort and contract actions.³⁴ Such a split may be intended by the parties,³⁵ and in fact is very frequently stipulated. But as a confusion of the spheres of contract and tort, the rule deserved its rejection.³⁶

There are, however, modern parallels. To some extent, the Argentine Supreme Court shares the view that each distance is governed by its own territorial law.³⁷

A comparable result is reached by the Dutch reform legislation of 1924. It has been taken for granted that the carrier contracting for through carriage on his own account is only responsible according to the laws obtaining in each territory passed. The same division, a fortiori, characterizes the liability of several carriers.³⁸

Law of the place of destination. While the place of the loss has sometimes been considered a place of performance, a few decisions, some of them involving lost baggage, applied the law of the place where delivery is due.³⁹

³³ See FOOTE 456; BATIFFOL 237 n. 1; for American cases, see 2 BEALE 1163 n. 2 and BATIFFOL 235 n. 4.

³⁴ MINOR 381 § 160.

³⁵ France: Cass. civ. (June 12, 1883) S. 1884.I.164; (Dec. 4, 1894) D. 1895.I.526; opposed by BATIFFOL 236, not rightly in my opinion.

³⁶ See, e.g., *Faulkner v. Hart* (1880) 82 N. Y. 413, 422; ECHÁVARRI, 3 Cód. Com. 525; BATIFFOL 234 ff. §§ 262, 263.

³⁷ Argentina: S. Ct. (Sept. 28, 1931) 36 Jur. Arg. 839 (*Molins & Cía. v. Ferrocarril Central de Buenos Aires*) assumes a unitary enterprise of carriage from Paraguay to Argentina but emphasizes that this does not prejudice the application of the territorial laws of the states along the line of travel. This may have been an obiter dictum in a case where the assumption of delay of the transport depended on the speed territorially prescribed, but has been understood in a broader meaning. Cf. *Cám. Com. Cap.* (June 3, 1938) 62 Jur. Arg. 792; *Cám. Apel. Mendoza* (May 10, 1941) 74 Jur. Arg. 793.

³⁸ The Netherlands: C. Com. art. 517v: The carrier makes himself liable for the whole distance "in conformity with the law applicable to each part of the transport"; art. 517w par. 1: "Two or more carriers who accept goods . . . are liable for the entire carriage in conformity with the law in force for each part of the transport."

³⁹ E.g., *Brown v. Camden & Atlantic R. Co.* (1877) 83 Pa. St. 316 and other cases cited by BATIFFOL 237 n. 1 and § 265. On baggage, *Curtis v. Delaware, Lackawanna R. Co.* (1878) 74 N. Y. 116; *Williams v. Central R. Co. of N. J.* (1904) 93 App. Div. 582, 88 N. Y. Supp. 434.

The prevailing criterion, disguised as *lex loci contractus*, has been defended against the emphasis on performance by arguing that the contract is one and the performance a continuous act not restricted to the final delivery;⁴⁰ that the shipper is presumed to send the goods under the law he knows;⁴¹ and that dispatching includes the commencement of performance,⁴² or, under certain theories is essential for the conclusion of the contract.⁴³ More often, the plurality of the places of performance has been said to leave the law of the place of contracting the only available one. The truth is that a carriage contract has its only material center in the place of dispatch, which has little to do with contracting and more with the delivery to the carrier and his acceptance, the Roman *receptum*, than with performance.

Special law. It would seem that the incidents of loading and unloading should have a special rule analogous to maritime carriage. The Montevideo text of 1940, in fact, establishes as a special rule that the law of the state where the delivery is made or should have been made to the consignee, governs the question concerning its performance and the form of the delivery.⁴⁴ A decision of the French Supreme Court may really rest on such a consideration; it determines the formalities and the time for protest as well as for the request for examination of the goods ac-

⁴⁰ Thomas, D. J., in *Wiley v. Grand Trunk R. of Canada* (D. C. W. D. N. Y. 1915) 227 Fed. 127.

⁴¹ *Valk v. Erie R. Co.* (1909) 130 App. Div. 446, 114 N. Y. Supp. 964.

⁴² *Cole, J., in McDaniel v. Chicago & N. W. Ry. Co.* (1868) 24 Iowa 412 stressed that it was necessary to transport the goods consigned to Chicago on the territory of Iowa. See more cases in *BATIFFOL* 239 n. 2.

⁴³ See *ASQUINI*, *Del contratto di trasporto*, in *Bolaffio e Vivante*, 6 *Il codice di commercio commentato* (ed. 6, 1935) II 147 § 49. The Bern and Rome Conventions are considered to require the acceptance of the goods, see *ARMINJON*, 1 *Droit Int. Pr. Com.* 431 § 245.

⁴⁴ Montevideo Treaty on Int. Com. Law, art. 14 *in fine*. On the interpretation, in part too broad as usual, see *LAZCANO*, "El transporte terrestre y mixto en el Derecho Internacional Privado," 6 *Rev. Arg. Der. Int.* (1944) ser. 2, VII, 252, 264, 343, 355, 357, 363.

ording to the (foreign) law of French Morocco rather than according to the Algerian (French) law of the shipping place.⁴⁵

2. Carriage of Persons

The transportation of passengers on railroads does not cause much conflict of laws at present. We may take it from the former practice of the American courts that here, too, the place of departure as indicated in the ticket supplies the law.⁴⁶ The reason, again, is not that the contract is a "real" contract needing performance for its completion, which is a minority opinion. In the majority view, the ticket is only evidence.⁴⁷

A case that has retained some actuality in the United States concerns "free passes," providing gratuitous transportation but expressly excluding liability for accidents. The latter stipulation has been recognized under federal law,⁴⁸ and in cases of multiple contacts under the law more favorable to the validity of the clause.⁴⁹ It would be simpler and more satisfactory to realize that such a clause is perfectly justifiable under any law if, and only if, the grant of free transportation is a courtesy and not a part of wages.

⁴⁵ Cass. civ. (April 12, 1938) 5 *Nouv. Revue* (1938) 627, reversing a decision of the App. Cour of Paris which applied the *lex loci contractus*. The 1940 text of Montevideo on Com. Terr. Law, art. 15 par. 2, adopts the special rule of the place of arrival for questions concerning delivery, see *infra* n. 84.

⁴⁶ Example: Ticket taken in Maine for transport of a person between two places in Manitoba; Manitoba law applies, *Brown v. Can. Pac. Ry.* (1887) 4 *Man. R.* 396.

⁴⁷ DALLOZ, I *Nouveau répert. de droit* (1947) 770 No. 89.

⁴⁸ *Francis etc. v. Southern Pacific Co.* (C. C. A. 10th 1947) 162 F. (2d) 813, *aff'd*, 333 U. S. 445, *cf.* *Ins. L. J.* 1947, 761 (pass issued under the Hepburn Act, 49 U. S. C. § 1 and based on federal law). A different situation existed in *Sasinowski v. Boston etc. Ry.* (C. C. A. 1st 1935) 74 F. (2d) 628 (a circus train); transportation was held to be agreed upon by the railway and the employer, a circus, and governed, with its exemption clause, by the Massachusetts law of the place of contracting because the railroad acted as a private carrier.

⁴⁹ *Atchison, Topeka, & Santa Fe R. Co. v. Smith* (1913) 38 *Okla.* 157, 132 *Pac.* 494.

We may note here a Belgian decision⁵⁰ elucidating the relation between contract and tort from a point of view not yet mentioned in this work. By judgment of a court in Rome, Italy, a streetcar company was declared liable simultaneously upon tort and breach of contract, for the damage done to the family of a man killed in Tivoli, near Rome. The action for enforcement in Belgium was denied for the reason that the damages were wrongly assessed in Italy. The family could sue only for tort since such claim is personal. In contract they could sue only for the damage suffered by the deceased himself, on survival of his action. To explain this curious case, it may be noted that Italian legislation did not hold railways responsible for damage without proof of negligence.⁵¹

V. AIR TRANSPORTATION

1. The Warsaw Convention

In commercial law, air transport has essentially the same position as maritime transport.⁵² Charters of planes and consignments are comparable to charters of ships and bills of lading.⁵³ Charters are distinguished as flight or voyage charter, time charter or lease, and charter hire.⁵⁴

It has been said that the document of carriage, either of goods or of persons, regularly contains a clause referring to a specific law, which is ordinarily that of the carrier.⁵⁵

In the absence of such clause, conflicts problems would

⁵⁰ App. Bruxelles (July 14, 1941) *Bonacci v. S. A. Belprise*, Jur. Com. Brux. 1942, 34.

⁵¹ See VIVANTE, 4 *Trattato Dir. Com.* §§ 2167 f.

⁵² MONACO 146 with citations.

⁵³ *Cf.*, e.g., *Curtiss-Wright Flying Service, Inc. v. Glose* (1933) 66 F. (2d) 710; 1933 U. S. Av. R. 26, 30; cert. denied, 290 U. S. 696, 1934 U. S. Av. R. 20.

⁵⁴ Thus, the U. S. Av. R. Indices.

⁵⁵ VAN HOUFFE, *La responsabilité civile dans les transports aériens intérieurs et internationaux* (1940) 61.

be particularly hard to solve if the Warsaw Convention and its almost worldwide adoption⁵⁶ had not eliminated the most conspicuous sources of trouble. Like the Hague Rules which inspired them, the provisions of the Convention, cutting through the opposing interests involved and smoothing out the legal distinction of tort and contract, have found a middle road, more favorable to their air carriers than some preceding special laws.⁵⁷ By such enactments as the British⁵⁸ and the Brazilian,⁵⁹ the rules of the Convention have been incorporated into the national body of law, to be applied also with respect to nonmember states.

The Convention provides that any clause shall be null and void which purports to infringe the rules of the Con-

⁵⁶ See Vol. II (ed. 2) p. 342. A few words are due here to this international achievement, including tort and contract claims. On the re-assumption of the prewar drafts and amendment proposals to the Convention, see KNAUTH, 1946 Annual Survey 771.

In 1955 the Convention has been amended by the Hague Protocol; see MANKIEWICZ, "Hague Protocol to Amend the Warsaw Convention," 5 *Am. J. Comp. Law* (1956) 78; RIESE, "Die internationale Luftprivatrechtskonferenz im Haag zur Revision des Warschauer Abkommens, September 1955," 5 *Zeitschrift für Luftrecht* (1956) 4; FORREST, "Carriage by Air: The Hague Protocol," 10 *Int. Comp. Law Q.* (1961) 726.

In 1961 a Convention supplementary to the Warsaw Convention, and relating to carriage by air performed by a person other than the contracting carrier, has been adopted by an international conference at Guadalajara and has been enacted in Great Britain (10 and 11 *Eliz. 2, c. 43*) and West Germany (1963 *BGBI. II. 1160*); see RIESE, "Die internationale Luftprivatrechtskonferenz und das Charterabkommen von Guadalajara (Jal., Mexico) vom 18. September 1961," 11 *Zeitschrift für Luftrecht* (1962) 1.

For a discussion on whether the United States should withdraw from the Warsaw Convention, see *Am. Soc. Int. Law, Proceedings, 56th Annual Meeting* (1962) 115 ff. and KARLIN, "Warsaw, Hague, the 88th Congress and Limited Damages in International Air Crashes," 12 *De Paul L. Rev.* (1962) 59. See also SAND, "Limitation of Liability and Passenger's Accident Compensation Under the Warsaw Convention," 11 *Am. J. Comp. Law* (1962) 21.

⁵⁷ This has been observed with some astonishment in Italy, *App. Milano* (April 29, 1938) *Giur. Ital.* 1939 I 2, 53.

⁵⁸ British Carriage by Air Act, 1932, 22 and 23 *Geo. 5, c. 36*. This act will cease to have effect as soon as the Carriage by Air Act, 1961, 9 and 10 *Eliz. 2, c. 27*, comes into full effect; see JOHNSON, "Carriage by Air Act, 1961," 25 *Mod. L. Rev.* (1962) 569.

⁵⁹ Brazil: Código do Air, D. Lei No. 483, of June 8, 1938, art. 68 par. ún; see HUGO SIMAS, Código brasileiro do air (1939) 164.

vention by determining the law to be applied (article 32). Thus party autonomy is limited to matters not covered by the Convention.⁶⁰ In view of this restriction, it is doubtful whether the parties to a contract of carriage by air may choose the law according to which their contract is to be construed, as an English author has submitted.⁶¹ The General Conditions of the former International Air Traffic Association, now International Air Transport Association (both known as IATA), implementing it, assure that the paramount clause referring to the Convention, if at all material, is practically never omitted.

It has also been doubted whether the Convention covers contractual relations or only liability for tort. The Convention, however, not only applies to air transportation without such distinction but determines its applicability according to certain terms of the contract of carriage between the carrier and the individual passenger.

2. Relation to National Laws

The national rules have been reduced by the Convention to a somewhat obscure scope. The literature distinguishes between a carriage international in the meaning of the Convention, which is a particular concept,⁶² and international carriage in the "ordinary sense."⁶³ But the latter is entirely unnecessary as a technical concept.

The Convention's definition of its own applicability has recently raised doubts informative for studies of choice of law. The Convention includes carriage between the terri-

⁶⁰ But it is not correct to suggest that all choice of law clauses in air passenger tickets or air waybills are invalid, as one author does; see HERZOG, "Validity of Contracts Exempting Carriers in Interstate and Foreign Commerce from Liability," 11 *Syracuse L. Rev.* (1959) 171, 199.

⁶¹ N. H. MOLLER, *Law of Civil Aviation* (1936) 297; CONRADIE, "International Private Law and The South African Carriage by Air Act, 1946," 64 *S. A. L. J.* (1947) 51, 60 n. 28 repeats the question without answering it.

⁶² Art. 1 (2) of the Convention.

⁶³ Crossing of a border and a single document of transportation are required, *cf.* LEMOINE 387 § 555.

tories of two parties to the Convention and the case where, departure and destination being within the territory of one contracting power, a stopping place in the territory of any other power is agreed upon. In postwar discussion it has been recognized that this delimitation imposes an unwarranted and possibly unenforceable burden upon aircraft of nonmember states (e.g., upon a Portuguese air line taking passengers from New York to Bermuda) and subjects air lines to different systems of liabilities according to the distances indicated in the tickets.⁶⁴ In the United States, moreover, it has been complained that the maximum amount of liability, often inadequate for American standards, strangely differs from the superior compensation due in the same case of an accident within the United States, to other passengers with a domestic ticket.⁶⁵

Yet it has been replied:

"On the other hand, to base the applicability of the Convention solely upon the nationality of the aircraft irrespective of the place of departure or destination, or the 'lex loci contractus' (or, which may be the same thing, upon the proper law of the contract), would raise difficulties of jurisdiction, and also practical difficulties since aircraft of different nationality flying the same route might be operating upon a different liability basis . . . possibly a combination of the two criteria may prove to be the solution."⁶⁶

The municipal laws raise questions respecting the relation of the Convention to federal and state statutes.^{66a} The few

⁶⁴ See WILBERFORCE, "The International Technical Committee of Experts in Air Law," 1 *The International Law Quarterly* (1947) 498, 502.

⁶⁵ RHYNE, "International Law and Air Transportation," address of July 16, 1948, 47 *Mich. L. Rev.* (1949) 41, 56. See the discussion mentioned *supra* n. 56 last paragraph.

⁶⁶ WILBERFORCE, *supra* n. 64. But when the Convention was amended by the Hague Protocol in 1955, *supra* n. 56, its provision on applicability remained practically unchanged.

^{66a} See RIESE, "Internationalprivatrechtliche Probleme auf dem Gebiet des Luftrechts," 7 *Zeitschrift für Luftrecht* (1958) 271, 277 ff.; MAKAROV, "Conflicts de lois en matière de droit aérien," *Annuaire* 1959 I 359, 385 ff.; SCHLEICHER-REYMAN-ABRAHAM, 1 *Das Recht der Luftfahrt* (ed. 3, 1960) 254 f.

American cases in point deal with the following questions.^{66b}

Death of passengers. The Warsaw Convention has been implemented in Great Britain by certain provisions set out in the Second Schedule of the Carriage by Air Act, 1932. Thereby, the liability is enforceable "for the benefit of such of the members of the passenger's family as sustained damage by reason of his death." With this complement, the courts have since applied article 17 of the Warsaw Convention, stating that "the carrier shall be liable for damage sustained in the event of death or wounding of a passenger. . . ."⁶⁷ Accordingly, the British courts recognize a cause of action governed by the new law rather than by Lord Campbell's (Fatal Accidents) Act.⁶⁸ Deprived of such statutory assistance, the American decisions thus far rendered have not determined "who may be thought to be injured by a death."⁶⁹ It seems that these courts have made up their mind to the effect that the cause of action for the death of a passenger is determined by the law of the place where the death occurred,⁷⁰ including the Death on the

^{66b} For cases dealing with the Convention in other than conflict-of-laws respects, see GUERRERI, *American Jurisprudence on the Warsaw Convention* (Montreal 1960).

⁶⁷ Schedule 2. *Cf.* for details, SHAWCROSS & BEAUMONT, *Air Law* (ed. 2, 1951) 383 ff. § 408.

⁶⁸ *Grein v. Imperial Airways, Ltd.* [1937] 1 K. B. 50, 1936 U. S. Av. R. 184, and *ibid.* p. 211 reversing the judgment of the K. B.

⁶⁹ *Frank Choy, as Adm. of the Estate of Watson Choy, deceased v. Pan-American Airways Co.* (D. C. N. Y. 1941) 1941 U. S. Av. R. 10, 1941 Am. Marit. Cas. 483, 1942 U. S. Av. R. 93. Apart from the question "whether the Convention confers rights or creates causes of action," the Convention is, of course, self-executing, *Rifkind, D. J., in Indemnity Ins. Co. of North America v. Pan-American Airways* (D. C. S. D. N. Y. 1944) 58 F. Supp. 338, 1945 U. S. Av. R. 52, 54 f.

Garcia and Alvarez v. Pan-American Airways, Inc. and others (1946) 183 Misc. 258, 269 App. Div. 287, 55 N. Y. Supp. (2d) 317, *aff'd*, 295 N. Y. 852, 67 N. E. (2d) 257. See for complete action, 1946 U. S. Av. R. 496.

⁷⁰ The decisions in the cases *Choy, Wyman, Garcia, and Indemnity Insurance Co.* (ns. 69, 71, 72) are understood in this sense by ORR, "The Warsaw Convention," in 31 Va. L. Rev. (1945) 434 n. 18; RHYNE, *Aviation Accident Law* (1947) 270; see also GOLDBERG, "Jurisdiction and Venue in Aviation Accident Cases etc.," 36 Cal. L. Rev. (1948) 41, 55 f. n. 59.

High Seas Act.⁷¹ Perhaps, a case could be made for the death statute of the *lex fori*; international draftsmen are likely to think of this first, and the British implementation rests on such an autarchic ground. But the *lex loci delicti* has doubtless a better claim in tort actions.

In one of the American cases,⁷² the Warsaw Convention was applied to a death on the high seas, but as the Convention says nothing about interest on the debt of compensation, the court looked to the Death on the High Seas Act which, however, is likewise silent on interest.⁷³

3. The Remaining Problems

Most questions not covered by the Convention have been uniformly answered in the General Conditions mentioned above.⁷⁴ One of these conditions prescribes that the consignment should be printed in one of the official languages of the country of departure. This is a new hint in favor of the law of that country for the remaining questions. How-

In *Komlos v. Compagnie Nationale Air France* (D. C. S. D. N. Y. 1952) 111 F. Supp. 393 the court applied Portuguese law as *lex loci delicti*; reversed on other grounds, (C. C. A. 2d 1953) 209 F. (2d) 436. On the other hand, the New York Supreme Court in *Salamon v. Koninlijke Luchtvaart Maatschappij, N. V.*, (N. Y. 1951) 107 N. Y. Supp. (2d) 768 took the position that the Convention itself created a cause of action and rendered inapplicable the pertinent *lex loci delicti*. But this view has been explicitly rejected in *Noel v. Linea Aeropostal Venezolana* (C. C. A. 2d 1957) 247 F. (2d) 677; cf. also *Spencer v. Northwest Orient Airlines* (D. C. S. D. N. Y. 1962) 201 F. Supp. 504. For a discussion, see CALKINS, "The Cause of Action under the Warsaw Convention," 26 J. Air L. & Comm. (1959) 217, 323; PROMINSKI, "Wrongful Death in Aviation: State, Federal, and Warsaw," 15 U. of Miami L. Rev. (1960) 59.

⁷¹ *Wyman and Bartlett v. Pan-American Airways* (S. Ct. N. Y. 1943) 181 Misc. 963, 43 N. Y. Supp. (2d) 420, 1943 U. S. Av. R. 1, aff'd, 267 App. Div. 947, 48 N. Y. Supp. (2d) 459, aff'd, 293 N. Y. 878, 59 N. E. (2d) 785, cert. denied, 324 U. S. 882; *Noel v. Linea Aeropostal Venezolana*, *supra* n. 70; *D'Aleman v. Pan-American World Airways* (C. C. A. 2d 1958) 259 F. (2d) 493.

⁷² *Wyman and Bartlett v. Pan-American Airways*, *supra* n. 71.

⁷³ 46 U. S. C. §§ 761, 762.

⁷⁴ *Supra* p. 312. Cf. *Grein v. Imperial Airways*, *supra* n. 68: if the carriage were not international in the meaning of the Warsaw Convention, it would be governed by the IATA agreement.

ever, a Dutch court took it for granted that Dutch law governed an air passage concluded with the Royal Dutch Airways in Bangkok, Siam.⁷⁵ And the Convention itself seems to point to the law of the forum.⁷⁶

VI. MIXED THROUGH CARRIAGE

Mixed through routes in international trade, with alternating transportation by railway, vessel, and aircraft have lacked adequate legal and organizational machinery,⁷⁷ with the main exception of the through bills in the traffic between the United States and Canada,⁷⁸ and the American Ocean Bill of Lading;⁷⁹ the latter as used for export, issued by a railroad, includes the maritime carriage. Although separate "local" bills of lading may be issued on the subsequent stages to the signer of the through bill, as shipper, the original bill is the document intended to represent the goods, in order to finance the transaction and to assure the right to delivery.⁸⁰ Usually a clause provides that no carrier is liable for loss, damage, or injury not occurring while the goods are in its custody.⁸¹ Difficulties in foreign countries in recognizing the American bill to its full extent have probably diminished.⁸²

⁷⁵ Rb. s'Gravenhage (Feb. 28, 1935) W. 12884. Application of the carrier's domiciliary law is also urged by the Inst. Dr. Int. in a recent resolution; see *Revue Crit.* 1964, 166 f., art. 5 par. 2.

⁷⁶ Vol. II (ed. 2) p. 342 n. 32.

HUGO SIMAS, *Código brasileiro do air* (1939) seems to understand art. 68 par. 2 of the Brazilian Code to the same effect.

⁷⁷ See the excellent summary by BAGGE, "Der Durchfrachtverkehr," 10 Z. ausl. PR. (1936) 463; also in his article, "International Through Bills of Lading," *Commercial and Financial Chronicle* (New York 1945) 1340, 1362.

⁷⁸ See COYNE, *The Railway Law of Canada* (1947) 467 f.

⁷⁹ Uniform Through Export Bills of Lading, prescribed by the Interstate Commerce Commission, first under the provisions of § 441 of the Transportation Act of 1920 (§ 25 Interstate Commerce Act) see HOTCHKISS, *A Manual on the Law of Bills of Lading etc.* (New York 1928) 131 f.

⁸⁰ SCRUTTON, *Charterparties* (ed. 16) 193 f.

⁸¹ See, e.g., *The Iristo* (D. C. S. D. N. Y. 1941) 43 F. Supp. 29.

⁸² RG. (June 23, 1939) 161 RGZ. 210 refused to consider an American bill, termed through bill (under which the goods were shipped from New York to Hamburg to be delivered in Leipzig but not delivered there), because the

There have been other efforts to create appropriate facilities for through carriage, however. Thus, the International Union of Railroads has concluded an agreement with the International Air Transport Association (IATA) on combined international air-rail transportation, with implementing accords.⁸³ The recent Montevideo text extends the unity of a contract in case of a through bill to mixed transportation on land, sea, and air, but is neither ratified nor implemented.⁸⁴

Through bills of lading in any sense of the word very commonly contain a reference to the conditions usual in the bills of lading of the on-carrying steamer or other carrier. Such a clause in a maritime through bill of lading has been declared to be recognizable only insofar as it is consistent with the original bill.⁸⁵ But with this restriction, particularly in mixed carriage, the measure of liability is separately determined for each kind of transportation. In the case of an ocean through bill, issued by a railway on the basis of the Pomeregne Act, the Carriage of Goods by Sea Act of 1936 took care to provide that insofar as the bill relates to the carriage of goods by sea, the bill is subject to the new Act. This section has been repealed because it was obviated by the federal legislation of 1940.

bill was not issued in the name of the shipowner. This objection has been eliminated by the Hague Rules, HGB. §§ 642, 656, as amended by Law of August 10, 1937. For a discussion and further references, see SCHAPS-ABRAHAM, 2 *Seerecht* (ed. 3) 621 ff.

⁸³ LEMOINE 435 § 629.

⁸⁴ Montevideo Treaty on Com. Terr. Law (1940) art. 15 par. 2. A draft convention on international combined traffic is discussed by PRODROMIDÈS in 14 *D. M. F.* (1962) 67.

⁸⁵ *The Idefjord*, Blumenthal Import Corp. v. Den Norske Amerikaline (C. C. A. 2d 1940) 114 F. (2d) 262, 266. Imperative rules of the original maritime carriage continue for continued sea carriage. Thus the British Carriage of Goods by Sea Act is considered applicable even though only the first part of a through bill of lading refers to a departure from a port in the United Kingdom and transshipment is to be effected in a foreign port. SCRUTTON, *Charterparties* (ed. 16) 461 f. On the other hand, art. I excludes the distance not by sea, SCRUTTON, *id.* 467.

Clearly, the provisions of the Bern Convention on the liability of railways do *not* extend to a continuation of the transport by sea.⁸⁶ Conformably to this, where a cask of brandy (cognac) was shipped from Cognac to Le Havre by rail and from Le Havre to New York by sea, and breakage occurred during the land transit, the exception from liability for negligence of the servants or agents under French law was recognized.⁸⁷

So far as the scattered attempts to solve the conflicts problem go, they reflect the present defective organization of combined international carriage. The consignee may be relieved by some provision from the necessity of receiving the goods at an intermediate place, but neither he nor the consignor is entitled to the benefits of the original bill as an exclusive embodiment of all rights. It seems to have been justifiably concluded therefrom in conflicts law that in this unorganized succession of carriers it is inevitable to let each part of the distance stand by itself. Hence, rights and liabilities are determined under the law of the territory where the individual facts completing the cause of action occur, be it loss or damage during carriage or any incident of delivery.

Contrarily, the perfection of interstate and export through bills in the United States and Canada eliminated the former division of opinions on the same question and has promoted the application of the law where the original through bill is issued. Under this approach and with all the usual precautionary stipulations, the exceptions needed in favor of local laws do not seem to require other consideration than in the case of ordinary bills of lading issued by one carrier.

⁸⁶ Italy: Cass. (March 21, 1941) *Foro Ital.* Mass. 1941, 173, *cf.* MARMO, 10 *Giur. Comp. DIP.* (1944) 128 No. 28: art. 28 of the Convention does not provide for combined transportation.

⁸⁷ *Baetjer v. La Compagnie General Transatlantique* (D. C. S. D. N. Y. 1894) 59 *Fed.* 789.

CHAPTER 46

Insurance

I. AMERICAN LAW*

THE question of the law governing insurance contracts in the United States recurs in three different spheres. The state courts determine the private law applicable to insurance contracts, allegedly under the ordinary general rules for contracts. The state statutes regulate the conditions for licensing foreign insurance companies with more or less effect upon the content of the contracts. To what extent the power of the states to regulate insurance contracts is restricted by the federal Constitution, has been the object of a long line of decisions of the Supreme Court. The interrelation among these three levels offers rarely noted problems of its own that reach beyond the task of this work.

1. Judicial Doctrine

In treatises respecting conflicts law, the Restatement, and the overwhelming majority of judicial authorities—numbering many hundreds of decisions—, the law applicable to insurance contracts is determined by the ordinary general tests of contracts. Among them, the place of contracting is commonly regarded as the paramount factor. But this is not an absolutely exclusive rule, and the place where an insurance contract is located has given rise to a complicated

* See also LENHOFF, "Probleme des zwischenstaatlichen Versicherungsrechts in amerikanischer Sicht," *Versicherungswissenschaftliches Archiv* 1955, 267; LENHOFF, "Conflict Avoidance in Insurance," 21 *Law and Cont. Probl.* (1956) 549 and 1957 *Ins. L. J.* 101; EHRENZWEIG, *Conflict* 511-520.

system of rules of thumb. Complete surveys have been made by three outstanding writers.

(a) *Beale*. Only Beale and the Restatement postulate an exclusive rule of *lex loci contractus*.¹ The confusion in determining the place of contracting is resolved in the Restatement by a tripartite distinction:

“§ 317. When an insurance policy becomes effective upon delivery by mail, the place of contracting is where the policy is posted.

“§ 318. When an insurance policy becomes effective upon delivery and is sent by the company to its agent and by him delivered to the assured, the place of contracting is where it is thus delivered to the assured.

“§ 319. When an offer for an insurance contract is received by the company through a broker who acts for a client, and the policy is effective on delivery, the place of contracting is where the policy is posted or otherwise delivered to the broker.”

This scheme has been suggested by a great number of cases and has influenced more. Apparently, it furnishes objectively conceived contacts, favoring the insurer insofar as he may choose the way of sending the policy, determining the applicable law. Beale has been receptive to the argument that the company sends the policy to its agent in order to keep control of it until the condition is fulfilled which makes it valid. The courts have certainly assumed that the last act of contracting is deferred when the agent has still to ascertain the good health of the insured or to receive payment of the first premium. But the rule expressed in § 318 has often been used where no continued control by the agent has been intended.

Whether the obvious oversimplification of the decisions in this set of rules presents an advance or not is doubtful. But a cardinal defect is that the Restatement reproduces

¹ 2 BEALE 1054 ff.

merely the ritualistic gestures of the courts. Other authors have looked to the practical results.

(b) *Batiffol*.² In his delicate research, the French scholar notes the application of the law of the place of contracting in the vast majority of the American decisions, although in many cases this place coincided with the place of payment of premiums or with the location of the insured objects. Batiffol's statistics deserve attention: The place of contracting was found in approximately 75 per cent of the cases at the domicile of the insured.³ The common law principle that a contract is completed by the dispatch of the acceptance would stand in the way, whenever the company simply accepts the initial application (an observation confirmed by the theoretical admission in § 317 of the Restatement quoted above). But the courts have used various devices to overcome this obstacle such as playing up small divergences in the policy as compared to the application and by insisting that the delivery into the hands of the insured is essential, when the policy is under seal and not mailed, or the agent has to exercise some control before he delivers the policy; at times the courts have given no explanation. Batiffol states expressly that the frequent justification that the agent had to check on the health of the insured at the time of the delivery, is rather farfetched. Many decisions bolster their arguments by defining the domicile of the insured as the place where the first premium has been paid.

In the remaining 25 per cent of the published decisions, the contract has been held to be made at the home office of the insurer. This has sometimes been justified by the

² BATIFFOL §§ 330, 338 bis, 341 ff.

³ *Id.* § 336. The recent decisions follow the same pattern. *Bradford v. Utica Mut. Ins. Co.* (1943) 179 Misc. 919, 39 N. Y. Supp. (2d) 810 is particularly noteworthy; here the court sets a striking example how this practice, combined with the adventures of husband-wife tort liability, manages to establish an insurance liability not existing, for one or the other reason, in either of the two involved states, New York and Massachusetts.

fact that the client sent the first premium with his application, but often no reason has been advanced.

The judges believe the insured best protected under his domiciliary law. In some cases, however, the mechanical rule has been followed so faithfully as to disregard an express stipulation for the insurer's law more advantageous to the insured⁴ or to localize the contract at a place where neither party was domiciled.⁵

(c) *Carnahan*.⁶ In the only monograph on the subject, a specialized voluminous treatise on the conflict of laws regarding life insurance, the expert author prudently distinguishes life insurance from other insurance and divides the problems involving life insurance into small compartments. These are concerned with the form of writing insurance, the various modes and conditions of delivering the policy, the warranties and representations made in applications, the rights of beneficiaries, the assignment of policies, the various nonforfeiture provisions, the death of the *cestui que vie*, limitation of action, incontestability clauses, and statutory penalties and fees. Within these parts smaller segments are formed. The basic contention is that within such a section or segment the courts handle the cases "in one of a few limited ways."⁷ Uniformity limited to these individual problems is claimed in the sense that there are majority rules.⁸ But the author reveals in the course of his investigation many more distinctions. Thus, the effectiveness of delivery for determining the place of contracting is allegedly decided by the query: Where is the last necessary act? Yet:

⁴ *Id.* 311 n. 2, citing *Mutual Life Ins. Co. of New York v. Hathaway* (C. C. A. 9th 1901) 106 Fed. 815.

⁵ *Id.* 311 n. 3, citing *Hicks v. National Life Ins. Co.* (C. C. A. 2d 1894) 60 Fed. 690.

⁶ CARNAHAN, *Conflict of Laws and Life Insurance Contracts* (ed. 2, 1958).

⁷ *Id.* 53, 495.

⁸ *Id.* 53.

“Actually one often suspects from the cases that selection was made with the consequence in view. The delivery concept is only a tool and how that tool will be employed in relation to problems of life insurance cannot accurately be determined merely by an inspection of the four corners of the insurance policy.”⁹

The last act may be defined in such way that it occurs at the home office of the carrier [insurer], or at the place of physical receipt of the policy. But:

“The courts adopt one or another connotation of delivery which will connect the policy with the law of the state where the applicant resided and manually received the policy. Consequently there is not the extent of uncertainty in the functioning of the delivery concept in conflict of laws as would at first appear.”¹⁰

For the law governing warranties and representations, “the courts have not consistently enunciated any single rule.” The courts have decided conflict of laws cases as the result of a weighing and balancing of various factors in their relation to the laws of several states.

“In six jurisdictions the opinions . . . have stated inconsistent rules. But most courts have explained their decisions in terms of the rule of the place of making of the contract.¹¹ . . . The cases reveal that a liberal statutory or decisional rule of the forum will be applied if the court, by adopting that connotation of delivery which relates to physical receipt of the policy by the applicant, finds that the forum was the place of making of the insurance contract. . . . Thus the net effect is to apply the law of the insured’s residence at the time he applied for the policy, at least when it is more favorable to him. . . .¹² To the extent that rules of the applicant’s home-state are most liberal, it may be taken that courts will tend to determine that the contract was

⁹ *Id.* 204.

¹⁰ *Id.* 250.

¹¹ *Id.* 325 f.

¹² *Id.* 327.

made there and to adhere, with at least verbal consistency, to the rule of the place of making the contract."¹³

Carnahan has summarized his findings in a forceful report in which he also asserts that

"Examples of the tendency to disregard conflict of laws rules in interstate transactions occur in every phase of insurance law, even in instances where the policy was taken out in another state. All too frequently, the court of the forum adopts and enforces its internal rule. . . ."¹⁴

(d) *Conclusion.* Carnahan's well-founded criticism is rather restrained. Viewing the matter under the general aspect of conflicts law reform, we must state that atomization of the contract by dissolving it into various incidents is totally unsound and that if conflicts rules are not binding on the court they are not legal rules. In sum, there is a certain stability in the method of handling the various situations, but practically no law on conflicts concerning insurance. This is all that the mechanical rules have achieved.

In the search for the real objective of the courts operating these rules, one more point seems characteristic. The question of where the contract is made, is largely replaced by the question of where the policy has been delivered, that is, the document is manually transferred to the insured; when this, too, cannot be ascertained, according to a rule adopted for instance in Pennsylvania, delivery is presumed to have occurred at the residence of the insured.¹⁵

The courts have had before them an overflowing mass of litigation in life insurance and relatively infrequent cases of other types of insurance. To these they have extended their questionable rules. But differences are notable,

¹³ *Id.* 328.

¹⁴ CARNAHAN, "The Conflict of Laws in Relation to Insurance Contracts," American Bar Assoc., Section of Insurance Law, 1937-38, 58 to 59.

¹⁵ *White v. Empire State Degree of Honor* (1911) 47 Pa. Super. Ct. 52, 57; *New York Life Ins. Co. v. Levine* (C. C. A. 3d 1943) 138 F. (2d) 286, 288; *Pierkowski v. New York Life Ins. Co.* (C. C. A. 3d 1944) 147 F. (2d) 928, 932.

and certain types of contracts, such as especially marine insurance, fall out of the picture. *Lex loci contractus* and the casuistry of delivery are applied also to marine insurance, but its old history has preserved for it universal principles of maritime law serving for the construction of the contract in agreement with other seafaring nations. The courts preferably interpret the contracts "in harmony with the marine insurance laws of England, the great field of this business."¹⁶

2. Statutes

In rare cases, decisions have pointed directly to the importance of the statutes, even to those of the forum.¹⁷ If they do, it is usually in order to declare that the statutes of the place of contracting are a part of the contract, which idea leads to a denial of party autonomy.¹⁸

In reality, most branches of the insurance business are very intensively regulated in the states and territories and the statutes have made various attempts to prescribe the application of domestic law to insurance contracts.

These provisions, however, despite a trend to unification,

¹⁶ *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.* (1923) 263 U. S. 487, 493; *Aetna Ins. Co. v. Houston Oil & Transport Co.* (C. C. A. 5th 1931) 49 F. (2d) 121, 124 states too pointedly that "it was a maritime contract, and therefore governed by the general admiralty law and not by the law of Texas," deserving correction as by *The Anthony D. Nichols* (D. C. S. D. N. Y. 1931) 49 F. (2d) 927. The international community of maritime insurance law must be kept in view in the problem of reform, as rightly suggested by KELLY, "Effect of Proposed Conflict of Laws etc.," *American Bar Assoc., Section of Insurance Law, 1940-1941*, 176, 177. In addition, see GRIESE, "Marine Insurance Contracts in the Conflict of Laws: A Comparative Study of the Case Law," 6 U. C. L. A. L. Rev. (1959) 55; GRIESE, "Internationales Seeversicherungsrecht," *Versicherungswissenschaftliches Archiv* 1959, 129.

¹⁷ As an exception, see, e.g., *Yeats v. Dodson* (1939) 345 Mo. 196, 206, 127 S. W. (2d) 652, 656 where the authorization to make insurance contracts at offices in Kansas City, Missouri and nowhere else is the principal of four reasons to apply Missouri law, thus avoiding a clause.

¹⁸ Cf. BATIFFOL 310 § 347; see Vol. II (ed. 2) p. 397. A restrictive theory as to party autonomy in insurance contracts is explicitly advocated by RYSER, *Der Versicherungsvertrag im internationalen Privatrecht* (Thesis) (Berne, 1957) 78-87 and KELLER in *Roelli's Komm.* (ed. 2) 61 ff.

still differ on the point here in question and, notwithstanding many improvements, still need reform.¹⁹ It is a rather obscure matter, somewhat neglected in the literature.

Tentatively, we may distinguish the following types of statutory provisions for governing insurance contracts.

(a) In some states, all policies of insurance issued for delivery or issued and delivered within the state are declared subject to the provisions of the domestic law, either as a condition of licensing foreign insurers,²⁰ or by subjecting foreign and domestic insurers in one clause to the insurance statutes.²¹

(b) In some statutes all insurance contracts on the life of residents and property or other interests within the state, are deemed to be made within the state and subject to its law.²² Contrary stipulations are sometimes declared void.²³

It may be noted marginally that in the flood of statutes in 1947-1948 mainly regulating insurance rates it has appeared natural to extend their scope to insurance on property or risks located in the state.²⁴

(c) Many provisions prohibit specific contract stipulations or prescribe certain clauses.²⁵

Other statutes contain variations or are difficult to place. In particular, the meaning of many provisions indiscriminately addressed to domestic and foreign insurers is ambiguous.

¹⁹ Cf. ORFIELD, "Improving State Regulations of Insurance," 32 Minn. L. Rev. (1948) 219.

²⁰ E.g., New Mexico: Stat. (1953) § 58-5-7; Wisconsin: Stat. Ann. (1957) § 201.32.

²¹ E.g., Indiana: Ann. Stat. (1952 Replacement) § 39-4206; Nebraska: Rev. Stat. (1943) § 44.302.

²² E.g., Minnesota: Ann. Stat. (1945) § 60.28; Mississippi: Code (1942) § 5633; cf. CARNAHAN (ed. 2) 122 ff. § 26.

²³ Massachusetts: Ann. Laws (1959) c. 175 § 22.

²⁴ See the list by ELY, "State Rating and Related Laws," *Ins. L. J.* 1947, at 877 n. 12.

²⁵ PATTERSON, "The Conflict Problems etc.," *American Bar Assoc., Section of Insurance Law, 1937-38*, 69 at 71 calls these statutes the "internal law group" and describes their criteria at 72 ff.

The over-all result, however, is a broad claim not only to regulate insurance business by administrative prescriptions but also to control insurance contracts of domestic and foreign licensed insurers by the domestic private law. In this regard, the statutes are efficiently supplemented by supervision over the policy forms to be used.²⁶ Consultations between the commissioners or superintendents and the companies about intended changes of legislation result, as I am told, in a satisfactory understanding as well as a vigorous influence by the state.

Insurance carriers and state legislatures have considerably simplified the matter by establishing standard policies. These are nation-wide in the case of insurance against automobile liability and workmen's compensation, or are similar in all but a few states, as in fire insurance, or they are uniform for a group of states, as in theft and burglary insurance. But although it is possible for the companies to comply with the various requirements of financial security and investments in the different states by obeying the highest standards,²⁷ the heterogeneous private law provisions may not be easily satisfied. At the same time, a typical policy clause says in fact that "terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes."

If this is the living law, working as a whole, it would appear without much question that the law of the books and of the decisions is very improperly correlated. How do both spheres co-operate?

The answer should lie with the definitions of the contracts

²⁶ Michigan: 17 Stat. Ann. (1943) §§ 24.266, 24.267.

Kansas: Gen. Stat. (1935) § 40-216.

South Dakota: Code (1939) § 31.1601.

²⁷ PATTERSON, "The Future of State Supervision of Insurance," 23 Tex. L. Rev. (1944) 18, 31.

which the domestic law claims to govern, or at least of the contracts under its administrative supervision.

We do not know, however, whether it is a singular pretension or presents the rule generally in mind of the legislatures, when the statute of Alabama prescribes:

"All contracts of insurance the application for which is taken within the state, shall be deemed to have been made within this state and subject to the laws thereof,"²⁸

or what is the exact meaning of the Utah provision:

"Every insurance contract made through an authorized agent . . . shall be deemed to have been made in the state of Utah irrespective of where the insurance contract was written."²⁹

Usually foreign corporations are not considered doing business in a state when they maintain only soliciting agents there, but insurance is a special matter. We encounter, in fact, divided opinions.³⁰

The universal trend, of course, towards extension of government control, in the states of this country as well as in Europe, produces results such as in Canada. Insurance

²⁸ Alabama: Code (1940) tit. 28 § 10. The Annotation declares that this is a constitutional provision, citing *State Life Ins. Co. v. Westcott* (1910) 166 Ala. 192, 52 So. 344.

North Carolina: Stat. (1943) § 58.28.

²⁹ Utah: Code (1943) tit. 43 c. 3 § 23.

³⁰ 44 C. J. S. Insurance § 82: "A foreign company may be doing business in the state, if it actively solicits insurance and collects assessments . . ."; to the same effect, 29 Am. Jur., Insurance § 41, Supp. 1948 p. 78 new par. But compare *FLETCHER*, 18 Cyc. Corp. § 8725: ". . . the mere solicitation of insurance through agents in such state, and the mere receipt or collection of premiums . . . does not constitute business there unless other activities are engaged in by the foreign corporation in the foreign state."

In a case involving contribution to an unemployment fund, the Supreme Court, in *International Shoe Co. v. Washington* (1945) 326 U. S. 310, 320, found activities carried on through soliciting sales agents so systematic and continuous throughout years as to justify liability for contribution. This, certainly, is an exception to the rule.

In *McGee v. International Life Ins. Co.* (1957) 355 U. S. 220, the Supreme Court upheld a California statute providing for jurisdiction over foreign companies in cases where suit is brought on insurance contracts with residents of that state. This, again, shows that insurance is a special matter.

contracts "deemed to be made in the Province" will be assumed subject to its law when a local residence has been indicated in the policy or application, even though there is no actual residence in the state.³¹ However, the same result is reached by construction also if the contracts are really made in the Province.³² Thus, two jurisdictions are immediately in a positive conflict.

For all connected questions, an exact definition of doing insurance business in a state is highly desirable but seldom afforded. An exception is Illinois where the following acts if performed within the state are declared to constitute transacting insurance business :

"(a) Maintaining an agency or office where contracts are executed which are or purport to be contracts of insurance with citizens of this or any other state; (b) maintaining files or records of contracts of insurance; or (c) receiving payment of premiums for contracts of insurance."³³

For describing the insurance contracts subject to supervision, the statutes usually emphasize issuance and/or delivery of the policy in the state. As Patterson has discovered, delivery, "the crucial word," is ordinarily supposed to occur at the residence of the applicant who is usually the insured, whereas the domestic insurers are normally said to have "issued" the policy.³⁴

In the entire picture, the most clearly emerging ideas are that states desire to regulate, partially or wholly, insurance contracts when (1) the insured is a resident or (2) the insured property is situated in the state. The first case conforms to the majority of the decisions. The second point of view is in direct contrast to the court decisions that in

³¹ *Re Duperreault* (Sask.) [1941] 1 D. L. R. 38, discussing *Rev. Stat. Sask., 1930, c. 101 s. 156.*

³² *Re Mutual Benefit Accident Ass'n and Anderson* (Ontario) [1941] 4 D. L. R. 347, commenting on *Ins. Act, Rev. Stat. Ont., 1937, c. 256 s. 130.*

³³ *Illinois: Rev. Stat. (1949) c. 73 § 733.*

³⁴ PATTERSON, *supra* n. 25, at 74.

apparent consistency, for one or the other reason, recognize the law of the place of contracting even for fire insurance, although the objects are in another state.³⁵

3. Federal Constitution

The impact of federal restrictions on state power to regulate insurance has been a controversial subject for a long time. The fluctuating views of the Supreme Court of the United States on this subject, often discussed,³⁶ have led ultimately to a minimum of interference with the state activity. Insurance may be regulated by any state as it sees fit, provided that the regulation is neither outrageous nor discriminating and can be justified in any reasonable manner.³⁷

The orbit of unchecked state regulation thus permitted,

³⁵ To the same effect, *Coffin v. London & Edinburgh Ins. Co.* (D. C. N. D. Ga. 1928) 27 F. (2d) 616, because "fire insurance is a purely personal contract," but the court clearly construed the *lex loci contractus* as truly intended by the parties, in order to maintain the validity of the contract. The *Seamans v. The Knapp Stout & Co.* (1895) 89 Wis. 171, 61 N. W. 757, because insurance does not affect title; *Western Massachusetts Mut. Fire Ins. Co. v. Hilton* (1899) 42 App. Div. 52, 58 N. Y. Supp. 996, because the insurance was payable in Massachusetts; *Palmetto Fire Ins. Co. v. Beha* (D. C. S. D. N. Y. 1926) 13 F. (2d) 500, 508, with constitutional argument; *Vermont Mutual Fire Ins. Co. v. Van Dyke* (1933) 105 Vt. 257, 165 Atl. 906, because of the "ordinary rule" of *lex loci contractus*. For comment see *infra* p. 347 f.

The location of property is mentioned in addition to countersignature as supporting choice of law in *George L. Squire Mfg. Co. v. Nat'l Fire Ins. Co.* (D. C. W. D. N. Y. 1933) 4 F. Supp. 137.

³⁶ On the background of insurance regulation in the relationship of federation and state, see in particular Mr. Justice Rutledge in *Prudential Ins. Co. v. Benjamin* (1946) 328 U. S. 408, 413 ff.

On the prehistory of this decision, see *United States v. South-Eastern Underwriters Association* (1944) 322 U. S. 533. Note, "Congressional Consent to Discriminatory State Legislation," 45 Col. L. Rev. (1945) 927; and subsequently the McCarran Act of March 9, 1945, c. 20, 59 Stat. 33, as amended July 25, 1947, c. 326, 61 Stat. 448, 15 U. S. C. A. §§ 1012-1015; and bibliography in "Insurance as Interstate Commerce," by the Insurance Section of the American Bar Association, 1946-1947. The ensuing legislative activity of the states has been described by ELY, *supra* n. 24, at 867.

³⁷ Mr. Justice Black, dissenting vote, in *Order of United Commercial Travelers of Amer. v. Wolfe* (1947) 331 U. S. 586 at 630: "I had considered it well settled that if an insurance company does business at all in a state, its contracts are 'subject to such valid regulations as the state may choose to adopt.'"

in turn must be defined. Since *Paul v. Virginia*,³⁸ the Supreme Court has simply used the customary criterion of the place of contracting. A contract made in Tennessee "was a Tennessee contract. The law of Tennessee entered into and became a part of it."³⁹ Mississippi overreached its scope when it claimed control over a contract "made and to be performed in Tennessee."⁴⁰

However, the Due Process Clause, as in the last-mentioned case, and the Full Faith and Credit Clause did not operate so smoothly in other situations. In 1943, an event occurred of extreme importance for a basic contention of this work. The criterion for distributing state power over insurance was readily changed. Mr. Justice Black spoke for the court:⁴¹

"In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizens insured or the protection of the state from the incidents of loss." (Reference to the opinions in the workmen's compensation case of *Alaska Packers*.)⁴²

³⁸ *Paul v. Virginia* (1863) 8 Wall. 168.

³⁹ *Aetna Life Ins. Co. v. Dunken* (1924) 266 U. S. 389, 399; *New York Life Ins. Co. v. Dodge* (1918) 246 U. S. 357.

⁴⁰ *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.* (1934) 292 U. S. 143; cf. Vol. II (ed. 2) p. 556 n. 15. The Supreme Court of Mississippi has accordingly revised its view, *Protective Life Ins. Co. v. Lamarque* (1938) 180 Miss. 243, 177 So. 15.

⁴¹ *Hoopstone Canning Co. v. Cullen* (1943) 318 U. S. 313, 316. See LENHOFF, "Die spezifischen grenzrechtlichen Probleme im neueren amerikanischen Versicherungsrecht," in *Internationales Versicherungsrecht—Festschrift für Albert Ehrenzweig* (1955) 153, 161 ff.

⁴² *Alaska Packers Ass'n v. Ind. Accident Comm. of California* (1935) 294 U. S. 532, 542.

Accordingly in the instant case, the elements connecting the insurance contract with the state of New York were enumerated and held to prevail, including activities, visits, and consultations, prior to and subsequent to the making of the contract, and the location of the insured object.

This abandoning of the formalized old contracts presents a progress of immeasurable value.^{42a} Their replacement by a method of balancing state interests in every individual situation, it is submitted, may not be the last word. It is too much like the method of ascertaining the most closely connected law by grouping all local connections, an operation vastly superior to *lex loci contractus*, but a source of great uncertainty. Conflicts law, advancing further, may once more suggest improvements in the constitutional doctrine.

4. Fraternal Benefit Associations in Particular

The different approaches in the three different spheres mentioned above are apparent in the treatment of corporations, including insurance of the members among other social purposes. The ancient Roman *collegia funeraticia* have their analogy in the fraternities taking care of the funerals of their members. From modest beginnings, certain American fraternal benefit associations have developed into very powerful companies using the same methods of business as ordinary insurers. Therefore the problem arose whether

^{42a} In *Clay v. Sun Insurance Office, Ltd.* (1960) 363 U. S. 207 the plaintiff, while being a resident of Illinois, purchased there from defendant an insurance policy requiring that suit for a loss be brought within one year of the discovery; after having moved to Florida, plaintiff sustained losses there and instituted an action more than 12 months after discovery. A minority of the court was willing to affirm the application by the District Court of a Florida statute invalidating the time limitation of one year, which presumably was valid under Illinois law; but the majority held that the constitutional question was prematurely put and refused to answer it.

See also *Watson v. Employers Liability Assurance Corp., Ltd.* (1954) 348 U. S. 66 and Vol. II (ed. 2) pp. 264 f.

the insurance relationship of the corporation to the members is governed by the law of the charter state conformably to the principle of personal law or follows the same law as an ordinary insurance contract.

(a) The courts were divided. A minority applied the law of the home state of the corporation.⁴³ For the most part, the *lex loci contractus* prevailed.⁴⁴

(b) The state statutes commonly have excluded fraternal associations from their main provisions on foreign insurance carriers and subjected them merely to a restricted supervision. Nevertheless, under the title of public policy the home law has been disregarded in several cases which have raised the question of federal restraint.⁴⁵

(c) Recently the Supreme Court has declared by a narrow majority the prevalence of the charter state over the state where a member resides.⁴⁶ An essential part of the reasoning, however, seems to rest on the argument that the state of South Dakota had licensed the association and thereby acquired full knowledge of the terms of its insurance conditions;⁴⁷ "if a state gives *some* faith and credit" to the organization of a fraternal benefit society by another state, permitting its own citizens to become members of, and benefit from, it, "then it must give *full* faith and credit" to the burdens and restrictions inherent in the membership.⁴⁸

The practical significance of the decision is doubtful,

⁴³ More recently, *Van de Water v. Order of United Commercial Travelers of America* (C. C. A. 2d 1935) 77 F. (2d) 331; *Meyer v. Meyer* (C. C. A. 8th 1935) 79 F. (2d) 55; *Modern Woodmen of America v. Crudup* (1935) 175 Okla. 183, 51 Pac. (2d) 718; *Kohler v. Kohler* (C. C. A. 9th 1939) 104 F. (2d) 38.

⁴⁴ *Supreme Lodge Knights of Pythias v. Meyer* (1905) 198 U. S. 508; for the other cases, cf. 2 BEALE 1056 n. 6.

⁴⁵ See Note, "Full Faith and Credit: Preferential Treatment of Fraternal Insurers," 57 *Yale L. J.* (1947) 139.

⁴⁶ *Order of United Commercial Travelers of America v. Wolfe* (1947) 331 U. S. 586.

⁴⁷ *Id.* p. 624.

⁴⁸ *Id.* p. 625.

since the plaintiff corporation itself subsequently changed the clause in issue (for a short limitation on members' suits)⁴⁹ and states are now expected to admit foreign fraternal associations less easily.⁵⁰

5. A Reform Attempt

In excellent reports to the American Bar Association in 1937, it was explained that the conflicts practice concerning insurance contracts is defective,⁵¹ and subsequently a committee under the chairmanship of Professor Patterson submitted a tentative draft of a Uniform Statute.⁵² Its first section was based on the principle that an insurance contract should be governed by the law of the state where the insured risk is situated. Life insurance should, for this purpose, be localized at the residence of the insured; insurance against loss or damage to property at the situation of the property; automobile liability insurance at the place where the vehicle is principally garaged, et cetera.^{52a} Section 2 limits the application of the domestic law to the contracts delivered or issued in the state. Section 3 exempts coverage of risks located in different states.

The draft has been abandoned because of opposition from a number of representatives of insurance companies.⁵³

⁴⁹ See Note, *supra* n. 45, at 143.

⁵⁰ *Id.* at 144.

⁵¹ American Bar Association, Section of Insurance Law, 1937-1938, Kansas City Meeting, 58 ff.

⁵² American Bar Association, Section of Insurance Law, Program and Committee Reports (for the Meeting at) San Francisco, July 10-12, 1939. See also PATTERSON, *Essentials of Insurance Law* (ed. 2, 1957) 52 ff. § 10.

^{52a} The Restatement (Second), Tent. Draft No. 6 (1960) § 346h and § 346i, contains virtually the same proposition. See also EHRENZWEIG, *Conflict* 516 ff.

⁵³ American Bar Association, Section of Insurance Law, Philadelphia Meeting 1940-1941, 176 ff., reports by AMEROSE B. KELLY, ROBERT E. HALL, and HERVEY J. DRAKE. HENRY, *id.* 173 *sub* (1) recognizes that the companies "escape liability" only by exception. The apprehensive arguments of KELLY, *id.* 178 f. against Patterson on the ground of unconstitutionality of rules other than the law of the place of contracting have since quickly lost their value.

Apart from certain amendments, they advanced the thesis, doubly astonishing in the mouth of insurers, that the present conflicts rules are all to the good and exclude any doubt. At the same time it was contended that the proposed local connections would provoke litigation. Force of habit is a strong force with lawyers! Professor Patterson's authority reinforces the conviction that in all three sets of American rules a change is maturing from legalistic tests to criteria indicating a connection with the scope of state supervision and with the risk insured. An analogous development of the European doctrines confirms the adequacy of the new method and contributes further suggestions for its use. There the conflicts literature has largely adopted the view of the specialists of insurance law that insurance contracts are of a peculiar nature due to the extensive influence of the supervising state which "directs" or "dictates" the contents of the contracts.⁵⁴

II. FOREIGN LAWS

I. Traditional Tests

Lex loci contractus. As in other contracts, the law of the place of contracting has exercised a strong hold on insurance contracts. This is true, not only of the United States, as well as France and Italy, countries professing this principle, but also of several other countries.⁵⁵ Particularly for maritime insurance, *lex loci contractus* is favored.⁵⁶

⁵⁴ See, e.g., LEREBOURS-PIGEONNIÈRE (ed. 7) 407 § 353.

⁵⁵ Canada: *Re Mutual Benefit & Accident Ass'n* (1941) 4 D. L. R. 347.

France: Cass. req. (Dec. 18, 1872) S. 1873.1.35, Clunet 1874, 235; Cass. civ. (Dec. 28, 1936) Revue Crit. 1937, 682: an English styled policy.

Germany: RG. (Feb. 13, 1891) 47 Seuff. Arch. 3 (domicil of insurer); (Nov. 11, 1928) 122 RGZ. 233. For other cases, see BATIFFOL § 350.

Italy: Former C. Com. art. 58; C. C. Disp. Prel. (1942) art. 25; CAVAGLIERI, Dir. Int. Com. 466 ff.

⁵⁶ See RIPERT, 3 Droit Marit. (ed. 4) 369 § 2377; 2 JACOBS § 681; (most cases cited *supra* n. 55 concern maritime insurance); 2 Répert. 180 n. 5.

Belgium: App. Bruxelles (March 17, 1925) Jur. Port Anvers 1925, 97.

The *Código Bustamante* repeats this rule if it is not a contract "by adhesion," for all insurance contracts, except fire insurance between parties of different personal law.⁵⁷

But a group of writers have adjusted the law of the place of contracting to the phenomenon of contracts of adhesion. Because the application is on the standard form of the insurer, the contract is completed by the insurer at his home office.⁵⁸

Law common to the parties. Nationality or domicile common to the parties has been stressed particularly if they are subjects of the forum,⁵⁹ but this is an awkward rule.

Lex loci solutionis. A few decisions have localized insurance at the insurer's place, apparently as a place of performance,⁶⁰ but they rest on the assumption that the prevailing circumstances point to this place.

France: Cass. req. (April 24, 1854) S. 1856.1.339; Trib. consulaire Alexandrie (June 29, 1874), aff'd, App. Aix (April 15, 1875), 2 Répert. 183 No. 29.

Germany: RG. (April 13, 1898) JW. 1898, 371, Clunet 1899, 295.

The Netherlands: See *infra* n. 63.

⁵⁷ *Código Bustamante*, art. 262, omits a reference to art. 185, but is considered to imply it by BUSTAMANTE, La Commission de Jurisconsultes de Rio 147; *id.*, 2 Der. Int. Priv. 294 § 1377.

⁵⁸ RIPERT, 3 Droit Marit. (ed. 4) 401 f. § 2409; DE SMET § 36; DIENA, 2 Dir. Com. Int. 462; CAVAGLIERI, Dir. Int. Com. 476 (thus evading art. 58 of the former Italian C. Com.). Cf. also Note, 22 Revue Dor (1930) 287.

⁵⁹ England: DICEY (ed. 6) Rule 149: where an English merchant ships goods from England and insures them with English underwriter, English law, despite a foreign flag. DICEY (ed. 7) Rule 161 superseded the old rule by enunciating the principle that marine insurance policies are governed by English law if issued by an underwriter carrying on business in England.

France: App. Aix (March 22, 1923) S. 1924.2.124 (maritime insurance; common nationality and flag).

Germany: RG. (Jan. 27, 1928) 120 RGZ. 70, 73 (German law for life insurance taken out in Vienna, Austria, by a German domiciled in Vienna from the local general representative of a German company; expressly overruling RG. (Feb. 13, 1891) 47 Seuff. Arch. 3. *Contra*: NUSSBAUM, JW. 1928, 1198; BRUCK 30 n. 84; KELLER in 4 Roelli's Komm. (ed. 2) 23.

Italy: Disp. Prel. C. C. (1942) art. 25 par. 1.

⁶⁰ Germany: RG. (Dec. 5, 1902) 53 RGZ. 138; (Jan. 16, 1925) 34 Z. int. R. (1925) 427; Bay. ObLG. (June 24, 1931) IPRspr. 1931 No. 5; OLG. Köln (Sept. 9, 1934) IPRspr. 1934, No. 94.

Switzerland: BG. (Nov. 2, 1945) 71 BGE. II 287, 291.

2. Proper Law

The English doctrine has consistently maintained the force of express and presumptive party intention. "It is no doubt competent to an underwriter on an English policy to stipulate . . . according to the law of any foreign state."⁶¹ Subsidiarily, the circumstances of the case may supersede even the English law of the place of contracting.⁶² The prevailing Continental theory has been to the same effect. Express agreement, presumptive intention, or the law most closely connected with the contract have been looked for as a rule.⁶³ Particularly maritime insurance, naturally free from intensive state supervision, has enjoyed a long tradition of free choice. Among the criteria of choice of law, use

⁶¹ Greer v. Poole (1880) 5 Q. B. D. 272, per Lush, J., cited by DICEY (ed. 7) 836 as a general rule. In Pick v. Manufacturers Life Ins. Co. (1958) 2 Ll. L. Rep. 93 per Diplock, J., the force of party intention has been confirmed, and from the circumstances given in the case at bar the learned judge inferred that the law of the insurer's head office (Ontario) governed a policy delivered to plaintiff in Palestine. For a comment, see KAHN-FREUND, "Contractual Obligation and the Conflict of Laws: Contracts of Insurance," 22 Mod. L. Rev. (1959) 195.

⁶² Maritime Ins. Co. v. Assecuranz Union von 1865 (1935) 79 Sol. J. 403, 52 Ll. L. Rep. 16 per Goddard, J.: reinsurance with a German reassurer, signed in Liverpool and Hamburg respectively; the English arbitration clause, though merely "an honorable agreement," points to English law under which the contract is void (an illustration to Vol. II (ed. 2) p. 390 n. 118).

⁶³ Belgium: App. Bruxelles (Feb. 6, 1900) and other cases, see DE SMET 49.

France: PICARD et BESSON, 1 Traité § 303 (for contracts that are not forcibly French, see *infra* p. 344).

Germany: RG. (Dec. 23, 1931) IPRspr. 1932, 61 No. 30 with respect to the consent of the parties in form (separated from the contract against the better methods of the same court); (April 11, 1933) IPRspr. 1933, 40 No. 21. OLG. Stettin (Feb. 22, 1932) IPRspr. 1932, 79 No. 35 (party intention for the law of the German insurer according to all circumstances).

Greece: FRAGISTAS, 1 Symmikta Streit at 347, proves full liberty of the parties to exist.

The Netherlands: H. R. (June 13, 1924) N. J. 1924, 859, 8 Revue Dor 319 (reversing the decision by App. den Haag cited in Vol. II (ed. 2) p. 390 n. 118; see also *id.* at n. 120). App. den Haag (Oct. 19, 1934) W. 12889, N. J. 1934, 1660 (two Belgians contract in the Netherlands on a Dutch policy for insurance of Dutch agricultural products).

of a national standard form has much importance as in maritime carriage.⁶⁴

The Swiss Federal Tribunal, however, seems only to recognize an express agreement, formulated by at least one party.⁶⁵

3. The Law of the Insurer

More recently a theory has found great favor which again starts by recognizing the group of "contracts of adhesion," concluded on the terms of one party through mere acceptance by the other. The contract of insurance is certainly an outstanding example. The need for protecting the interests of the insured is evident and well known.⁶⁶ But this is a consideration of municipal policy everywhere.

In conflicts law it has been inferred that the place of the insurer is the center of the contract. In addition to the authors mentioned above who to this effect construe the place of the insurer as the place of contracting, increasing authority has directly adopted this law.⁶⁷ A sound formula-

⁶⁴ Congress of Antwerp on Commercial Law (1885) Actes 129 quest. 52.

Belgium: App. Bruxelles (May 13, 1936) 35 Revue Dor 96.

England: The Penthames, Boag v. Standard Marine Ins. Co., Ltd. (1937) 57 Ll. L. Rep. 83 (implicitly).

France: App. Aix (March 22, 1923) S. 1924.2.124: goods shipped from the Philippines, where contract made, to Marseilles, English insurance form; *contra*: Cass. req. (Dec. 28, 1936) Revue Crit. 1937, 682.

Germany: RG. (Dec. 23, 1931) IPRspr. 1932, 61 No. 30: English law for a contract of participation in an insurance risk, because of policy clauses. OLG. Hamburg (Nov. 23, 1934) Hans. RGZ. 1935 B 31: insurance taken in Istanbul with reference to Lloyd's usages, no application of the General German Marine Insurance Conditions.

⁶⁵ BG. (Nov. 2, 1945) 71 BGE. II 287, 290 in this case acknowledges intention to apply German law. On the subsidiary rule, see *infra* p. 343 n. 80. On the requirement of an express agreement, see RYSER, *supra* n. 18, at 84 f.

⁶⁶ A book by A. MISSOL, *L'assurance contrat d'adhésion, et le problème de la protection de l'assuré* (Paris 1934) is announced in 34 Revue Trim. D. Civ. (1935) 344 No. 16.

⁶⁷ 2 BAR 148, 226; 2 MEILI 375; DIENA, 2 Dir. Com. Int. 458, 3 *id.* 468; JITTA, 1 Substance 393; JOSEPH, 1 Z. int. R. (1913) 492; 2 SCHNITZER (ed. 4) 734 f.; KEGEL, Kom. (ed. 9) 562 f. note 193 before art. 7 EG. BGB.

Poland: Int. Priv. Law, art. 8 No. 5; Draft 1961, art. 15 § 2 No. 7.

tion has been achieved by the leading German scholar in insurance law, Ernst Bruck.⁶⁸ He argues as follows:

In exceptional cases, individual agreements may be concluded in insurance of transport, vessels, credit, or against loss by money exchange. Other insurance contracts, however, usually follow a definite pattern, although some individual clauses may be modified or inserted. The totality of the contracts of one class form an economic unit conditioned by their essentially identical legal structure. To assume a risk requires technical as well as legal uniform planning. We must focus not on the isolated contract but on the group of similar contracts, when we look for adequate localization. Consequently, the contract centers in the country where the insurer uses his particular technique under national supervision.

Or to quote a French author:

It seems more normal to localize the contract at the seat of the insurer, because of the technical organization of insurance and the insurer's duty of basing statistics on similar conditions, in order to calculate with some certainty. Often the idea of protecting the assured is invoked for justifying the application of the law of the place of contracting, but if the assured knows the law of his domicile, it is not shown that this law protects him better than the law of the insurer's domicile.⁶⁹

Nevertheless, the concentration on the domicile of the insurer, by this reasoning, turns to its exact opposite in case of a branch or agency established in a foreign country since it forms a partial nucleus of contracts. Even on this basis several systems are possible. But in the majority⁷⁰ of Euro-

⁶⁸ BRUCK *IO* f.; BRUCK, *Privatversich. R.* 40 ff.; BRUCK-MÖLLER, *Kom.* (ed. 8) 81 ff. ns. 86-98 before sect. I.

⁶⁹ PICARD et BESSON, I *Traité* 624 § 304.

⁷⁰ See, as an example, Brazil, *Decreto-Lei* of March 7, 1940, No. 2063 art. 7.

We do not hear much of the minority to which England belongs and in which FRAGISTAS, "The Contract of Insurance in Private International Law (Greek)" in 1 *Symmikta Streit* 341, 345 counts Greece. He maintains that a

pean and Latin-American countries, insurance contracts made through the general representative of a foreign insurer are in a compulsory manner subjected to a domestic law. This seems to have been suggested by the particular nature of the license needed by any insurer, which includes a grant depending on numerous prerequisites. The subjection of the contracts to the domestic law has been inferred from their presumptive intention, or voluntary submission, or by implication from the grant of the license.⁷¹

The impact of the territorial law on establishments of a foreign insurer is commonly very large in Europe and Latin America. The authority of the general representative whom foreign insurers must appoint, is broad, if not unlimited and unlimitable as in Germany. Often a company is not allowed to make contracts otherwise than by the local agent with residents of the state or with respect to domestic immovables.⁷² The local requirements of financial security and investment contribute to complete the division of an international insurer's business into separate territorial compartments.

An illustration existed in the Peace Treaty of Versailles. An Allied or Associated Power could cancel the insurance contracts of its nationals with a German company, in which case the company had to hand over "the proportion of its assets attributable to the policies so cancelled." In the case of a branch in a victor country, subject to the latter's right to liquidation, conflicts rules were expressed:

Greek license to do business subjects the foreign insurance carrier to the Greek laws but does not force application of Greek (private) law upon contracts made in Greece.

⁷¹ BRUCK 30 n. 84; KEGEL, *Kom.* (ed. 9) 563 n. 55.

For a thorough discussion, see PRÖLSS, "Das Statut der Zweigniederlassung im internationalen Versicherungsrecht," 16 *RabelsZ.* (1950-51) 203; RAISER, *Bestandzugehörigkeit im internationalen Versicherungsrecht*, Festschrift für Hans Lewald (1953) 349.

⁷² BRUCK, *Privatversich.* R. 112, 114. The method is familiar; see, for instance, *Palmetto Fire Ins. Co. v. Conn.* (D. C. S. D. Ohio 1925) 9 F. (2d) 202, based on a provision of the Ohio Code respecting property in Ohio.

"Where contracts of life insurance have been entered into by a local branch . . . in a country which subsequently became an enemy country, the contract shall, in the absence of any stipulation to the contrary in the contract itself, be governed by the local law. . . .

"In any case where by the law applicable to the contract the insurer remains bound by the contract . . . until notice is given to the insured, etc."⁷³

The local state control over business establishments issuing policies played a role also in other problems after the First World War. A well-known New York decision went so far as to attribute to the New York branch of a nationalized Russian insurance company a distinct personality sufficient to keep it alive.⁷⁴ The Swiss Federal Tribunal, in analogous reasoning, mentioned the importance of the obligatory Swiss general representative of any foreign insurer and the security furnished by the latter, and held that where a German obtained a policy through the Swiss branch of a German company, his rights were inaccessible to a French war liquidation.⁷⁵ The German Supreme Court similarly assumed that an insurance policy issued by an Indian branch of the New York Life Insurance Company, but later wholly transferred to the Berlin branch of the company, could not be validly seized by the British custodian in India :

It may be left undecided whether the Berlin branch is an independent legal person. In any case it is represented by the general agent, entitled in its external relation to acquire

⁷³ Treaty of Versailles, Part X, V, Annex III, MARTENS, Recueil Ser. 3, XI, 580 ff., §§ 13, 14. In the Peace Treaty with Italy of 1947, Annex XVI, No. 4, insurance contracts are reserved for separate conventions between the Allied or Associated Power interested and the Italian Government. An implementing agreement between Italy and the U. K. of June 1, 1954, was ratified on May 9, 1958 (British Treaty Series No. 27, 1958). A similar agreement was concluded between the Federal Republic of Germany and the U. K. (1961 BGBI. II. 110).

⁷⁴ Lehman, J., in *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.* (1939) 280 N. Y. 286, 20 N. E. (2d) 758, aff'd (1940) 309 U. S. 624.

⁷⁵ Swiss BG. (Nov. 4, 1920) 46 BGE. II 421.

rights independently and must therefore be treated like an independent legal person in domestic transactions.⁷⁶

Correspondingly, an American court, refusing jurisdiction in a test case for recovery of the cash surrender value from the New York Life Insurance Company, states that the policy was issued by the branch in Germany to a German resident and:

"The agency in Germany was established as a distinct entity, a German creation under German law. A reserve fund was made and all premiums received were placed in that fund and invested in Germany under German official approval."⁷⁷

Numerous consequences of this situation are perceptible.⁷⁸ The entire theory calling for the law of the insurer's headquarters or its branch office, respectively, has been endorsed by contemporary writers,⁷⁹ German and Swiss courts,⁸⁰ and the Montevideo Draft of 1940.⁸¹

If, however, the applicable law is to be dependent on

⁷⁶ RG. (Nov. 26, 1920) JW. 1921, 245.

⁷⁷ Heine v. New York Life Ins. Co. (C. C. A. 9th 1931) 50 F. (2d) 382, 385. The court says that 28,000 policies executed in Germany were sought to be enforced in this country.

⁷⁸ E.g., Italy: Cass. (April 8, 1938) Foro Ital. 1938 I 823, Giur. Ital. 1938 I 755, 7 Giur. Comp. DIP. 1938, 323; the Italian "general agency" of a foreign insurer is an independent enterprise, hence its assets in the country may be separately liquidated; Cass. (Jan. 10, 1941) Foro Ital. Mass. 1941, 12, 10 Giur. Comp. DIP. (1944) 125 No. 25; hence, also, the Italian stock of insurances with reserves is a possible object of separate transfer.

⁷⁹ Argentina: HALPERIN, *El contrato de seguro (seguros terrestres)* (Buenos Aires 1946) 64 § 57.

Austria: ALBERT EHRENZWEIG, sr., *Deutsches (österreichisches) Versicherungsvertragsrecht* (1952) 29 f.

France: PICARD et BESSON, *1 Traité* 624 § 304, *supra* n. 69; ARMINJON, *Droit Int. Pr. Com.* 471 § 281.

Germany: BAR in Ehrenberg's *Handb.* 413; NUSSBAUM, *D. IPR.* 231. An opponent has been criticized by MÖLLER, 9 *Z. ausl. PR.* (1935) 336; HAGEN, *Z. f. d. Ges. Versicherungs-Wissenschaft* (1935) 76.

Italy: LORDI, *1 Istituzioni di diritto commerciale* (1943) 34, referring to his work, 2 *Obbligazioni commerciali* 1032 § 831; CAVAGLIERI, *Dir. Int. Com.* 501.

Switzerland: KELLER in 4 *Roelli's Komm.* (ed. 2) 7 ff.; BG. (Nov. 2, 1945) 71 BGE. II 287, 292.

⁸⁰ Germany: OLG. Königsberg (Dec. 9, 1930) *Bl. IPR.* 1931, 211; Bay. ObLG. (June 24, 1931) *IPRspr.* 1931, 13; RG. (April 11, 1933) *IPRspr.* 1933,

the influence of state supervision, the delimitation of the administrative state supervision is of primary importance. In the same connection the situation of the insured risk requires consideration.

4. State Supervision and the Situation of the Risk

The European doctrine concedes great influence to the scope claimed by the state for administrative control of insurance contracts.

In contrast to the traditional American emphasis on the legal completion of contract-making, the most thorough Continental authors have stated that doing insurance business requires carrying on of insurance operations, whereas the making of contracts is neither necessary nor sufficient. In the German opinion, any activities preparatory to or subsequent to contracting such as soliciting, advising, cashing of premiums, or watching the development of the risk, may be grounds for state supervision even though the contract may be concluded in a foreign country.⁸²

Even taking this broad definition of the agent's co-operation in the individual contract as a criterion, delimitation of the scope of the domestic law requires additional facts. Definition of the scope of control in general is given by each state as it sees fit, and is often left to the controlling board of commissioners.⁸³ But the laws leave gaps, and

40; see the comment by BATIFFOL 313 n. 6; BGH. (Feb. 11, 1953) 9 BGHZ. 34 and IPRspr. 1952-53, No. 37; BGH. (March 24, 1955) 17 BGHZ. 74 and IPRspr. 1954-55, No. 32.

Switzerland: BG. (Nov. 2, 1945) 71 BGE. II 287, 291, referring to its independently developed previous thesis, 51 BGE. II 409, that insurance of Swiss 79 BGE. II 193.

inhabitants by foreign insurers is subject to Swiss law. BG. (March 26, 1953)

⁸¹ Montevideo Treaty on Int. Com. Terr. Law (1940) art. 12 sent. 2 for life insurance: where the company is domiciled or has its branch or agency.

⁸² NEUMEYER, 2 Int. Verwaltungs R. 329.

⁸³ NEUMEYER, *id.* 343 ff.

As to constitutional limitations on state supervision in insurance matters in this country, see *Travelers Health Ass'n v. Virginia* (1950) 339 U. S. 643. On

choice of law is sufficiently distinguishable from discretionary delimitation of the scope of supervision, to be subjected, for instance in Germany, to court jurisdiction.⁸⁴

The literature has sought a desirable method of defining the limits of state control for the purpose of choice of law. Among the numerous solutions,⁸⁵ one has been prevailingly favored: In the insurance of persons their residence, in the insurance of property rights the situation of the property, and generally the place of the risk insured, are decisive.⁸⁶ The similarity of these results with the order of ideas leading in the United States to the recent theory of the Supreme Court and to the proposals of the Patterson Committee and of the Restatement (Second) is obvious.

A recent French development is of particular interest. First conceived for fiscal purposes, a theory emphasizing the locality of the risk has been extended to the application of private law. Foreign insurers submit reports on all contracts "signed or performed in France or Algiers . . . or any contract of assurance accepted by them and concerning a person, an asset, or a liability in these territories." It is further provided that any contract of insurance not registered within a month from its date is void.⁸⁷ According to authoritative writers, this recent law implies that all activi-

the scope of application of the Federal Trade Commission Act in the field of interstate insurance, as defined by the McCarran-Ferguson Act, see *Federal Trade Commission v. Travelers Health Ass'n* (1960) 362 U. S. 293 and (C. C. A. 8th 1962) 298 F. (2d) 820.

⁸⁴ This seems to be the true thesis of RG. (Feb. 21, 1930) 127 RGZ. 360.

⁸⁵ NEUMEYER, 2 Int. Verwaltungs R. 348 f.

⁸⁶ Montevideo Treaty on Int. Commercial Law (1889) art. 8 for insurance "on land" and transportation: where the object is at the time of contracting. NEUMEYER, *id.* 350 advocates localization of the risk as to movables at their ordinary place; and of liability and reinsurance at the center of the assets and liabilities of the insured.

⁸⁷ Decree-Law of October 30, 1935, amending art. 2 of the Law of Feb. 15, 1917, complemented by Decree of Jan. 12, 1937 concerning the foreign enterprises or insurers doing business in France and Algiers. These provisions have been maintained in the Insurance Law, Decree-Law of June 14, 1938, art. 42.

ties of foreign insurers in France are compulsorily subjected to all "imperative French laws."⁸⁸ Hence French law is applicable, not only the fiscal but also the private law, whenever the risk covered is situated in France. This means that life insurance or an individually agreed accident or health insurance is localized at the domicile or the habitual residence of the insured, if in France. A liability insurance is French, when the act involving responsibility covered should normally or principally occur in France. The object insured against fire, hail, and the like must be in France.

In this view, French law does not necessarily govern marine, credit, or fluvial insurance and reinsurance if they have foreign elements, nor are contracts signed in a foreign country and covering a risk situated outside France, subject to its law. These contracts are said to be the only subject matters of conflict of laws which follow the lines designed by Bruck.⁸⁹

III. CONCLUSIONS

The basic problems of conflicts of insurance laws could not by any means be exhausted in the foregoing report.⁹⁰ But the fundamental trend in the efforts to reach conflicts rules more adequate to the real situation is rather obvious. The old rules clinging to the formation of the contract or its fulfillment are in this field particularly obnoxious, and in-

⁸⁸ PICARD et BESSON, 1 *Traité* 618 § 301 arguing particularly (1) as to life insurance, *cf.* Laws of March 17, 1905 and July 13, 1930, (2) as to workmen's accident insurance, *cf.* Decree of Feb. 28, 1899, (3) as to automobile accident insurance, *cf.* Decree-Law of August 8, 1935, and Decree of June 3, 1936, art. 6, and generally *cf.* Decree-Law of August 25, 1937. For other literature to the same effect, see DALLOZ, I *Nouveau répertoire de droit* (1947) 313.

⁸⁹ *Id.* 623 § 302.

⁹⁰ Still less are special problems discussed. See for Continental literature on double insurance, 2 *BAR* §§ 267, 335; BRUCK 48; 3 *SMEESTERS* and WINKELMOLEN 11 § 940; DE SMET 369 § 402; and on reinsurance, BRUCK 15; 2 *Répert.* 183 § 31; BATIFFOL 317 n. 4; ARMINJON, *Droit Int. Pr. Com.* 487 § 297.

On the scope of the conflicts rule concerning insurance contracts, see BRUCK 16 f.; FRAGISTAS, *supra* n. 70, 356 ff.

tensive state control over the insurance business is recognized as the most powerful force localizing insurance activities of all sorts. When the Canadian provinces adopted the Uniform Life Insurance Act, the fact was stated with regard to alien insurers "that the very natural intention of the parties, who live and who do business here, legalized and protected by our laws, is that the insurance law of this country will govern the contract and rights which arise thereunder."⁹¹

1. Special Choice of Law

It must be remembered even in this field that despite extremely large inroads of imperative norms into the contractual law,⁹² disposition by the parties is the primary principle and that the rules demanded are merely intended for use in the typical standard contracts.

(a) *Party autonomy*. As a principle, the right of parties also to stipulate for the applicable law in insurance contracts has been strictly affirmed in Europe.⁹³ In the United

⁹¹ FRANK HODGINS, 22 Can. L. T. (1902) 1, quoted with approval by PIERSON, Am. Bar Assoc., Section of Insurance Law, 1937-1938, 81, a lawyer connected with a New York life insurance company.

⁹² On the compulsory rule applied to the contract, as a whole, and public policy opposing foreign law recognized as applicable in general, see in particular 44 C. J. S. 516 § 54; BATIFFOL 310 § 347; BRUCK 26 ff., 37 ff.; KELLER in 4 Roelli's Komm. (ed. 2) 71 ff.

An example of an illicit object of insurance, much discussed in Continental literature, involves the old prohibition against insuring the wages of master and crew of a vessel, still existing in German HGB. § 780 but restricted in Belgian C. Com. art. 191; see 2 BAR 227 n. 109; 3 SMEESTERS and WINKELMOLEN 62 § 972 and *cit*.

Another nice question: Is insurance with insurers in Johannesburg for transport (from Portuguese Africa to Belgium) of diamonds smuggled out of Transvaal, lawful? App. Bruxelles (May 13, 1936) Belg. Jud. 1937, 4.

⁹³ Inst. Int. Law, Florence, Resol. art. 2 n. f, 22 Annuaire (1908) 290.

Germany: BRUCK, Privatversich. R. 39 § 5 n. 3; HAGEN, Seeverversicherungsrecht (Berlin 1938) 19 ("German conception").

Greece: FRAGISTAS, *supra* p. 339 n. 70, at 347 and n. 2.

Italy: DIENA, 2 Dir. Com. Int. 462.

France: SUMIEN, 2 Répert. 151 Nos. 15, 16. *Contra*: ARMINJON, Droit Int. Pr. Com. 478 § 288.

Switzerland: RYSER and KELLER, *supra* p. 325 n. 18, tend to deny any party autonomy in insurance matters.

States it has sometimes been denied.⁹⁴ But apart from the philosophy of private law, admitting for the sake of the argument the very system of a compulsory law of the place of contracting, it must always be remembered that in this country a state cannot impose its insurance law on parties contracting in another state.⁹⁵ The forum, thus, is powerless to prevent the parties from eluding all of the applicable provisions of the forum, including its most vital "interests." It would be strange if they were not allowed to contract in the forum and stipulate for a foreign law, which nevertheless would not remove the imperative part of the domestic statute. This more considerate approach, under the present-day practice, even preserves extraterritorial effect to the public policy of the forum.

Now, as we are to abandon the system of mechanical rules, we have to discover the most suitable rules to replace them. But adequate conflicts rules for various types of insurance contracts cannot be stated except in a subsidiary function. The task would be forbidding, if these rules were to be imposed upon the parties with ironclad necessity.

(b) *Special situations.* Analogous considerations are due to the atypical cases. If we, for instance, postulate as a sound rule that fire or windstorm insurance should be governed by the law of the state where the insured object lies, we must yet recognize that two parties residing and contracting in one state to insure a risk located in Japan may be subjected to the law of the place of residence, in contrast to the case where they contract through their local agents in Japan.⁹⁶ This consideration is entirely different

⁹⁴ See Vol. II (ed. 2) p. 414, *cf.* the Mississippi case referred to *id.* p. 528 n. 38.

⁹⁵ See, e.g., *Palmetto Fire Ins. Co. v. Beha* (D. C. S. D. N. Y. 1926) 13 F. (2d) 500.

⁹⁶ See the analogous German reinsurance case, Vol. II (ed. 2) p. 526; and BG. (Jan. 20, 1948) 74 BGE. II 81, 88: Italian parties to an insurance of a transport from Rotterdam to Basle, Italian law, including Italian subrogation in contractual claims.

from those on account of which fire and windstorm insurance has been held not to fall under the law of the situs.⁹⁷

Dealing next with the subsidiary rule referring to the law of the residence of the insured, we shall concentrate on life insurance where this test points in an appropriate direction.

2. Life Insurance: Law of the Residence of the Insured

A majority of the American court decisions, by applying the law of the place of contracting in all insurance contracts, have reached the law of the domicil or residence of the insured. Many American statutes obtain a similar result through various formulas. European doctrines use the same criterion in restriction to insurance of persons, such as life, health, and accident insurance.

Yet if the results seem similar, the ideas underlying the localization vary, and the exact choice of the decisive contact must be shaped accordingly.

(a) *Delivery of policy.* American courts contemplate the place where the insured manually receives the insurance policy. As such, this place is so casual as to defy the purpose of conflicts law. The application of this test has been made tolerable only through added fictions.

(b) *Inhabitants.* The statutes may certainly be presumed to extend their protection to the inhabitants of the state, in prescribing standards of fair dealing and fair competition between insurers.⁹⁸ This formula seems to include citizens of the state, residents and also probably even people temporarily present in the state.

Logically, the formula implies that the domestic law should govern all contracts of residents and exclude all

⁹⁷ *Supra* p. 330 n. 35 and see the analogous situations in sales of immovables, *supra* p. 110.

⁹⁸ PATTERSON, "The Conflict Problems etc.," *supra* n. 25, at 74.

contracts of nonresidents (at least, with foreign insurers). A proposal understood to this effect was opposed, advancing the example that life insurance has been obtainable only with exclusion of risk by flying, although some states prohibited "aviation riders"; a resident of such a state would be prevented from going to another state where he may obtain the usual policy.⁹⁹ This objection is of doubtful value, but such meaning should not be ascribed to the rule. In the United States, the constitutional restrictions on state power and, elsewhere, principles of reasonable interpretation require more than domiciliary or residential conditions, as shown in the following essentially different constructions.

(c) *Law of licensing state.* If the applicable law is conceived as that of the licensing state rather than that of the insured's domicil, two basic conditions are required, to which the personal location of the insured in the state may or may not be a precondition. One of these conditions is that the insurer must do business in the state so as to need licensing. The other is that the local agent whom every foreign insurer is bound to appoint must be in some way connected with the individual contract.

The latter connection can be imagined in various manners. The minimum requirement has been indicated, for instance, in Germany and Alabama: any activity of a foreign corporation through its agent with respect to a contract suffices to justify the application of the domestic law, soliciting, receiving the application, delivering the policy, collecting the first premium, etc. Often making the contract is a condition. The Patterson Draft (Section 2) requires in all cases of insurance that the contract should be:

"Either delivered in this state by or through an agent or other representative of the insurer, or issued by the insurer

⁹⁹ Amer. Bar Assoc., Section of Ins. Law 1940-1941, 173 No. 2 and 185 No. 4.

in this state for delivery by or through a person other than an agent or other representative of the insurer, . . .”

which in case of life, accident, or health insurance is additional to the condition that the insured is a resident of the state when the contract becomes effective. (Section 1 a)

In all these variants, a policy is not affected if the local agent has no part whatever in its negotiation. Many statutes, seeking to avoid evasion, therefore declare that any insurance concluded abroad with an insurer licensed in the state should be deemed as made in the state or declared void. Whether challengeable or not,¹⁰⁰ such provisions transgress the reasonable limits of state power.

Insurance procured merely by correspondence with a foreign insurer, at least one not having a local agent, is left free. This agrees with the American practice¹⁰¹ and the German doctrine.¹⁰²

Thus far, however, we have presupposed that the conflicts rule selects its own criterion with respect to all life insurance contracts.

(d) *Law of the state supervising the contract.* Since many states refrain from imposing the imperative part of their private law upon insurance contracts not “made” in the state, it is a possible solution to make the application of the local law dependent on the individual regulation of doing business in the state. This would avoid applying

¹⁰⁰ As illustration, see for the United States *supra* pp. 328, 330; for Brazil, McDOWELL, “Contratos de seguro celebrados no estrangeiro,” 26 Rev. Jur. 252 (against the then existing decrees); and inversely in France, SUMIEN, “Des conflits de lois relatifs aux assurances sur la vie contractées irrégulièrement avec des sociétés étrangères,” Revue Crit. 1934, 50, against a liberal decision of Cass. req. (March 21, 1933) published *ibid.* On the corresponding German controversy, see BRUCK, Privatversich. R. 46 f.

Swiss courts recognize that a Swiss insurer doing business abroad and contracting there is under foreign law; see KELLER in Roelli's Komm. (ed. 2) 32.

¹⁰¹ E.g., *Huntington v. Sheehan* (1912) 206 N. Y. 486, 489, 100 N. E. 41.

Since the mail-order insurance business has grown enormously, modern American practice is evidently taking a new approach; see the Travelers Health Ass'n cases, *supra* n. 83.

¹⁰² BRUCK 33.

the law of a state which does not impose it and thus obviate some complications. But the uncertainty now prevailing in many states with respect to what contracts are subject to supervision, would extend to private law.

The least uncertain term for a permanent living center is "habitual residence." Whether temporary residence should suffice ought to be expressly stated in the statutes.

3. The Law of Situs

Insurance of immovables against risks such as fire, storm, or hail, damage to glass, machines, or waterpipes, manifestly belongs to the sphere of the state of the situation. State care for agriculture, industry, and housing has become of such importance as to require intensive control over preventive policy as well as over the recovery of damage to domestic resources and investments.¹⁰³ It is reasonable to apply the same test to movables "insured in a fixed location."¹⁰⁴

4. Various Kinds of Insurance

It is interesting that the American proposals of 1939 and likewise the French doctrine locate the center of liability for automobile accidents at the place where the car is principally garaged (or principally used, adds the American draft). Normally, this results in the law of the car owner's or user's residence and to that extent it does not justify the fear of uncertainty. But the residence by itself may well suffice for localizing all types of insurance not

¹⁰³ NEUMEYER, 2 Int. Verwaltungs R. 352; BRUCK, Privatversich. R. 47. This kind of consideration seems to have escaped the opponents to Professor Patterson's proposal, Amer. Bar Assoc., Section of Ins. Law, 1940-1941, 178. Cf. Restatement (Second), Tent. Draft No. 6 (1960) § 346i.

On difficulties in multiple-location cases, see PATTERSON, Essentials, *supra* n. 52, at 57; EHRENZWEIG, Conflict 517 f.

¹⁰⁴ Draft of the Patterson Committee, Amer. Bar Assoc., Section of Ins. Law, Program 1939, 51 s. 1 (b), *supra* n. 52.

connected with another unquestionable central point. If it is the state control over territorial acts of the residents rather than the residence itself (as localizing the risk) that justifies the imposition of the state's law, a fidelity or surety contract, or a group insurance covering health or accident, is correctly centered at the headquarters of the insured enterprise, as courts have generally held.

When workmen's compensation insurance is brought under the law of the state where "the principal place of employment" of the employee is when the contract becomes effective,¹⁰⁵ this approach comes close to the localization of the employer's liability to which modern development tends, as discussed earlier.¹⁰⁶

5. Proposals

Continued studies by insurance experts will be needed to reconcile the possible differences of opinion on the precise local connections for various types of risks. But the desirable approach to the conflicts problem can scarcely be doubtful. As an attempt to show roughly the resulting principle, the following formulation is advanced with respect to life insurance and fire insurance, in the absence of a stipulation for the applicable law and of special circumstances.

A contract of life insurance is governed by the law of the state where the insured has his habitual residence, provided that this state claims administrative supervision over the contract, and that an agent of the insurer in the state has participated in the negotiation of the contract.

A fire insurance contract respecting immovables, movables, or other interests in a fixed location, is governed by the law of the state of the situation.

¹⁰⁵ Draft, *id.* § 1 (d).

¹⁰⁶ *Supra* pp. 194 f. (employment), 225, 236 (workmen's compensation).

Suretyship¹

I. SURVEY

1. The Object of the Rule

PAST and existing legal systems provide for various types of contracts in which a person promises either to perform another person's duty in case of noncompliance, or to indemnify the creditor therefor. The basic types of suretyship and guaranty at common law are impregnated by this contrast. But a rich variety of forms has overgrown the historic dualism. In civil law, the present representative types of transactions have developed from the late Roman categories from which, however, they differ. They include suretyship (*fideiussio*)—with certain aspects of common law guaranty—; mandate of credit (*mandatum qualificatum*); guaranty (different from the common law institution of the same name); and assumption of subsidiary liability as codebtor. The differences in the various kinds of promises reach from formalities to defenses and enforcement.

The terminology varies greatly in covering this wide and

¹ LETZGUS, "Die Bürgschaft" (in private international law), 3 Z.ausl.PR. (1929) 837; K. RILLING, Die Bürgschaft nach Deutschem IPR. (Thesis, Tübingen 1935).

Comparative municipal law: Articles, HANS SCHULZE, "Garantievertrag," and ANDREAS B. SCHWARZ, "Bürgschaft," in 3 Rechtsvergl. Handwörterbuch 593-622; SLOVENKO, "Effects of Suretyship," 9 Am. J. Comp. L. (1960) 48; for the main South-American codes: RAMIRO NAVA, La fianza y la unidad en las legislaciones (Caracas 1927).

On the modern "compensated surety" (Restatement of Security § 82 comment i), see for the United States: G. W. CRIST, Corporate Suretyship (1939); for Switzerland and Germany: RAAFLAUB, "Die Solidarbürgschaft im Bankverkehr," Gmür's Abh. (N. F.) No. 73 (1932).

practically important ground. Also, its external boundaries are not delimited on the same lines. The Restatement of the Law of Security, after thoughtful exploration of the diverse terms used in American legal language, decided to embrace the entire doctrine under the name of suretyship and to use guaranty as a synonym. This all-comprehensive concept is defined as:

“The relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform.” (§ 82)

Such broad terms are particularly suitable to conflicts law. For it seems to be agreed that conflicts rules do not discriminate among all the possible kinds of such promises.² Far from any characterization according to the law of the forum, the terms suretyship, *cautionnement*, *Bürgschaft*, *fiança*, are used to cover every contract creating a personal obligation to the creditor, securing his claim against another person.

The Restatement of Security (§ 83) includes, in addition to contracts with the creditor whereby the obligor directly intends to become a surety, other transactions having similar results. These situations and the various cases in which persons are treated by law as if they were sureties, may be passed over here.

2. Independence of the Rule

It was once assumed³ that because a surety's obligation is “accessory” to the principal debt, that is, depends on its validity and extent, it is *necessarily* subject to the same law.

² LETZGUS, *supra* n. 1, 842; EHRENZWEIG, Conflict 520; Restatement (Second), Tent. Draft No. 6 (1960) 130.

³ BOUHIER, 1 Observations sur la coutume du Duché de Bourgogne (1742) ch. 21, 413 § 197, citing a decision of the Parliament of Toulouse of 1655.

The only English leading case, seemingly still in authority, is definitely to this effect,⁴ and so are possibly a few American decisions.⁵ Some modern writers believe in this view.⁶

The contrary opinion is undoubtedly correct. Quite as a surety or a guarantor is bound by his own agreement with the creditor, as distinguished from the undertaking giving rise to the obligation of the principal debtor, suretyship is governed by its own law independently, in principle, from that controlling the main debt. This theory is firmly maintained by consistent doctrine in Germany⁷ and other countries,⁸ and is dominant in the civil law literature.⁹ Story and Wharton thought along the same lines.¹⁰ The American decisions, in great majority though usually without express mention, are consonant when they apply the law of the place where the contract of suretyship is made, or that of the place where this contract, distinguished from the principal debt, is performable.¹¹

⁴ England: *Rouquette v. Overmann and Schou* (1875) L. R. 10 Q. B. 525, per Cockburn, C. J.; BURGE, 2 Commentaries 39.

⁵ United States: Cases cited by BATIFFOL 424 n. 1.

Also in Germany: RG. (Feb. 11, 1896) 7 Z.int.R. (1897) 262.

⁶ Italy: 3 FIORE § 1240; DE AMICIS, I contratti accessori (1909) 46, cited by FEDOZZI-CERETI 760.

Recently to a similar effect, GUTZWILLER, 6 Z.ausl.PR. (1932) 98.

⁷ RG. (May 23, 1883) 9 RGZ. 185, 187; (April 23, 1903) 54 RGZ. 311, Clunet 1905, 1050; and many other decisions in constant practice. The literature is unanimous to the same effect, see e.g., NEUMEYER, IPR. 30; LETZGUS, *supra* n. 1, 839; LEWALD 257; NUSSBAUM, D. IPR. 267; RAAPE, IPR. (ed. 5) 525; KEGEL, Kom. (ed. 9) 574 n. 242 before art. 7 EG. BGB.

⁸ Austria: OGH. (June 11, 1929) Clunet 1930, 740.

France: The literature in the absence of cases, cf. 3 Répert. 165 No. 10; BATIFFOL, Traité (ed. 3) 677 § 625; Note (FRANCESKAKIS) Revue Crit. 1958, 133, 139.

Switzerland: BG. (July 18, 1927) 53 BGE. II 347, Clunet 1928, 508 and *passim*; 2 MEILI 42; 2 SCHNITZER (ed. 4) 744.

Anglo-German Mixed Arb. Trib., *Campbells v. Blank*, 8 Recueil trib. arb. mixtes 17, 19.

⁹ See, in addition to the citations in n. 8, e.g., JITTA 495; 3 FIORE § 1237; FEDOZZI-CERETI 760; BATIFFOL 423 § 521.

¹⁰ STORY 360 § 267; 2 WHARTON 934 § 427.

¹¹ See in particular, Cowles v. Townsend and Milliken (1860) 37 Ala. 77; Tolman v. Reed (1897) 115 Mich. 71, 72 N. W. 1104; *Compagnie Générale de Fourrures v. Simon Herzig & Sons Co.* (1915) 89 Misc. 573, 153 N. Y. Supp. 717. The new Restatement mentions expressly that the suretyship and

The principle was adequately formulated by Zitelmann: The law governing suretyship determines the extent to which the liability of the surety depends on the validity and content of the liability of the principal debtor.¹² Aiming at the same idea, the Reichsgericht has often used the succinct but inaccurate formula, that the law of the principal debt decides *what* the surety owes, whereas the law of the suretyship indicates *whether* he owes.¹³ In fact, the contrast is not between existence and extent of the obligation, but is presented by the difference in the scope of the two obligations.

Illustrations. (i) Campbell Renfroe, in delegating his paternal powers to a trustee, delivered a note to him for the support of his children, and Gates signed the note as surety. All this happened in Georgia, the law of which was applied by the Louisiana court. Gates, who had paid the note to the trustee without being sued, was unable to recover from the debtor or his cosurety, either as surety or as holder of the note. The surety obligation did not exist because the debt was void.¹⁴

(ii) A creditor in France agreed with the debtor that the sum due should be paid in pounds sterling instead of francs. The French Court of Cassation held that the modification of currency was not a novation discharging the surety (C. C. article 1271 No. 1), but neither did it bind the surety to pay otherwise than in francs.¹⁵ Both points pertain to the law of suretyship.

(iii) Where someone wrongly believed himself to be a surety and paid the true creditor, the question was from

the main contract may be governed by different laws; Restatement (Second), Tent. Draft No. 6 (1960) 130.

¹² 2 ZITELMANN 388.

¹³ RG. (April 23, 1903) 54 RGZ. 311, 315; (Jan. 21, 1926) IPRspr. 1929 No. 30. Various criticism has been addressed to this formulation by 2 FRANKENSTEIN 348 n. 79; NUSSBAUM, D. IPR. 268 (but see BATIFFOL 425 § 524); and especially RILLING, *supra* n. 1, 13 ff.

¹⁴ Gates v. Renfroe (1852) 7 La. Ann. 569. In Louisiana C. C. § 3025 (now § 3056) cited by the court, the surety is said to have no recourse against the principal debtor, if he pays without being sued and without informing the principal; but this is expressly subordinated to the condition that the debt did not exist at the time of the payment.

¹⁵ French Cass. civ. (Dec. 17, 1928) Clunet 1929, 1286.

whom he might recover. The Swiss Federal Tribunal held that in the first place the creditor was unduly enriched and owed restitution. But if an action against the creditor were barred by limitation or waived by the surety, he was entitled to compensation from the debtor, who had been eventually discharged of his obligation.¹⁶ This interesting theory of unjust enrichment presupposes a relation based on an invalid suretyship and another resulting from discharge of the principal debt. Thus two laws may have to be ascertained, both distinguishable from that governing the principal debt.

Yet, while the law need not necessarily be the same for the debt and its guaranty, it is a reasonable wish that it should be identical as often as possible. The problem of establishing the adequate local connection for suretyship is similar to that arising with respect to a contract to sell an immovable, for which situs is not a compulsory but a desirable contact.

II. CONTACTS

I. United States

Apart from old cases applying the law of the forum,¹⁷ the courts in this country have generally adhered either to the law of the place of contracting¹⁸ or to the law of the place of performance.¹⁹ But, as usual, these are merely the labels.

The largest group of decisions is characterized by the essential role of the creditor's domicile. The surety may have had his residence in the same jurisdiction²⁰ or the written guaranty may have been mailed to the creditor and

¹⁶ Swiss BG. (Oct. 17, 1944) 70 BGE. II 271, 34 Praxis No. 33.

¹⁷ *Toomer v. Dickerson* (1867) 37 Ga. 428. Expressly *contra*: *Tenant v. Tenant* (1885) 110 Pa. 478, 1 Atl. 532.

¹⁸ 2 WHARTON § 4278; BATIFFOL 423 § 522.

¹⁹ BATIFFOL 423 n. 6.

²⁰ *Walker v. Forbes* (1857) 31 Ala. 9; *Colston v. Pemberton* (1897) 20 Misc. 410, 45 N. Y. Supp. 1034; *Hays v. King* (1914) 44 Okla. 180, 143 Pac. 1142.

accepted by him,²¹ thereby localizing the making of the contract; or performance by the surety allegedly was due at the creditor's place so as to call for the law of the place of performance.²² A characteristic category was presented by the customary official surety bonds delivered to the federal government as security for the service of employees; they were localized at the seat of the government in Washington, D. C.²³

Ordinarily, the law applied also governed the principal debt.²⁴ The courts sometimes stress this fact,²⁵ although at other times they do not mention it.

Another notable situation may be mentioned, although some writers minimize its importance.²⁶ Where a guaranty is written on the instrument embodying the principal debt, courts are probably inclined to let both be controlled by one law.²⁷ In one case, it was expressly declared immaterial that the surety signed the note of the debtor at a different place.²⁸ When a financial operation was negotiated in New York, the main contract executed in Nebraska, and the guaranty appended in Illinois, the gambling statute of Illi-

²¹ E.g., *Watkins Co. v. Daniel* (1934) 228 Ala. 399, 153 So. 771.

²² *John A. Tolman Co. v. Reed* (1897) 115 Mich. 71, 72 N. W. 1104; *Alexandria etc. R. R. Co. v. Johnson* (1900) 61 Kan. 417, 59 Pac. 1063; *Johnson v. Charles D. Norton Co.* (C. C. A. 6th 1908) 159 Fed. 361; *Fox v. Corry* (1921) 149 La. 445, 89 So. 410.

Canada: *Scandinavian Amer. Nat'l Bank v. Kneeland* (Manitoba 1914) 24 Man. R. 168, 16 D. L. R. 565.

²³ *Cox and Dick v. United States* (1832) 6 Pet. 172; *Duncan v. United States* (1833) 7 Pet. 435. Cf. STORY § 290, commented on by 2 BAR 110 n. 11: here the surety must know that his obligation is not accepted unless it conforms to the law at the seat of the government.

²⁴ *Compagnie Générales de Fourrures etc. v. Simon Herzig & Sons* (1915) 89 Misc. 573, 153 N. Y. Supp. 717; *Halloran v. Schmidt Brewing Co.* (1917) 137 Minn. 141, 162 N. W. 1082; *Furst and Thomas v. Sandlin* (1922) 208 Ala. 490, 94 So. 740; *Watkins Co. v. Hill* (1926) 214 Ala. 507, 108 So. 244.

²⁵ See the collection of cases by BATIFFOL 424 n. 1.

²⁶ E.g., RILLING, *supra* n. 1, 95 before n. 2.

²⁷ *Continental & Commercial Nat'l Bank of Chicago v. Cobb* (C. C. A. 1st 1912) 200 Fed. 511, 516, 517; *Fisk Rubber Co. v. Muller* (1914) 42 App. D. C. 49.

²⁸ *Pugh v. Cameron's Adm'r* (1877) 11 W. Va. 523.

nois was eliminated.²⁹ In twin cases, the wives of two brothers and debtors, domiciled in Michigan, signed mortgage guaranties for property in Ohio. One note was signed by one defendant when she was temporarily there with her husband in the bank office; the other note was signed at home. But in both cases the contracting was held to have occurred in Ohio.³⁰

The bulk of the decisions may be summarized, notwithstanding their varying formal terms, to the effect that contracts of guaranty or suretyship are preferably subjected to the law of the principal debt, especially when the latter is governed by the law of the domicile of the creditor.^{30a}

2. Other Countries

Apart from the abandoned test of nationality of the surety,³¹ most Continental opinions have been divided between the domiciliary law of the surety³² and the law of the place of *his* performance.³³ The law of the place of contracting which is provided in so many laws as a general rule,³⁴ does not appear often in practice.

²⁹ Richter v. Frank (C. C. N. D. Ill. 1890) 41 Fed. 859.

³⁰ Butzel, J., in State of Ohio v. James N. Purse and State of Ohio v. Artie Purse (1935) 273 Mich. 502, 507, 263 N. W. 872 and 874 although speaking in terms of *lex loci contractus* and of the Restatement.

^{30a} To the same effect, the Restatement (Second), Tent. Draft No. 6 (1960) § 346j., and with certain qualifications EHRENZWEIG, Conflict 522.

As to party autonomy in the field of suretyship, see cases cited in the Restatement (Second), *supra*, p. 136 and LOUIS C. JAMES, "The Effects of the Autonomy of the Parties in the Validity of Conflict of Laws of Surety and Guarantee Contracts," 9 Am. U. L. Rev. (1960) 24.

³¹ 2 ZITELMANN 366; 2 FRANKENSTEIN 123 ff., 349.

³² 3 FIORE § 1243 (but see § 1238 for *lex fori*); JITTA 495; 2 BAR 24; NEUMEYER, IPR. 27; WALKER 496; 3 ROLIN § 1412.

Denmark: Copenhagen (Feb. 2, 1885) Clunet 1887, 223.

Germany: Decisions of the temporary sixth senate of the RG., see (Oct. 12, 1905) 61 RGZ. 343.

Switzerland: See n. 35.

³³ Germany: RG. (Oct. 4, 1894) 34 RGZ. 16 and constant practice; see list of decisions, LETZGUS, *supra* n. 1, 837, 840; LEWALD §§ 314-317; RAAPE, IPR. (ed. 5) 525.

³⁴ Italian writers mention Disp. Prel. C. C. (1865) art. 9 par. 2; (1942) art. 25. For an interesting case illustrating the application of art. 25, see Cass. (Oct. 4, 1954) Clunet 1956, 1000.

The law of the domicile of the surety has been justified by the Swiss Federal Tribunal as suitable to the nature of his unilateral and onerous obligation,³⁵ because such an obligor ought to be considered bound to a minimum, i. e., to not more than his own law indicates. Where a guaranty is given for consideration, such as by a bank in the course of its business, the circumstances and particularly the connection with the entire financial arrangement are decisive.³⁶

The comprehensive treatment in the German cases assumes that suretyship is governed by the law of the place of its performance, but since according to the general German principle the surety like any debtor owes performance at his domicile, the result is regularly the same as in the view mentioned above.³⁷

Through this emphasis on the domicile of the person giving the guaranty, it happens more often and more strikingly than in other systems that principal debt and guaranty are controlled by different laws.

Illustration. In a case where creditor, debtor and a surety lived in Luxembourg, the Reichsgericht did not doubt that all their relationships were governed by the law of Luxembourg (substantially French law). This included the question whether the surety was to be subrogated by payment to the creditor's rights. But at the time of the original transaction, the wife of the debtor assumed (1) cosuretyship with the surety to the creditor and (2) countersecurity to the surety. She expressed both these obligations simply by signing the loan instrument "as cosurety and countersurety" (*als Mitbürge und Rückbürge*). When the surety later sued the woman, the Reichsgericht determined the recovery under German law because the woman had always lived in Germany and therefore had to pay there.³⁸

This surprising conflicts decision could have been avoided

³⁵ 53 BGE. II 344, 347; 61 *id.* II 181; 63 *id.* II 308; 67 *id.* II 215, 220.

³⁶ BG. (Sept. 23, 1941) 67 BGE. II 215, 220, reported Vol. II (ed. 2) p. 437.

³⁷ Cf. NUSSBAUM, D. IPR. 268 n. 2.

³⁸ RG. (Oct. 12, 1905) 61 RGZ. 343, 16 Z.int.R. (1906) 324.

by presuming a unitary law.^{38a} The practical result may be strange. Supposing the first surety paid and was subrogated, according to his own law, to the creditor, the cosurety, reimbursing him partially, may not be subrogated under his law. The debtor would be discharged to such extent, contrary to the law governing debt and suretyship.

3. Conclusion

Although the legal situation of an accessory codebtor may be independently defined in conflicts law, in most cases it would be desirable to subordinate it to the law of the principal debt.³⁹ More recently, study of the American decisions has suggested to Batiffol a general presumption in favor of this law.

At least, in the spirit of the American decisions, we may propose such extension when no counterindicia appear in the individual cases, in the following situations:

(a) Where surety and principal enter into obligation, by signing the same instrument, or otherwise in common;

(b) Where the principal debt is governed by the law of the creditor's domicile; and we may add as a suggestion—

(c) Where an accessory debtor intervened upon agreement with the principal debtor, to the knowledge of the creditor.

Finally, it may be assumed that, likewise as in the United States,⁴⁰ bonds required by a state to secure the fidelity or

^{38a} In recent cases the courts have availed themselves of such presumption; see AG. Bremen (Nov. 22, 1952) IPRspr. 1950-51 No. 17; OLG. Hamm (June 6, 1957) IPRspr. 1956-57 No. 27.

³⁹ FEDOZZI-CERETI 761; LEWALD 258 advocates the law of the principal debtor's domicile. See Cass. (Sept. 12, 1957) Rivista 1958, 251 for a case where, in the opinion of the Italian Supreme Court, the provision of Disp. Prel. C. C. (1942) art. 25 thwarted the desirable result: an obligation created in Switzerland between an Italian creditor and a Swiss debtor was secured by the guaranty of a second Italian; Swiss law as the *lex loci contractus* governed the principal debt, whereas Italian law was applicable to the guaranty as the national law of both parties to this contract.

⁴⁰ BATIFFOL 424 § 523.

aptitude of its servants or compliance with the laws of the state by a foreign corporation are exclusively subject to the law of that state as are the principal obligations.⁴¹

III. SCOPE OF THE RULE

Apart from formalities⁴² and capacity,⁴³ presenting the usual problems, the validity, effects, and extinction of guaranty or suretyship are controlled by the governing law.⁴⁴ Some particulars have been elaborated and may be mentioned. We should also notice some intricate questions connected with the fact that statutory regulations of collateral obligations usually include the use of defenses belonging to the principal debtor and the recourse against the latter. Apparently a part of the law of suretyship, these provisions go substantially beyond its primary scope.

1. Extent of Liability

The law of the guaranty or suretyship, as said before, determines the extent to which the legal effect of the principal debt influences the liability of the obligor. It decides whether an obligor accedes to the debt merely to the extent of the debtor's liability, or more independently, either as a subsidiary or as an original promisor. Sued by the obligee, the promisor may (like a typical guarantor) or may not (like an ordinary surety) be entitled to object that the

⁴¹ See for the United States, *supra* n. 23, and the observations by 2 MEILI 44.

⁴² United States: *Allshouse v. Ramsay* (1841) 6 Whart. (Pa.) 331; *Halloran v. Schmidt Brewing Co.* (1917) 137 Minn. 141, 162 N. Y. 1082.

Germany: 9 RGZ. 176; 61 *id.* 343.

On intricate special problems *cf.* MANNL, 11 Z.ausl.PR. (1937) 802.

⁴³ United States: See the well-known decisions on guaranty by married women, such as *Milliken v. Pratt* (1878) 125 Mass. 374, 28 Am. Rep. 241; *Nichols & Shepard Co. v. Marshall* (1899) 108 Ia. 518, 79 N. W. 282; *Freeman's Appeal* (1897) 68 Conn. 533, 37 Atl. 420. *Cf.* Vol. I (ed. 2) pp. 111, 197.

Germany: RG. (July 7, 1903) 13 Z.int.R. (1903) 442, *Clunet* 1905, 1049.

⁴⁴ United States: See lists of cases in 50 C. J. 14. *Cf.* 72 C. J. S. 517 and *Restatement (Second)*, Tent. Draft No. 6 (1960) § 346j; but see EHRENZWEIG, *Conflict* 521 f.

Germany: LETZGUS, *supra* n. 1, 844.

creditor should have first attempted enforcement against the principal debtor (*beneficium excussionis personalis*), that he indulged in neglect, or that he failed to give notice or written notice of the debtor's default to the defendant, according to the contract made between the parties and the law governing it.⁴⁵ For it has been universally recognized since Story⁴⁶ that it is a substantive, not a procedural, question whether the creditor may sue the principal and surety jointly or severally and whether he has to comply with a prescribed order of suits. Obviously, it is the contract between creditor and surety, rather than the contract between creditor and debtor, that decides whether the surety bears an absolute or conditional liability.

If the burden of proof regarding the diligence of the obligee is regulated in the law of guaranty, this provision is also binding. On the same theory, the law of suretyship determines whether the surety may assert against the creditor the defenses of the principal.⁴⁷

This is obvious but for one point, viz., the faculty of the surety to set off a counterclaim belonging to the principal debtor. Under the prevailing opinion in the United States, a surety sued alone by the creditor is not entitled to such setoff except in certain cases,⁴⁸ although contrary statutes exist. Analogous differences are found in Europe. Like the American reasoning that the setoff claim of the debtor can-

⁴⁵ United States: Walker v. Forbes (1857) 31 Ala. 9: guaranty in Louisiana, defense of failure of due diligence dismissed; Toomer v. Dickerson (1867) 37 Ga. 428: presumably South Carolina contract, promisee lost a pledge of slaves by negligent failure to register them in Georgia, the court regards the enforcement against the surety as remedy; Johnson v. Charles D. Norton Co. (C. C. A. 6th 1908) 159 Fed. 361, 363: guaranty executed in Ohio but centered in Pennsylvania whose law decides whether it is conditional on pursuing the principle to insolvency.

Denmark: Landesöverret Copenhagen (Feb. 2, 1885) Clunet 1887, 223.

Germany: 9 RGZ. 185, 188; 10 *id.* 282; 34 *id.* 15; 54 *id.* 311, 314.

⁴⁶ Howard v. Fletcher (1879) 59 N. H. 151; STORY § 322 b; ROLIN, 3 Principes §§ 1410, 1417; 2 BAR 109.

⁴⁷ Germany: RG. (July 6, 1910) 74 RGZ. 46.

⁴⁸ Note, 46 Yale L. J. (1937) 833, 842.

not be brought to final decision without his consent,⁴⁹ the German Code⁵⁰ is motivated by the consideration that a surety may not use another's right without his consent. If the contract of suretyship is under ordinary American law, "setoff" is undoubtedly excluded. But can it be considered to be permitted to a surety bound under French law according to the French Code⁵¹ when the principal debt follows American law? The difficulty is twofold. One involves the disposition over the debtor's ownership of a claim. It is scarcely possible to leave this question to the law governing the suretyship; it rather belongs to the law controlling the relationship surety-principal. The other difficulty arises on the fundamental theoretical problem which law or laws have to be consulted for permitting setoff between persons not identical with the original parties to a claim. This problem of setoff is discussed further in Chapter 51 on setoff.

2. Paying Surety as Assignee

According to Roman law and a series of codes, a surety is entitled to require, as a condition of his payment to the creditor, that the latter assign him the principal debt, commonly with the securities attached to it (*beneficium cedendarum actionum*). In common law as well as in the French law which is followed by practically all modern codes, the debt is transferred to the paying surety by operation of law (*subrogation*).⁵²

Either effect of the payment, tending towards a succession to the creditor's claim rather than its discharge, pertains

⁴⁹ Restatement of Security § 133 comment b.

⁵⁰ BGB. § 768; Swiss C. Obl. art. 502 (as amended 1941). The surety may, however, suspend payment, at least if the creditor can compensate against the debtor. See RG. (June 16, 1932) 137 RGZ. 34.

⁵¹ C. C. art. 1294 par. 1.

Italy: C. C. (1865) art. 1290 par. 1, (1942) art. 1247 par. 1.

Spain: C. C. art. 1197, etc.

⁵² For civil law, see BIASIO, Der Übergang der Gläubigerrechte auf den Bürgen und dessen Regressrechte, Gmürs Abh. (N. F.) No. 211 (1944).

to the law governing the suretyship. German decisions are precise on this point.⁵³ But doubt arises when such a subrogation is not simultaneously supported by the law of the principal debt. This problem must be referred to the doctrine of legal assignment.⁵⁴

3. Termination

Extinction of the principal debt, for instance, by setoff or release,⁵⁵ or a bar of limitation on the principal debt, as a defense for the surety,⁵⁶ affects the latter's obligation in correspondence with the law governing the debt.

Moreover, of course, suretyship has its own limitation of action.⁵⁷

4. Retribution and Exoneration

When a surety, after payment to the creditor but without obtaining from him subrogation or assignment, seeks to recover from the principal debtor, it seems logical that this is not part of the law governing suretyship.^{57a} His claim to be discharged after the principal obligation has matured is on the same footing. Ordinarily there is a contract between

⁵³ Germany: RG. (April 23, 1903) 54 RGZ. 311, 316, Clunet 1905, 1050; and constant practice. On related German and Swiss decisions, see *infra* p. 447 and n. 3.

⁵⁴ *Infra* pp. 447-450.

⁵⁵ *Cf.* Howard v. Fletcher (1879) 59 N. H. 151: deferment of maturity of the principal debt (in the instant case all three parties resided in Vermont); RG. (Dec. 17, 1907) 33 Els. L. Z. 314 cited by LEWALD § 317.

That discharge of the principal by federal bankruptcy proceedings does not extend to the surety either under federal or Louisiana surety law, was stated in Serra é Hijo v. Hoffman & Co. (1878) 30 La. Ann. 67, and with respect to a Norwegian bankruptcy and a German surety in OLG. Hamburg (Feb. 12, 1903) 6 ROLG. 365.

⁵⁶ RG. (July 6, 1910) 74 RGZ. 46: the surety liable under German law may invoke the limitation having run for the principal under French law.

⁵⁷ OLG. Karlsruhe (Nov. 10, 1927) IPRspr. 1928 No. 32.

^{57a} See RAAPE, IPR. (ed. 5) 525, giving an example of a case where the relationship between the surety and the principal debtor is governed by a law different from the law governing the contracts between either one of them and the creditor. On the other hand, see AG. Bremen (Nov. 22, 1951) IPRspr. 1950-51 No. 17 and KEGEL, Kom. (ed. 9) 574 note 244 before art. 7 EG. BGB.

the debtor and surety such as agency or partnership. However, it would often be desirable to have the same law govern the recovery as that under which the surety must pay. An example of how such a result may be reached was set a century ago.

Illustration. Thomas, a resident of Kentucky, brought an alleged slave to Louisiana and there authorized Beckman to sell the slave with guaranty of title. This the latter did under his own guaranty, but the purchaser was evicted by a suit for freedom and had to pay 450 dollars for services of the illegally detained person; Beckman was bound to make restitution under Louisiana law, including the damages. Thomas was held liable to Beckman to the same extent, notwithstanding a limitation of liability under the law of Kentucky, which was the law of the forum, Thomas "having sanctioned the contract, as made."⁵⁸

If the surety intervenes as a voluntary agent, he may sue in quasi contract (*negotiorum gestio* or unjust enrichment), Security Restatement § 104 (2). Under which law he may do so will be mentioned in the next chapter.

IV. PLURALITY OF SURETIES

I. Law Common to Cosureties

Where several obligors contract by common contract, they are ordinarily liable under the law of the principal debt. Furthermore the law defining their liability to the obligee is generally extended to their internal relationship. Both propositions are not necessary but convenient, and evidently favored by the courts in the case of cosureties.

Illustrations. (i) The Alexandria Railroad advanced money for construction of a road in Louisiana, whereas its partner, the Kansas City Railroad also of Louisiana, procured an agreement from their members to indemnify the Alexandria if the Kansas failed to pay. Although all the

⁵⁸ Thomas v. Beckman (1840) 1 B. Mon. (40 Ky.) 29.

signers of the guaranty were residents of Kansas, the forum, their liability was determined under the law of Louisiana, "where the delinquency indemnified against was to occur and did occur."⁵⁹

(ii) Where three guarantors signed a bond jointly and severally for a bank in Laurel, Mississippi, in agreement with the cashier, to secure loans made by that bank to a Mississippi company, the Louisiana court applied Mississippi law to determine rights and duties among the co-guarantors, without further investigation.⁶⁰

(iii) A resident of Winnipeg, Manitoba, signed jointly with others a written guaranty, dated and apparently executed in Minnesota, to secure a credit given by a Minneapolis bank to a corporation doing business there. The bank released one guarantor after partial payment. The Manitoba court decided according to Minnesota law and contrary to its own law that even in the case of joint obligors release of one of them did not discharge the others.⁶¹

The German Supreme Court has taken an identical attitude to the effect that when the cosureties are bound under one law to the creditor, they are presumed to be bound under the same law as to contribution among themselves.⁶²

2. Different Laws

Codebtors in the absence of a common source of obligation, are considered to be subject each to his own law.⁶³ According to this principle, the situation of cosureties may become complicated.

⁵⁹ Alexandria, Arcadia & Fort Smith R. R. Co. v. Johnson (1900) 61 Kan. 417, 59 Pac. 1063, 1064. Cynically, one might note that in this manner the residents of the forum were spared the common law liability *in solidum*.

⁶⁰ Fox v. Corry (1921) 149 La. 445, 89 So. 410.

⁶¹ Scandinavian Amer. Nat'l Bank v. Kneeland (1914) 24 Man. R. 168, 16 D. L. R. 565.

⁶² RG. (May 13, 1929) IPRspr. 1929 No. 3; KEGEL, Kom. (ed. 9) 574 n. 244 before art. 7 EG. BGB.

⁶³ PARMELE in 2 Wharton 930 A; 2 ZITELMANN 389; SCHOENENBERGER-JAEGGI No. 372.

In the relation to the creditor, this principle leads to a different treatment of the cosureties.

Illustration. The Swedish Supreme Court had to decide the extent of liability of two cosureties, one domiciled in Sweden and one in Germany. Determining the applicable law according to the places of performance and identifying them with the domicils of the debtors, the court held the Swedish cosurety liable for a part and the German liable jointly and severally for the entire debt.⁶⁴

This method of measuring each codebt under its separate law has been declared to be consistent and natural.⁶⁵

If this may be taken as the correct view, what is the law controlling contribution by cosureties if they are not connected by agreement among themselves? A German court resorted to the law of the place where the duty of contribution should be fulfilled.⁶⁶ The solution may depend on the conflicts rule suitable to extracontractual legal obligations.

V. CURRENCY RESTRICTIONS

Can a surety avail himself of the defense that legal or factual impossibility of payment has been caused by currency restrictions applying either to him or to the principal? The question has come up repeatedly and the answer lies, apart from stringent public policy, in the dominant role of the law governing the debt,⁶⁷ which in the case of a surety means the law governing suretyship as an independent contract.

⁶⁴ See SÖDERQUIST, *Revue* 1923, 465.

⁶⁵ 3 FIORE § 1243; 2 MEILI 43; 2 FRANKENSTEIN 349 n. 86. Likewise, as it seems, RG. (Dec. 6, 1884) 1 Bolze No. 88, cited in the literature, not available here.

⁶⁶ OLG. Hamburg (May 5, 1933) IPRspr. 1933 No. 17.

In *Frew v. Scouler* (1917) 101 Neb. 131, 162 N. W. 496, one cosurety seems to have been subject to Scottish law, while the court had no opportunity to say whether the other, the defendant, was under Nebraska law. The Scottish limitation of action had not run its 40 years when the Scottish cosurety paid the local creditor; the Nebraska court applied the domestic statute of limitation but assumed that its 5-year period began only with the payment.

⁶⁷ *Supra* p. 48.

Correctly, therefore, the Austrian Supreme Court has decided for an Austrian surety against the Belgian creditor on the ground of the restrictions in the German law of *Devisen* because the suretyship was contracted along with the principal debt under German law.⁶⁸ The same court likewise followed the principle when it did not allow a suretyship obligation governed by Austrian law to be affected by the German restrictions excusing the German debtor.⁶⁹

The Swiss Federal Court forcefully sustained this solution, explaining that the faculty of a surety to use the defenses of the principal debtor is limited to normal excuses and does not extend to the abnormal interference of a foreign state in political and economic emergency.⁷⁰ Even though a German debtor were discharged under the German currency laws, a Swiss surety would be liable according to the law of his Swiss place of performance.⁷¹ This court, moreover, in pursuance of its absolute public policy rejecting any resort to foreign measures of economic warfare, enforced claims against a surety even when his obligation was governed by German law.⁷² In view of repeated criticism, more recently the court seems to reserve an ultimate formulation.⁷³ It distinguished the case of a discharge obtained by the Italian principal debtor in the clearing procedure operated between Italy and Belgium in accordance with a treaty. Since credit in these proceedings is considered full payment, the Swiss surety was entitled to avail himself of the defense.⁷⁴

⁶⁸ Austria: OGH. (April 24, 1936) 18 SZ. 211 No. 72.

⁶⁹ Austria: OGH. (Sept. 5, 1934) 16 SZ. 447 No. 162.

⁷⁰ Switzerland: See the discussion in BG. (Sept. 21, 1937) 63 BGE. II 303, 311.

⁷¹ BG. (Sept. 18, 1934) 60 BGE. II 294, 304 ff.

⁷² BG. (Sept. 18, 1934) 60 BGE. II 294, 311 ff.; (June 19, 1935) 61 BGE. II 181, Revue 1936, 692, S. 1936, 415.

⁷³ BG. (Sept. 21, 1937) 63 BGE. II 303, 311.

⁷⁴ *Ibid.*

Extracontractual Obligations

SOME codifications have stated as a general rule that all obligations arising without contract are governed by the law of the place where the act creating the obligation is done.¹ This rule is either trite or wrong. Our conflicts rule determines whether we recognize a foreign law as the origin of an obligation and the law so recognized decides what elements create the obligation.

Nothing better is achieved by general rules placing "quasi contracts" under the law of the place where the obligating act is done.² Quasi contract is not a useful term. From its range, three topics require a report on the actual state of the doctrine.

I. VOLUNTARY AGENCY (*NEGOTIORUM GESTIO*)³

In the old doctrine of civil law derived from Roman and Byzantine sources, altruistic intervention in the interest of another person is considered as a praiseworthy activity, suitable to Christian readiness to help. English courts have

¹ Italy: Disp. Prel. C. C. (1942) art. 25 par. 2.

Poland: Int. Priv. Law, art. 11 part. 1; Draft 1961, rat. 18 § 1.

Rumania: C. C. (1940) art. 42.

Treaty of Montevideo on Int. Civ. Law (1889) art. 38. *Contra*, e.g., BEVILAQUA, Dir. Int. Priv. 372.

² Former Belgian Congo: C. C. art. 11 par. 3.

Spanish Morocco: Dahir of 1914, art. 21.

Tangier: Dahir of 1925, art. 16 par. 2.

Código Bustamante, art. 222.

³ Comparative municipal law, American and Roman laws: HEILMAN, "Rights of the Voluntary Agent Against His Principal in Roman Law and in Anglo-American Law," 4 Tenn. L. Rev. (1926) 34-54, 76-95; DAWSON, "Rewards for the Rescue of Human Life?" XXth Century Comparative and Conflicts Law (1961) 142; DAWSON, "Negotiorum Gestio: The Altruistic Intermeddler," 74 Harv. L. Rev. (1961) 817, 1073.

taken the contrary attitude in damning "officious meddling." In the United States, this hostility to voluntary taking care of the business of another has been maintained in principle, but it is riddled with a great many exceptions. Occasionally, American law has been more generous than certain civilian doctrines. Where there is a duty implied by law to preserve human life or property, the work and labor spent to this end may be compensable in American courts, a result not always reached by German courts.⁴

Due to the contrasts in history and development, it is understandable that the conflicts problems of this subject have been discussed almost exclusively in the Continental literature.

I. Usual Conflicts Theories

The traditional doctrine, basically territorial in its origin, has split on a systematic question. Roman law establishes two actions. The *actio directa* belongs to the person in whose business or sphere the intervention occurred, the *dominus negotii*, and is directed to recovery of the gain the *gestor* may have made and of the damage he may have caused by negligence. By the *actio contraria*, the acting person, if conditions are present, sues for restitution of expenses. Writers regarding the existence of these two actions as the only effect of voluntary intervention concluded that each action had its own law. The direct action would be localized at the place where the act of interference is done,

⁴ HEILMAN, *supra* n. 3, at 83 ff.; American Law Institute, SEAVEY and SCOTT, Notes on Certain Important Sections of Restatement of Restitution 171 ff. § 117.

Germany: The problem whether more than expenses is recoverable, has been controversial. OLG. Celle (Nov. 10, 1905) 12 ROLG. 272 and OLG. Kiel (Oct. 9, 1906) 18 *id.* 22 granted physicians' fees, characterizing labor spent by a professional man as expenses. In ENNECERUS-LEHMANN, 2 Derecho de obligaciones (Recht der Schuldverhältnisse, translation by PÉREZ GONZALES y ALGUER, 1933) 353, note to § 164, it is noted that in Spain probably all useful expenditures may be recovered.

and the counterclaim would be governed by the law of the principal. When, to the contrary, the medieval construction of the actions as flowing from a phenomenon similar to a contract, a quasi contract, was followed, the entire effects were subjected to a single law.⁵ With various motivations, the modern theory has preferred the latter result. The applicable law has been found in the place where the agent accomplishes his intervention.⁶

In one opinion, however, exceptions are made in case the agent takes care of an entire unity of assets; in the absence of a single place of acting the law of the principal should be stressed.⁷

On the other hand, the domicil of the principal has been indicated as the dominating contact because his interest prevails in the institution.⁸

2. Distinctions

Some authors have noticed that the circumstances of the cases must be considered.⁹ In this view, where a contractual relation connects the principal and agent, the law governing the contract must extend to the effects of acts by the agent that exceed his authority.¹⁰ This is the correct point of view

⁵ For the first opinion, REGELSBERGER, *Pandekten* 175 and n. (g); 2 MEILI 86; WEISS, 4 *Traité* 413; 2 FRANKENSTEIN 395. *Contra*: PILLET, 2 *Traité* 310 f. (nationality of the principal); POULLET, 352 f.; PACCHIONI 332 f.; SAUSER-HALL, 44 *Z. Schweiz. R. (N. F.)* (1925) 296a. The same result is based on the presumptive intention of the agent by ROLIN, 1 *Principes* §§ 358, 362; 3 *id.* § 1059 f.; *contra*: 2 ARMINJON § 118, e.g., BUSTAMANTE, 2 *Der. Int. Priv.* 312.

⁶ China: *Int. Priv. Law*, art. 24.

Japan: *Int. Priv. Law*, art. 11 par. 1.

Código Bustamante, art. 220.

See e.g., FIORE, *Clunet* 1900, 458; Note, RICCI-BUZATTI, 1 *Rivista* (1906) 213; PILLET, 2 *Traité* 310 § 547 bis.

⁷ PILLET, 2 *Traité* 311; 2 ARMINJON § 118.

⁸ NUSSBAUM, *D. IPR.* 295 and n. 3 *in fine*; Swiss BG. (Nov. 25, 1905) 31 BGE. II 662, 665.

⁹ NEUMEYER, *IPR.* 32; 2 FRANKENSTEIN 394 n. 44.

¹⁰ See in particular, M. WOLFF, *Priv. Int. Law* (ed. 2) 499 § 481.

and should be enlarged to include any preceding contractual or legal relationship.^{10a}

After the First World War, it was a situation familiar to the mixed arbitral tribunals that a contract involving some kind of custody—sale, agency, bailment, etc.—was deemed retroactively dissolved by the Treaty of Versailles as of the time when the parties became enemies, but the custodian had continued to act during the war. This was done either in his own interest on the basis of the contract or to safeguard the interest of the other party. In the latter case, his acting, deprived of its contractual foundation, could be construed as voluntary agency. Acting in self-interest could possibly constitute a so-called quasi *negotiorum gestio*, that is, intervention of a person in the business of another person in the belief that it is his own.¹¹ The mixed arbitral tribunals were first inclined to deny a German party any excuse for continuing to act, but finally considered the war period of suspension as a sequel to the contract. Hence, the law governing the contract extended to the additional relationship. The same result obtained *ex fortiori* when the contract remained in force by exception.

Illustration. A Rumanian firm before the war deposited ten oil tank cars with a German firm. This contract was not dissolved by the Treaty. At a time when it seemed reasonable, the cars were sold in the interest of the owner but with loss. The court justified the application of German law to the contract of deposit and concluded without any question that the German provisions on *negotiorum gestio* should be applied.¹²

^{10a} *Contra*: BOUREL, *Les conflits de lois en matière d'obligations extracontractuelles* (Thesis, 1961) 195 f.; his objections are of a purely conceptualistic nature.

¹¹ Germany: BGB. § 687, applied by Germano-Belgian Mixed Arb. Trib. (May 27, 1924) Pres. Moriaud, *Sturbelle v. Netter*, 4 *Recueil trib. arb. mixtes* 342, 345.

¹² Rumano-German Mixed Arb. Trib. (Jan. 11, 1929) Pres. Fazy, 8 *Recueil trib. arb. mixtes* 917, 921.

If the German firm would have had to sell the cars in Belgium, it would be absurd to apply Belgian law. Suppose the contract had been dissolved by the war. The extension of the law governing the *former* contract would be equally satisfactory.

3. Maritime Assistance and Salvage

When in a famous dictum, Lord Bowen formulated the aversion of common law to voluntary agency, he contrasted the principle, "liabilities are not to be forced upon people behind their backs," with the recognized exceptions of maritime law as to salvage, general average, and contribution.¹³ Despite the universal background of general maritime law, however, national differences in the treatment of assistance and salvage were numerous, and conflicts theories abounded,¹⁴ while very few laws attempted a solution.¹⁵ The multilateral Brussels Convention of September 23, 1910, adopted by the United States and many other countries,¹⁶ has eliminated most, though not all, conflicts among the participant powers and is applied in member states even though the other state involved is not a member.¹⁷ Some conflicts rules are included in the Convention.¹⁸

Remaining problems seem to be considered subject to the *lex fori* as general maritime law when jurisdiction is taken in an English or American admiralty court. In civil law

¹³ Falcke v. Scottish Imperial Ins. Co. (1886) 34 Ch. D. 234, 248.

¹⁴ For surveys, see 2 Répert. (1929) 69 ff.; 2 ARMINJON (ed. 2) 338 ns. 2-7; 2 STREIT-VALLINDAS 268; 2 FRANKENSTEIN 553 ff.

¹⁵ Portugal: C. Com. art. 690 is known as an exception.

¹⁶ International Convention for the Unification of Certain Rules Relating to the Salvage of Vessels at Sea, 37 Stat. 1658, 1667; The Salvage Act, 1912, 37 Stat. 242, 46 U. S. C. §§ 727-731, BENEDICT, 6A Admiralty (ed. 7) 615; GILMORE & BLACK 445.

¹⁷ Art. 15.

On the distinction between contractual and extracontractual duties, see LE BRUN, "Assistance, sauvetage et obligation de service," 1 Revue Trim. D. Com. (1948) 388.

¹⁸ Arts. 6 par. 1, 9 par. 1, 10 par. 2, 15 par. 2.

they are at present prevailingly treated by the law of the flag if it is common to both parties,¹⁹ and otherwise by the national law in force in territorial waters.²⁰ But where the act occurs on the high seas, or begins there and terminates in a port, the opinions are extremely divided.²¹

A convention on assistance and salvage of aircraft, of Brussels, 1938, has not been ratified by any country.²² The efforts to fill the gaps of unification are being continued.

II. UNJUST ENRICHMENT²³

A. IN GENERAL

Restitution of enrichment obtained without just cause, a favorite of Justinian's compilers and of the Continental common practice at the time of the natural law, has found

¹⁹ Germany: RG. (June 15, 1927) 117 RGZ. 249.

²⁰ Portugal: C. Com. art. 690.

Treaty of Montevideo on Int. Com. Navigation (1940) art. 12; DIENA, 3 Dir. Com. Int. 396; WEISS, 3 *Traité* 413 n. 2.

²¹ Particularly: Law of the salvaging vessel, or of the salvaged vessel, or *lex fori*. See for France, DESPAGNET 931; 2 ARMINJON (ed. 2) 338; RIPERT, 3 *Droit Marit.* § 2207; 2 *Répert.* 72 f.; NIBOYET, 54 *Traité* 506.

For Germany: NEUMEYER, IPR. 33, incorrectly opposed by 2 FRANKENSTEIN 558 n. 226.

Treaty of Montevideo on Int. Com. Navig. (1940) art. 12 applies the law of the flag of the salvaging vessel.

²² See 1 Int. L. Q. (1947) 505; and the text in BENEDICT, 6A Admiralty (ed. 7) 621 and in SCHLEICHER-REYMANN-ABRAHAM, 1 *Das Recht der Luftfahrt* (ed. 3, 1960) 615.

Some governments (Guatemala, Italy, Mexico) have been authorized according to their national laws to deposit their ratifications; see BENEDICT, *op. cit. supra*, at 620; MATOS 566.

²³ Comparative writing on municipal laws: FRIEDMANN, *Die Bereicherungshaftung im anglo-amerikanischen Rechtskreis* (1930); *id.*, "The Principle of Unjust Enrichment," 16 *Can. Bar Rev.* (1938) 243, 365; GUTTERIDGE and DAVID, "The Doctrine of Unjustified Enrichment," 5 *Cambr. L. J.* (1934) 204; O'CONNELL, "Unjust Enrichment," 5 *Am. J. Comp. Law* (1956) 2; NICHOLAS, "Unjustified Enrichment in Civil Law and Louisiana Law," 36 *Tul. L. Rev.* (1962) 605; 37 *id.* (1963) 49. Instructive with respect to the divergence of American and English laws, SCOTT and SEAVEY, "Restitution," 54 *Law Q. Rev.* (1938) 29. A comprehensive, comparative article in 7 *Rechtsvergl. Handwörterbuch* is not available. For a penetrating comparative study, see DAWSON, *Unjust Enrichment: A Comparative Analysis* (1951).

Comparative conflicts law: surveys of literary opinions have been afforded

its most complete development in the German Civil Code and comments, and recently in the American Restatement of Restitution. An enormous mass of apparently heterogeneous situations is covered thereby. In France and other civil law countries, the codes have prevailingly restricted their attention to *condictio indebiti*, the recovery of a payment not due, which is therefore alone considered in the bulk of the conflicts literature, while the more recent French doctrine using the name of *actio de in rem verso*²⁴ has been scarcely noted. The English action of *indebitatus assumpsit* produced in an early period the actions for money had and received and *quantum meruit*, with an important though by no means exhaustive scope.

Heavy problems burden not only the less advanced theories of unjust enrichment; new problems arise with elaboration of the system. At the same time the slowly growing popularity of the subject multiplies the cases revealing divergent solutions.

The differences are caused much more by legal intricacies of technique than by contrasting ideas of justice. But there exist also divergencies of the latter kind. Although the entire institution rests everywhere upon equity, the concept of equity varies. If, for instance, someone in the mistaken belief that he owns a motor car, causes it to be painted, in

by GUTTERIDGE and LIPSTEIN, "Conflicts of Law in Matters of Unjustifiable Enrichment," 7 *Cambr. L. J.* (1941) 80; Anon., 10 *Répert.* 776; FICKER, 4 *Rechtsvergl. Handwörterbuch* (1929) 387; and most Continental and Latin-American treatises. There is not even accord among these reports about the views attributable to the sketchy treatment by writers.

Recently, a Swiss thesis has endeavored to deal with the conflicts problems of unjust enrichment on a limited comparative basis; see BALASTÈR, *Die ungerechtfertigte Bereicherung im internationalen Privatrecht* (1955). In addition, see BOUREL, *supra* n. 10a, at 31 ff., 89 f., 191 ff., 229 f. and KNOCH, *Die Aufgliederung der Konditionen in der modernen Zivilrechtsdogmatik in ihren Auswirkungen auf das Internationale Privatrecht* (Thesis, Muenster 1963).

²⁴ With more justification, the Austrian doctrine has taken § 1041, Allg. BGB. as the starting point for developing a modern *actio de in rem verso* different from the action based on enrichment. (A good illustration of the distinction: 97 *RGZ.* 61 at 65.)

this country it is thought unfair to let him have compensation for the plus value of the car;²⁵ in this special case Romanistic doctrine does not even need the action for unjust enrichment since compensation is provided by the principles of vindication.²⁶

In conflicts literature, including the Restatement, the subject has often been discussed, but in an offhand manner until very recently when the real problem was discovered. But only tentative propositions in illustrative cases have been advanced. A promising study on the same basis of comparative research as underlies the present work is announced,²⁷ and should provide the needed monograph for which the following remarks are no substitute.

Judicial decisions have been declared missing in the United States and England.²⁸ Few are available on the Continent.

At least it is certain that however narrow the domestic scope of unjust enrichment may be, foreign application of this institution is definitely recognized. With regard to the peculiar English treatment of foreign tort actions, it has been noted that recovery of values based on an applicable foreign law of unjust enrichment is enforceable without requiring an English parallel. This thesis finds support in a decision of the Court of Appeal.²⁹

²⁵ SCOTT and SEAVEY, "Restitution," 54 Law Q. Rev. (1938) 29 at 36.

²⁶ German BGB. § 996; cf. § 818 par. 2.

²⁷ By Professor KONRAD ZWEIGERT in Tübingen who defines his method in an article "Bereicherungsansprüche im internationalen Privatrecht," 2 Süd-deutsche Juristen-Zeitung (1947) 247.

²⁸ 2 BEALE 1429; GUTTERIDGE, 7 *Cambr. L. J.*, *supra* n. 23, at 82. *Universal Credit Co. v. Marks* (1933) 164 Md. 130, 163 Atl. 810, 816 does not speak of an obligation but only of a burden to pay unless a lien be lost under Maryland law. For further cases, see Restatement (Second), Tent. Draft No. 6 (1960) 234 f.; EHRENZWEIG, *Conflict* 601 n. 30 (criticizing the Second Restatement's case references); COHEN, "Quasi Contract and the Conflict of Laws," 31 *Los Angeles Bar Bulletin* (1956) 71.

²⁹ *Batthyany v. Walford* (1887) 36 Ch. D. 269; GUTTERIDGE, *supra* n. 23, 83 f. (the case mentioned awakens my early personal memory since my father was one of the plaintiff prince's experts heard by the court on the law of family fideicommisses).

B. THE CONFLICTS THEORIES

I. Connection with a Fact

(a) *Place of enriching act.* In Belgian and French literature it has often been proclaimed that the decisive place is where the defendant completes the acquisition said to be his enrichment. Thus the law of the place where a sum not due is paid governs its recovery. This widely held,³⁰ though by no means overwhelmingly supported,³¹ rule has been readily adopted by Beale and the Restatement. In two obscurely related sections the Restatement³² asserts, regarding "benefits or other enrichment,"³³ that the law of the place where a benefit is conferred or unjust enrichment is rendered, determines compensation or repayment. The illustrations show that this means the place of a physical act.

In England, Gutteridge, as the first to take a stand in that country,³⁴ has adhered to this view.

Various codifications include this rule in their broader provisions.³⁵

It should be noted that in the few known cases decided by courts, all possible theories usually coincide in the result. But the basis of this idea is obvious. Trying to localize the

³⁰ Belgium: ROLIN, 1 Principes 568 § 362; POULLET § 315.

Brazil: BEVILACQUA 371.

France: 1 FOELIX 238; BARTIN, 1 Principes 187; LEREBOURS-PIGEONNIÈRE (ed. 7) § 356; BATIFFOL, *Traité* (ed. 3) 613 § 564.

Italy: CERETI, *Obblig.* § 76.

Japan: *Int. Priv. Law*, art. 11 par. 1.

Switzerland: BG. (June 5, 1886) 12 BGE. 339, 342, Clunet 1889, 350; (April 28, 1900) 26 BGE. II 268, 272; (Nov. 25, 1905) 31 *id.* II 660, 665; 2 MEILI 86; 2 BROCHER 138; FRITZSCHE, 44 Z. Schweiz. R. (N. F.) (1925) 243a; SAUSER-HALL, *id.* 295a; 2 SCHNITZER (ed. 4) 682.

Código Bustamante, art. 221.

³¹ This is also the conclusion of ESPINOLA, 2 *Lei Introd.* 534 § 236: "Não existe acôrdo"; 3 VICO 128 § 146: "Son diversas las soluciones propuestas. . ." Otherwise, LIPSTEIN, 7 *Cambr. L. J.*, *supra* n. 23, at 86 and n. 11.

³² Restatement §§ 452, 453.

³³ Thus 2 BEALE 1429 § 452.1 formulates the common topic of §§ 452, 453.

³⁴ *Supra* n. 23.

³⁵ See *supra* ns. 1 and 2.

action of enrichment and missing another purely material attachment to a territory, the authors believed that they were compelled to select the place of the act of enrichment. Territorialism so practiced was naturally attractive to Beale.

A Belgian-French group of writers has argued that restitution of payment of money not due, as based on a "quasi contract,"³⁶ or "rather a quasi delict,"³⁷ allows a presumption of party intention for an applicable law. This, again, has led to the place where the sum is paid.

(b) *Other connections.* Many contacts have been considered such as the nationality common to both parties,³⁸ or the nationality³⁹ or the domicile⁴⁰ of the defendant, or the place where he has to make restitution of the enrichment,⁴¹ which is usually both his domicile and the place of enrichment. The *lex fori* has also found an advocate.⁴²

All these haphazard theories have no following. Their feeble justification, however, consists in the grave doubt inherent in the theory under (a), concerning exactly what event should make the alleged territorial contact. It is generally assumed that it is the enrichment of the defendant rather than the impoverishment of the plaintiff which must be localized.^{42a} But when in a case before the Swiss Federal Tribunal a draft was paid in Paris by mistake of

³⁶ 8 LAURENT 8; WEISS, 4 *Traité* 415 n. 1.

³⁷ DESPAGNET 934 § 321.

³⁸ LAURENT and WEISS, *supra* n. 36. ROLIN, 1 *Principes* 566 § 360; POULLET 467; Código Bustamante, art. 221 (common personal law); 2 PONTES DE MIRANDA 184.

³⁹ 2 ZITELMANN 528.

⁴⁰ GEBHARD in Niemeyer, *Vorgeschichte* 156; WALKER 546.

⁴¹ Germany: RG. (Nov. 8, 1906) 18 *Z. int. R.* (1908) 159; (July 5, 1910) 74 *RGZ.* 171; (March 16, 1928) 82 *Seuff. Arch.* 205 No. 121, *IPRspr.* 1928, 58 No. 37; (July 7, 1932) *IPRspr.* 1932 No. 39; 2 FRANKENSTEIN 384, 392; NUSSBAUM, *D. IPR.* 294.

⁴² VALÉRY 970 § 671; Cour Paris (May 18, 1893) *Clunet* 1893, 827; App. Alger (May 5, 1896) *D.* 1899.2.412.

^{42a} Only COHEN, *supra* n. 28, suggests that in view of an alleged analogy between torts and cases of unjust enrichment the law of the place where the loss occurs should control.

the local cashier⁴³ of a certain bank, the enrichment of the defendant, a Swiss bank, must have occurred at his domicile, the center of his assets, and not in Paris as the court assumed. In fact, a subsequent decision of the same Swiss court applies "the law of the place where the enrichment is said to have occurred, hence, as a rule, at the place of the domicile of the acquirer."⁴⁴

2. Law of the Relationship Causing Enrichment

Should it not be feasible to localize internationally the duty of restitution by contemplating the legal origin of the enrichment, rather than its territorial origin or the vicissitudes of its future development? Despite all the variety in the laws respecting the conditions of a duty of restitution, there is a common pattern. Whatever else motivates a law to recognize a claim for unjust enrichment, the aim is always to disallow on account of some initial or subsequent vice an acquisition duly made in accordance with the formal laws. Following this common idea and neglecting the technical differences by which the systems of law operate, our attention moves back to the various situations that need correction. No mechanically ascertainable contact is adequate for all cases. Choice of law must depend on the nature of the source from which the enrichment stems.

This experience has slowly emerged from frequent though casual observations that all legal obligations cannot be bound to one territorial connection,⁴⁵ and gradual awareness that in particular the law governing a frustrated contract should extend to the actions enforcing the return of a performance made on the contract. Niemeyer and Neuner⁴⁶

⁴³ BG. (April 28, 1900) 26 BGE. II 268.

⁴⁴ BG. (Nov. 25, 1905) 31 BGE. II 662, 665.

⁴⁵ E.g., 2 ARMINJON (ed. 2) 335; 10 Répert. 776 No. 2.

⁴⁶ NIEMEYER, *Vorschläge und Materialien zur Kodifikation des IPR.* (1895) 244; NEUNER, 2 *Z.ausl.PR.* (1928) 122 n. 1.

in Germany, and with respect to undue payment Pillet and Arminjon⁴⁷ in France, have prepared an appropriate theory, now tentatively but with increasing assurance expressed by the most recent German authors, particularly Martin Wolff, Raape, and Zweigert.⁴⁸ Various German decisions have followed the same view.⁴⁹ At the same time, the British Law Reform (Frustrated Contracts) Act, 1943, has instinctively chosen an identical method. The new law prescribes restitution of all sums paid in pursuance of a contract discharged by impossibility of performance or other frustration, and applies to contracts "governed by English law." The place where the sum is paid, thus, is without importance. Although this deviation from the orthodox criterion has been criticized by some writers, it has been welcomed and extensively interpreted by Falconbridge.⁵⁰

Also, the draftsmen of the revised draft of the Montevideo Treaty (art. 43) in 1940, must have felt in a similar way. To the rule that obligations arising without contract are governed by the law of the place where the "licit or illicit fact" occurs, they add the words: "and in an appropriate case, by the law governing the legal relations to which they correspond."

This approach will doubtless be improved by thorough exploration. Here we may briefly contemplate the theoretical ground and a few typical applications.

⁴⁷ PILLET, 2 *Traité* 311 § 547a; 2 ARMINJON (ed. 2) 338.

⁴⁸ GUTZWILLER 1623; NUSSBAUM, D. IPR. 295 n. 2; M. WOLFF, IPR. (ed. 3) 169; *id.*, Priv. Int. Law (ed. 2) 499 ff. § 481; 2 STREIT-VALLINDAS 267; RAAPE, IPR. (ed. 5) 527 ff.; ZWIEGERT, *supra* n. 27; KNAUER, Note 25 *RabelsZ.* (1960) 318, 327 ff.

⁴⁹ Bay. ObLG. (Nov. 16, 1882) 38 *Seuff. Arch.* 260; RG. (June 18, 1887) 4 *Bolze No. 26* (unavailable); and citations of recent decisions below.

⁵⁰ See Vol. II (ed. 2) pp. 541 ff.; FALCONBRIDGE, *Conflict of Laws* (ed. 2) 428 ff.; MORRIS, "The Choice of Law Clause in Statutes," 62 *Law Q. Rev.* (1946) 170, 180 in case of frustration of a contract. See also EHRENZWEIG, *Conflict* 599 f. with further references in n. 19.

C. RATIONALE

1. Theoretical Approach

It is generally agreed that the question whether an enrichment is justified must be determined by the law under which its acquisition takes effect.⁵¹ It is submitted that the same law governs the action for restitution as a whole.

Suppose a seller has delivered the goods but rescinded the contract because of the buyer's default. This means in American and German laws the destruction of the contract. If he, then, sues for the return of the goods on the theory of unjust enrichment (rather than of ownership), the provisions on enrichment of the legal system governing the contract must apply. It is quite true that the enrichment is unjust only because the contract has ceased to exist. But if it has been therefore objected that it is "illogical" to extend the law of the former contract to its *sequelae*,⁵² this is the typical wrong logic by which it has been declared impossible that the formation of a contract should be governed by the law applicable if the contract is valid.⁵³

Any comparison of the municipal systems shows that restitution on the ground of failure of consideration is afforded by different technical means, such as a claim of ownership reverting to the seller; a "*condictio*" or claim for unjust enrichment properly termed; an action intermediate between those for enrichment and breach; or a remedy sounding purely in contract. Even the elaborate German Civil Code has failed to make it clear to what category exactly the action based on rescission belongs.⁵⁴ It is

⁵¹ GEBHARD in Niemeyer, *Vorgeschichte* 156 n. 1; PILLET, 2 *Traité* 311; ROLIN, 3 *Principes* 62; 2 ZITELMANN 194, 525; NEUMEYER, *IPR.* (ed. 1) 32; 2 FRANKENSTEIN 392 n. 32.

⁵² 2 SCHNITZER (ed. 4) 682 verbally followed by LIPSTEIN, 7 *Cambr. L. J.*, *supra* n. 23, 86.

⁵³ Vol. I (ed. 2) p. 74; Vol. II (ed. 2) p. 523 n. 17.

⁵⁴ See the commentaries to BGB. §§ 327, 348.

imperative to subject all of these—merely with certain reservations concerning property—to one conflicts rule. Where ownership is transferred irrespective of the validity of the sales or other contract, as may occur under German law, the absence of the presupposed cause leads to unjust enrichment. Since the transfer was caused by the contract—one might say, was done to satisfy the law of the contract—this law ought to determine what should happen to restore balance. The law of the place of transfer has no importance whatever.

Even when a contract is termed void *ab initio* or by annulment, this is proper juridical language, but it should not be stressed too literally. There may be an aftereffect, such as when damages for fault in contracting or innocent representation are recoverable; without any doubt they are subject to contract rules.⁵⁵ There is no obstacle in theory to applying the law of such a contract to actions for return of performance. The common law doctrine of constructive trust is commonly applied where there is a violation of a fiduciary relationship. The unjust enrichment of the agent should therefore be subjected to the law governing the relationship and not necessarily to that of the place of the enriching act.^{55a}

That a contractual debtor pays more than he finally is found to owe, is an analogous occurrence. Where a seller delivers more goods than he should and the surplus quantity is finally rejected, ownership may or may not have passed, according to the system and the circumstances. No distinction in this respect can be made in a conflicts rule concerning the obligatory claim. We may, however, even go farther.

A claim for violation of a legal or beneficial property

⁵⁵ RABEL, 27 Z. Schweiz. R. (N. F.) 291.

^{55a} *Accord*, Restatement (Second), Tent. Draft No. 6 (1960) § 354k and comment on pp. 229 ff.; for criticism, see EHRENZWEIG, Conflict 600 f.

right is commonly regarded in isolation; and therefore, no local contact seems possible other than the *lex situs*. But the relationship between the parties may not be so simple. A distinct example is the resulting trust at common law; a legal transfer of property in the absence of consideration is understood to create, by a tacit agreement, an obligation to return the beneficial interest therein. Is the *lex situs* competent to govern this construction or rather the law controlling the transaction of the parties?

Inversely, ownership or any property interest may vanish, leaving an obligation for restitution. Of such nature is innocent conversion at civil law where it is conceived as unjust enrichment rather than as tort. For instance, Justinian—to show himself as the protector of art—ending an old school controversy, adopted the opinion that a table used for painting but belonging to another person, should become the property of the artist who, however, ought to pay the value of the table to the former owner.⁵⁶ These are two parts of one solution and cannot be divided between two laws. The *lex situs*, indispensable for the disposition of property, hence, must also furnish the rule on enrichment. If goods have been shipped to Rio de Janeiro and there delivered to a wrong address, viz., to the local agent of a New York firm, enrichment is probably deemed to occur in New York, but Brazilian law must govern. It decides whether, at what time, and to whom, property passes and ought also to determine what duty of restitution burdens the new owner.

2. Historical Reminder

It is a curious observation that juridical elaboration of our system may tempt us to overestimate the value of the

⁵⁶ Inst. Just. 2, 1, 34, incorporating Gai. Inst. II 78, cf. GAIUS, Dig. 41, 1, 9, § 2; PAULUS, Dig. 6, 1, 23, § 3.

differentiation of categories brought about by our professional development. We should not forget that all direct and indirect effects of agreement have originated upon one basis, first of tort, later of contract. The Roman classic process formula of *actio certae creditae pecuniae* served for the recovery of a valid loan but, if the contract was void, for instance, because the borrower was a lunatic, or because he was in error about the person of the lender, the same formula was good for the repayment of the enrichment.⁵⁷ The same formal writ used for ages in England to enforce repayment of a loan was employed when the money given appeared to belong to the plaintiff without a recognized type of contract or tort.⁵⁸ The primitive notion that the lender may claim "my money," recurs to this day. "Debt" is really *detinue*, as the Roman *condictio* is based on non-justified *habere*. Our ineluctable division between property and obligations is not meant to establish barriers separating naturally connected problems. Conflicts law must rigorously strive to avoid this danger.

D. ILLUSTRATIONS^{58a}

I. Family Law

A German recognized in Switzerland his paternity of certain children. He sued for revocation of the recognition as unjustly obtained by deceit (BGB. § 812 par. 2). A German court correctly applied Swiss law to this claim.⁵⁹

⁵⁷ JULIANUS, Dig. 12, 1, 19, § 1 (despite interpolation); CELSUS, Dig. 12, 1, 32.

⁵⁸ § HOLDSWORTH 88, 92.

^{58a} For more recent German cases, see OLG. Frankfurt (Nov. 22, 1957) IPRspr. 1956-57 No. 33; BGH. (Apr. 15, 1959) 25 *RebelsZ.* (1960) 313; BGH. (Feb. 4, 1960) NJW. 1960, 774; BGH. (July 6, 1961) 35 *BGHZ.* 267.

Switzerland: BG. (April 23, 1951) 77 *BGE.* II 86, 94 f.; BG. (Nov. 1, 1952) 78 *BGE.* II 385, *Revue Crit.* 1953, 401 with a note by HOLLEAUX.

Austria: OGH. (June 24, 1959) 2 *Z. f. RV.* (1961) 18 and note by BYDLINSKI, *id.* at 22, 29 ff.

From these cases the tendency is clearly discernible to apply the law of a pre-existing legal relationship also to questions of unjust enrichment.

⁵⁹ LG. Frankfurt (Aug. 17, 1932) IPRspr. 1933, 105 No. 48.

2. Rescission and Avoidance of Contract

(i) A buyer not paying the price has to restore the goods on the request of the seller, because the return is implied in the *synallagma*, that is, the exchange of price and delivery, essential to sale. Hence, the law governing the sales contract extends to the action for restitution, however it may be legally construed.

(ii) Dissolution of contracts by war. The Treaty of Versailles dissolved contracts between persons having become enemies, with certain exceptions. What became of a partial performance by one party? Judge Algot Bagge as president of a division of the Anglo-German Mixed Arbitral Tribunal ascertained that under German and Scotch laws an action would lie for recovery as unjust enrichment, but that in England under the rule of *Chandler v. Webster*⁶⁰ the acts of performance done before the dissolution were not recoverable. To escape such different results, under the Treaty, Bagge decided that the Treaty must have intended to recognize and maintain a money obligation for restitution every time the parties had not distributed the risks otherwise.⁶¹ Thus he rightly took it for granted that restitution of a performance is essentially connected with the law destroying the basis of the obligation. In several decisions by another Swedish president, a division of the same court turned to the application of the national law of unjust enrichment, but this, again, was in all cases taken from the system governing the contract.⁶² The same question of whether a claim for the repayment of advances made in performance of contracts is implied in the peace treaty

⁶⁰ [1904] 1 K. B. 493—but overruled by the *Fibrosa Case* and the Act of 1943, see Vol. II (ed. 2) pp. 542 f.

⁶¹ Anglo-German Mixed Arb. Trib. (Jan. 19, 1926) *Burroughs Wellcome & Co. v. Chemische Fabrik auf Aktien*, 6 *Recueil trib. arb. mixtes* 13, 16. Followed by British-Turkish Mixed Arb. Trib. (Dec. 19, 1928) *Gouv. Turc v. Armstrong Whitworth & Co. Ltd. et Vickers Ltd.*, 8 *Recueil trib. arb. mixtes* 996, 1001.

⁶² Anglo-German Mixed Arb. Trib. President Klaestad (July 21, 1926) *Alexander Davidson v. Gebrüder Dammann*, 6 *Recueil trib. arb. mixtes* 588; (Oct. 20, 1926) *Arnold and Foster, Ltd. v. J. W. Erkens*, 6 *id.* 606; (Dec. 1, 1926) *The Dunderland Iron Ore Co., Ltd. v. Friedr. Krupp A. G.* 6 *id.* 639; and in 7 *id.* 372, 375, 379, 418, 493; 8 *id.* 7, 283.

dissolving contracts or to be based on the applicable national law, has recurred under the obscure texts of the five peace treaties of 1947.⁶³

3. Performance Without Just Cause—Upon an Assumed Pre-existing Obligation

(i) Suppose a legacy left by a testator domiciled in Argentina to a citizen of New Orleans is paid to him in New York. The Argentine law of inheritance competent to state whether a valid legacy obligation exists, is the right law also to determine the effects of payment in case of avoidance of the legacy. What import has the place of payment or the domicile of the receiving person?⁶⁴

(ii) Before 1900, A, in a place under Prussian law, having bought a house in Brunswick from a vendor domiciled there, paid more than he owed, by a payment in Magdeburg, a place under common law. The sale was naturally governed by the *lex situs* (Brunswick) and rightly the Reichsgericht applied the same law to the limitation of action for the repayment of that which was not due. It should not have invoked the place of performance, but it was right in pointing to the connection between the seller's duty to repay and his contractual obligations.⁶⁵ The place of payment was immaterial.

(iii) A Germany company, owner of a German-registered steamer, created a first mortgage in Dutch currency to a Dutch firm. The vessel was sold at auction in England, and the Dutch mortgagee—under an English rule deemed to be substantive—received the amount of the mortgage by conversion of the guilders into pounds according to the exchange rate of the day of the creation of the mortgage. The Hamburg Appeal Court stated that the loan and mortgage contract expressly stipulated for German law and as this law included a rule for conversion according to the date

⁶³ For the first construction, MARTIN, "Private Property etc. in the Paris Peace Treaties," 24 Brit. Year Book Int. Law 273, 297 n. 6; for the second, ERNST WOLFF repeatedly, and most recently in his book, *Vorkriegsverträge in Friedensverträgen* (1949) 101.

⁶⁴ RAAPE, IPR. (ed. 5) 529.

⁶⁵ RG. (July 5, 1910) 74 RGZ. 171.

of payment, it extended to the claim for unjust enrichment to recover whatever excess had been paid in England.⁶⁶

4. Without an Assumed Pre-existing Obligation

(i) A German firm assigned all its claims, arising from sales to Dutch customers, to a German bank for security of credit, but subsequently assigned one of the Dutch drafts involved to another German firm. The first assignee obtained restitution from the second under a German rule applicable, as the court said, under all conflicts theories concerning enrichment.⁶⁷ But the decision could not have been different, if the second assignee had received the draft by indorsement in Holland or had cashed it there. Nor is the circumstance that both assignees were nationals and domiciliaries of Germany of any significance. The real reason for acknowledging the right of the plaintiff was the priority of his claim against the debtor (according to the law of the assignor's domicil)⁶⁸ effective in the field of enrichment even after he lost the claim.

(ii) If a surety has entered into his obligation without agreement with the principal debtor and by payment is not subrogated in the principal debt, he may have a claim on the ground of unjust enrichment against the debtor—according to what law? The traditional opinions point to the places either where the surety paid or wherever he could pay, or where the debtor is enriched by liberation, probably at his domicil.⁶⁹ But as generally in suretyship matters, it is desirable to apply the law under which the surety is liable, which wherever feasible⁷⁰ is to be identified with the law of the principal debt.

III. GENERAL AVERAGE

From ancient times the sacrifice of goods carried on the seas in order to save other goods and particularly the

⁶⁶ OLG. Hamburg (May 15, 1929) Hans. RGZ. 1929 B No. 227, IPRspr. 1929, 74 No. 51.

⁶⁷ RG. (July 7, 1932) IPRspr. 1932 No. 39, cf. BGB. § 816 par. 2. Cf. an analogous case of wrong delivery of a cargo, OLG. Hamburg (July 1, 1932) *id.* No. 40.

⁶⁸ *Infra* Ch. 49.

⁶⁹ Thus FEDOZZI-CERETI 764.

⁷⁰ *Supra* Ch. 47, p. 361.

vessel has produced rules for equitable distribution of the loss. The underlying idea is at present regarded as the community of risk involved in a sea carriage rather than unjust enrichment.⁷¹ A common legal history has not prevented, however, a great many differences of regulations, accompanied by a chaos of conflicts rules. Unification was therefore early sought by the International Law Association at the Congresses of York, 1864, and Antwerp, 1877, with the resulting rules, reformed at Stockholm, 1924.⁷² These "York-Antwerp Rules" have obtained almost universal force by insertion or reference in bills of lading and contracts of affreightment. Such a clause may run as in the Argentine governmental form: General average is subject to the York-Antwerp Rules, 1924, and insofar as these do not decide, to the Argentine Commercial Code and usage. The place of the adjustment will be Buenos Aires and the carrier will appoint the adjuster or adjusters.⁷³

Unfortunately, some forms still refer to the older draft of the Rules, and even the rules of 1950, though more complete, have left gaps and are not used for every carriage. Hence there is still great force in the age-old principle that the adjustment of the claims should be made at the port of destination, or in case the voyage cannot be carried to its end, the port of refuge where ship and goods are separated.⁷⁴ Some formulations use less distinctive indications,

⁷¹ L. MOSSA, 2 *Derecho mercantil* (1940) 549 (Spanish ed. of *Diritto commerciale*) and cited authors.

⁷² Reports of the 33rd Conference (1925) 670 ff. A revision of the rules has been adopted at Amsterdam, September 19-24, 1949, by the International Maritime Committee and has become effective on Jan. 1, 1950; see BENEICT, 6A *Admiralty* (ed. 7) 812.

⁷³ Rep. Argentina, Ministerio de Marina, Admin. Gen. de la Flota Mercante del Estado, s. 34, printed in MALVAGNI, *Curso de derecho de la navegación* (1946) (Pocket Ann.). For analogous clauses recommended in the United States, see BENEICT, 6A *Admiralty* (ed. 7) 821; KNAUTH, *Ocean Bills of Lading* (ed. 4) 110.

⁷⁴ United States: *Charter Shipping Co. v. Bowring, Jones & Tidy* (1930) 281 U. S. 515; and cases cited by 2 BEALE 1332 § 411.2; 2 WHARTON 962.

England: *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 126; WESTLAKE § 220;

such as the Portuguese Code referring to the port "where the goods will be delivered."⁷⁵

Many writers have attacked this very old practice and favored the law of the flag or the law of the contract.⁷⁶ Their arguments are rather deceptive. Nor is the customary rule to be explained as *lex loci solutionis* or on some other theory. It is simply the practical need that points to the place where the last remaining goods are discharged.⁷⁷ As an English judge said in 1824: "The place at which the average shall be adjusted . . . is the place of the ship's destination or delivery of her cargo," and the shipper of goods "by assenting to general average, must be understood to consent also to its adjustment, according to the usage

DICEY (ed. 7) 837 Rule 162; LOWNDES & RUDOLPH, *Law of General Average and the York-Antwerp Rules* (ed. 8, 1955) 191.

France: RIPERT, 3 *Droit Marit.* (ed. 4) 199 §§ 2227 ff.; CROUVÈS, 2 *Répert.* 287 No. 88.

Germany: WAGNER, *Seerecht* 142; SCHAPS-ABRAHAM, 2 *Seerecht* (ed. 3) 903 § 700 Nos. 31 f.

Greece: App. Athens (April 8, 1895) *Clunet* 1897, 192.

Italy: Former practice, see SCERNI 278.

The Netherlands: C. Com. arts. 722, 723, 745 (distinguishing several cases); H. R. (June 22, 1928) 22 *Revue Dor* 434.

Norway: S. Ct. (March 25, 1886) *Clunet* 1888, 151.

Portugal: C. Com. art. 650.

Spain: C. Com. art. 847 par. 2.

Brazil: Sup. Trib. (Sept. 10, 1926) 82 *Rev. Dir.* 111; (April 27, 1927) 85 *id.* 460.

Guatemala: C. Com. art. 961; MATOS 561 § 402.

Treaty of Montevideo on Int. Com. Navig. (1940) art. 17 (excepting the formalities and conditions of the stipulation on average reserved for the law of the flag, in accordance with the restriction on *locus regit actum*, see GOWLAND, Report in República Argentina, Segundo Congreso Sudamericano at 303.

⁷⁵ Portugal: C. Com. art. 650. Often "port de reste" and "port de destination" are used synonymously, which is confusing.

⁷⁶ Survey of laws and literature in CROUVÈS, 2 *Répert.* 265 ff.; Note, 22 *Revue Dor* 461; cf. 2 *BAR* 2212; 2 *MEILI* 369; LYON-CAEN, *Clunet* 1882, 593; EYNARD 180; *Inst. Droit Internat.*, 8 *Annuaire* (1886) 124; 6 LYON-CAEN et RENAULT § 983; DESPAGNET 930; BONNECASE, *Dr. Com. Mar.* 700 § 791.

Montevideo Treaty on Int. Commercial Law (1889) art. 21 (reversed by the text of 1940); Código Bustamante, art. 288.

⁷⁷ Excellent, Note, 22 *Revue Dor* at 465. See also MONACO, *Studi per la codificazione* (1940) 142.

and law of the place at which the adjustment is to be made."⁷⁸ The adjuster is not expected to study the laws of all the parties concerned, nor is there a reason why the law of the vessel which is a party to the community of interests, should be preferred to the other laws. The persons primarily interested are the consignees and the insurers.

The binding force of foreign adjustment, undoubted as to the coadventurers, has been subject to certain questions with regard to the underwriters. But legal provisions and the revised clauses of the insurance policies have taken care of the doubts.⁷⁹

The scope of the local law of the port is not always easy to trace. English and American discussions seem to be missing. In the Continental literature, the doubts have been increased by the frequent claim that the law of the flag should control, if not the whole matter, at least special problems. Of course, the law of the flag may adequately determine whether the master has to consult the crew before sacrificing goods,⁸⁰ and in what cases he obligates the shipowner. But the relation between the shipowner and the cargo owners is the subject of the carriage contract, complemented by usages.⁸¹

Other questions discussed are: the meaning of maritime voyage in the average doctrine; who ought to contribute and to what extent (if not covered by the York-Antwerp Rules); and whether the obligation of the ship owner is personal or only *ad rem*.

The German courts apparently resort indiscriminately to the law of the port of destination, applied by them to

⁷⁸ Abbott, J., in *Simonds and Loder v. White* (1824) 2 B. & C. 805, 811, 813.

⁷⁹ For a comprehensive discussion, see ARNOULD, 2 *The Law of Marine Insurance and Average* (ed. 15, 1961) 992 §§ 993 ff.

⁸⁰ France: Cass. req. (Feb. 11, 1862) D. 1862.1.247.

⁸¹ Germany: OLG. Hamburg (June 12, 1922) Hans. RGZ. 1922 No. 175, 78 Seuff. Arch. No. 96, approving SCHAPS, *Seerecht* (ed. 2) § 700 ns. 29 f.; Note, 22 *Revue Dor* at 468.

affreightment. All other courts, in the true meaning of the tradition, look to the law applied by the adjuster. His conclusions are internationally respected, provided—and this should never be forgotten—that they are vested with the judicial authority of the country where the port lies. Thus, the Dutch courts, construing their new code provisions as the consecration of the universal custom, have recognized that a Swedish adjustment following the local law, had authority not only as respects the damage and the amounts assessed, but also in determining the parties liable.⁸²

⁸² H. R. (June 22, 1928) *The Thabetta I*, 22 *Revue Dor* 458. On connected doubtful questions in England, see DICEY (ed. 7) 839.

PART TEN

MODIFICATION AND DISCHARGE
OF OBLIGATIONS

Voluntary Assignment of Simple Debts

I. THE PROBLEM

1. Municipal Differences

THE full transfer of choses of action has become recognized in almost every municipal system. But the methods of dealing with the specific problems of this institution are not identical.¹ These problems arise out of the coexistence of three interested parties, the assignor, the debtor, and the assignee, and the additional possibility of conflicts between two or more assignees and their creditors. The influences coming from the bordering fields of attachment, garnishment, and bankruptcy, least favored by international co-operation, further complicate the matter.

Most of the legal diversity is caused by residua from former periods. There is, however, a difficult conflict between the interest of the debtor whose situation should not be altered by the act of two other parties without his consent, and the modern desire for unhampered mobilization of values. A creditor ordinarily may vest any other person with his right, not only without the debtor's consent but without his knowledge. Notice, essentially required in the older codes, such as the influential French Code, in modern systems is only a means for improving the position of the assignee. Particulars in the protection of the debtor, on one hand, and of the assignee and his successors, on the other, vary and are often obscure.

¹ For comparative municipal law, see KARL ARNDT, *Zessionsrecht*, 7 Beiträge zum ausländischen und internationalen Privatrecht (Berlin, Leipzig, 1932).

The involved and delicate structure of the municipal rules has caused a peculiar contrast in classifying the incidents of assignment. This diversity demands a thorough investigation before definitive conclusions are reached with respect to the advisable conflicts rules.

The American decisions in point are numerous but mostly confined to life insurance policies. Appointment of a beneficiary to insurance is not an assignment of the policy but has been adequately treated in conflicts law in an analogous manner. On the other hand, cases concerning bills and notes have been mixed into the discussion, which we must strictly avoid. Transfer of rights through the endorsement of negotiable instruments follows special principles in municipal law as well as in conflicts law, although the differences are not equally accentuated in all systems. In some situations, endorsement has the effect of assignment, but even then the distinction is useful.

To introduce the reader to the conflicts arising from the variety of municipal laws despite the modern tendency to uniform development, the following examples may serve:

(i) *Capacity of parties.* Cabrera, President of Guatemala, deposited a sum of money with a London bank and later requested the bank to transfer this sum to Nuñez, his illegitimate minor son. The English courts held the transfer void under Guatemalan law under which the son could not accept the assignment, although it would have been valid by English law.² In the concurring, though entirely diverse, opinions, the former law was applied either as *lex loci actus*, or the proper law of the assignment, or the *lex domicilii* of the assignor and assignee. English law was considered as the *lex situs* of the debt and as its proper law.

(ii) *Assignability of the debt.* Carr, injured in a railway accident in Iowa, assigned his claim for damages on the ground of tort by an assignment made in Illinois. The claim

² República de Guatemala v. Nuñez, see *infra* n. 23.

could be transferred in Iowa but not in Illinois where tort obligations were nonassignable under common law. The Iowa court applied its own law as that under which the debt arose.³

(iii) *Requirement of notification.* The English creditor of a French debtor assigns in Switzerland the debt to an American, without giving the debtor notice through formal signification, as required by the French Civil Code, art. 1690, although not in Switzerland. Supposing that French law governs the debt, most European courts hold the transfer incomplete, either because French law governs the debt (Swiss conflicts rule) or because the debtor is domiciled in France (French conflicts rule). In the most frequently expressed American view, however, the transfer is perfected because made in Switzerland.

(iv) *Warranty of solvency of the debtor.* German parties once made an assignment in Nürnberg of a debt governed by Austrian law. The German courts denied liability of the assignor for the debtor's solvency according to the Austrian Code, following the Roman law in force in Nürnberg.⁴

(v) *Priority between successive assignees.* A firm in the state of New York assigned its accounts receivable as security for a loan to a finance corporation in Philadelphia. The debtors in numerous states were not notified. Afterward, the firm assigned one of these debts in payment to another creditor, who collected the money. At the time (before 1945) in Pennsylvania failure to notify allowed a subsequent bona fide assignee by giving notice to the debtor to acquire a right superior to that of an earlier assignee. According to the "New York rule" (similar to German law) however, a prior assignee is not only to be preferred before payment of the debt but may recover from the subsequent assignee what the latter collects from the debtor. In the United States, under theory of law of the place of assignment, it is uncertain which law would be applied. The Eng-

³ *Vimont v. Chicago & N. W. Ry. Co.* (1886) 69 Iowa 296, 22 N. W. 906, aff'd, 28 N. W. 612, *infra* n. 75.

⁴ RG. (Dec. 3, 1891) 2 Z.int.R. (1892) 162, Clunet 1892, 1039.

See *infra* p. 423 n. 106.

lish and French conflicts rules call for neither of these laws but for those of the various domicils of the debtors. The German conflicts rule points to the laws governing the individual single debts assigned.

2. The Nature of Assignment

Since in ancient laws obligations were strictly personal, neither in English nor in Roman law could a creditor put another person in his own place as holder of an obligatory right. The auxiliary practices developed in both laws for approaching this purpose were exactly the same. The creditor appointed the intended assignee as his agent for enforcing the claim and retaining the proceeds (*mandatum agendi* to a *procurator in rem suam*). Reflections of this stage of history persist in the Anglo-American literature. Notably, the question whether an assignee may sue the debtor in his own name has preserved an anachronistic importance.⁵ Also, the distinction between legal and equitable assignment is still significant in common law, although it should not affect the structure of the conflicts rules.⁶ Full and present transfer of the complete right of the creditor is the basic form of assignment. Modern efforts, to be sure, have tended to split the right into segments such as legal and beneficiary ownership, or substance of the right and its exercise. These differences are included in what is termed assignability in conflicts law.⁷

It is opportune, however, to be clearly aware of the elements of a voluntary transaction in the course of which a chose in action is transferred from the owner to another person. The Romans spoke of the sale of a debt (*emptio*

⁵ See 2 WHARTON 1482 § 735; CHESHIRE (ed. 6) 500 f., 694 ff.; ROBERTSON, *Characterization* 273, 278.

⁶ 2 BEALE §§ 348-350, 353 (by implication).

⁷ 2 BEALE 1251 § 348.2. E.g., if the beneficiary of a spendthrift trust assigns his interest, he constitutes only a revocable power of attorney, GRISWOLD, *Spendthrift Trusts* 378.

venditio nominis) or of an estate (*hereditatis*). Nevertheless, only a century ago, the German literature had to be admonished to observe the duality of an obligatory contract containing a promise to assign and a quasi-real contract effecting the assignment. The distinction even now is not very familiar to many lawyers,⁸ and sometimes a court in this country thinks it necessary to recall it to the readers of its decision. But the distinction between sale or security arrangement and actual assignment is so well known⁹ that it may be surprising that no such distinction appears in any discussion of the conflicts problems. American courts and the Restatement (§ 350) seem to consider only a law governing the assignment, and German courts and writers speak exclusively of the law governing the underlying relationship. The Restatement illustrates its rule exactly by mentioning warranty of the "assignor" for the existence of the debt, although in the modern doctrine (if not in the codes) this particular liability has always been the most characteristic incident, not of assignment, but of a promise to assign for value.

The American attitude is the more striking, as in the most frequent language "assignment" evidently does not mean the entire contract, including the promise to transfer and the transfer, but is thought of as a unilateral manifestation of transferring the right, hence as a part of the all-inclusive transaction. Its definition in the Restatement of the Law of Contracts suggests the same idea.¹⁰ Never-

⁸ According to the original doctrine laid down in French C. C. art. 1583, sale or gift of a debt includes assignment. Only its effects as to third persons, including the debtor, depend on notice, C. C. art. 1690. However, in modern theory and practice, the situation is very similar to the rules of American statutes requiring notice. Therefore, the transfer of the debt in French law, even though simultaneously with the sale etc., is not a transfer by law, as GULDENER 89 construes it, naturally without French confirmation, but rests on the presumed intention of the parties.

⁹ See the cases in 6 C. J. S. 1048 n. 50 distinguishing sale and assignment.

¹⁰ Restatement of Contracts § 149.

theless, common law assignment is a bilateral transaction, a true contract, requiring acceptance, actual or presumptive, or better said, constructive. The language mentioned may have originated from the ancient appointment of an agent for enforcing the debt and at present may refer more precisely to the customary and useful separate instrument of assignment, evidencing the transfer especially to third parties.

Scope of discussion. Although in the United States and most Latin-American countries assignment is distinguished from conventional subrogation, the kind of subrogation whereby the creditor and a voluntary payor agree on transfer of the debt, is very nearly related to assignment. The practical analogy is so great that the assignment rules are generally applied.¹¹ The same must be true of conflicts rules.

In American conflicts treatment, the subject is sometimes termed assignment of *contracts*, which is too broad, since the transfer of an entire contract, occurring in modern commerce, cannot be adequately explained by a mere division into transfers of claims and debts.¹² We must be satisfied with the transfer of single or several claims. On the other hand, the Restatement is not justified in restricting the topic to the transfer of *contractual rights*.¹³ The source of an obligatory claim is immaterial so long as the claim is transferable.

The term "debt" is used in the broad sense of common usage, not restricted to monetary obligations nor to the duty to pay a fixed amount. It means here the right to claim that which is due (French *créance*, German *Forderung*), rather than the corresponding duty.

¹¹ WENGLER, "Surrogation," 6 Rechtsvergl. Handwörterbuch at 493 f.

¹² See recently, also for the literature, FRÜH, Die Vertragsübertragung im schweizerischen Recht, Zürcher Beiträge zur Rechtswissenschaft, N. F. Heft III (1945). As to the conflict aspects and for further literature, see ZWEIGERT, "Das Statut der Vertragsübernahme," 23 RabelsZ. (1958) 643; EHRENZWEIG, Conflict 438 n. 1.

¹³ Restatement §§ 348 ff.

3. The Relationships Involved

Simplification is always desirable in conflicts laws. Yet before deciding to what extent it may be reached through rules covering more than one of the relationships involved, we have to note them exhaustively. Although we limit our discussion to those assignments of debt that rest on voluntary obligatory contracts to assign, we have to distinguish four aspects of the problem:

(1) The original debt between C (reditor) and D (ebtor), doubtless governed by its own law (*lex obligationis*);

(2) The contract containing the promise to assign (*causa cessionis*) between C and P (urchaser), following its own law according to its nature as sale, gift, security, substitution for payment, etc.;

(3) The assignment between C and P, the present transfer of the debt;

(4) The relation between P and D which may be altered by new events, such as payment, release, setoff, etc. between C and D.

II. THE MAIN CONFLICTS SYSTEMS

I. Situs Doctrine

The statisticians felt constrained by their territorial dogma to subject even intangibles to the statute real and had, therefore, to give them a local situation in a territory.¹⁴ Assignments of debts were sometimes localized at the domicile of the debtor,¹⁵ but the vast majority of authors, particularly of the French scholars of the eighteenth century, accentuated the situs of the property which a debt represents and located it at the domicile of the assignor as the party disposing of his property.¹⁶

¹⁴ Fundamental: 2 LAINÉ 265-278.

¹⁵ GUY COQUILLE, Questions et responses etc. (1634) quest. 237.

¹⁶ See 2 LAINÉ 265 f.

This past has left its traces in the conflicts doctrine of the nineteenth century. In England and the United States, the domicile of the owner of a claim has been characteristically identified with the situs of the claim, in analogy to his other movables.¹⁷ Notably in the French and Italian literature, the same old view has found expression¹⁸ with some effect on codification.¹⁹ Sometimes the domicile has been replaced by nationality.²⁰

The modern French doctrine has taken the side of the small minority of statisticians and consistently favored the law of the debtor. Also in this view the basis of the situs theory may sometimes be recognized.²¹ The Treaty of Montevideo declares the situs of the debt generally to be at the place of performance.²²

Nevertheless, in the present literature it is universally settled that choses in action do not really have any situs, and that if some fictitious situs must be construed in such

¹⁷ United States: STORY §§ 397 ff.; 1 WHARTON 792 § 363; Vanbuskirk v. Hartford Fire Ins. (1842) 14 Conn. 582; personal property in contemplation of law has no situs but follows the person of the owner. Speed v. May (1851) 17 Pa. St. 91 for general assignments: the actual situs of personal property protects local creditors only against transfer by operation of law. Otherwise, the personal property follows the domicile of the owner, effective against attachment by resident creditors (at the debtor's domicile). This reasoning recurs in Cole v. Cunningham (1889) 133 U. S. at 129 and Barnett v. Kinney (1893) 147 U. S. 476.

England: 4 PHILLIMORE 611 § 759, with citations.

¹⁸ France: 1 FOELIX § 61; DEMOLOMBE, 9 Cours § 61; SURVILLE, "La cession et la mise en gage des créances en droit international privé," Clunet 1897, 671, 673 (for the cessibility of the claim); SURVILLE 280 § 171 and n. 3; ROGUIN, Règle de droit (1889) 141.

Norway: The law of the creditor's domicile (perhaps not as *lex situs*) is adopted according to CHRISTIANSEN, 6 Répert. 580 No. 161.

Germany: OLG. Frankfurt (March 4, 1892) 2 Z.int.R. (1892) 477.

¹⁹ Japan: Int. Priv. Law, art. 12.

Belgium: Draft of 1887, tit. prélim., art. 5, 19 Bull. Soc. Législ. Comp. (1889-90) 449.

²⁰ E.g., 2 ZITELMANN 394; 2 PONTES DE MIRANDA 222.

²¹ England: *In re* Queensland Mercantile & Agency Co. [1891] 1 Ch. 536, per North, J., aff'd [1892] 1 Ch. 219. DICEY (ed. 5), Rule 153, but cf. DICEY (ed. 7) 551 n. 72 and accompanying text.

France: WEISS, 4 Traité 431 f.

²² Treaty of Montevideo on Int. Civ. Law (1889) art. 29; (1940) art. 33.

matters as taxation, jurisdiction, seizure, or administration of estates, the voluntary transfer of debts needs no such fixed relation to a territory. In fact, there is no reasonable ground for denying the parties to an assignment the full freedom in choosing the law applicable to it.

Where the domicil of the debtor has been taken as decisive in the modern literature, ordinarily other reasons have prevailed. But the old doctrine did include an insight into the subject matter that should not be entirely forgotten. The creditor's domicil must be important, in the absence of more weighty connections, as the center of the assignor's assets, in relation to his act of surrendering a right, part of these assets. A subsidiary rule, exclusively based on the domicil of the debtor, is condemned thereby. The dilemma of the old and still active controversy, whether the domicil of the creditor or that of the debtor of the assigned debt is decisive, is wrong in itself.

2. England

In the principal English leading case, it was declared that no clear statement of the law applicable to assignment was available;²³ the four jurists, namely, the first judge and the three justices of the Court of Appeal, advanced no less than five different theories on the law determining the validity of, and the capacity to make, an assignment.²⁴

Falconbridge offers three theories for choice,²⁵ and Foote, Cheshire, and Wolff have suggested to supersede the present confusion by a rule similar to the German, extending to the assignment the law that governs the debt assigned.²⁶

²³ Scrutton, L. J., in *República de Guatemala v. Nuñez* [1927] 1 K. B. 669 at 688.

²⁴ See the satirical remark by FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 *Brit. Year Book Int. Law* (1935) 84, 94.

²⁵ FALCONBRIDGE, *Conflict of Laws* (ed. 2) 495 ff.

²⁶ FOOTE 426, 296; CHESHIRE (ed. 6) 489 ff.; M. WOLFF, *Priv. Int. Law* (ed. 2) §§ 511 ff.

Doubtless, the authorities are entirely inconclusive. We may find only some preference for two theories, one that a voluntary transfer of a chose in action is governed by the law of the debtor's domicile,²⁷ and the other that it has its own proper law,²⁸ which is presumably to be found at the place of assigning, either by mechanical rule²⁹ or with better reason in case both parties are domiciled in the same jurisdiction.³⁰

The judicial indecision is moderated, however, by the incipient insight that the three parties involved in an assignment of rights are connected by different relationships. Thus, the assignment of an English life insurance as a gift from a husband to his wife in Cape Colony was correctly subjected to their domiciliary local law.³¹ And in Canada it was clearly distinguished that a life insurance policy was under the law of Ontario, but the "assignment of or dealing with the benefits of the policy made by the assured in Manitoba" belonged to the law of the latter province.³²

CHESHIRE, 51 Law Q. Rev. (1935) 76, 85 and Priv. Int. Law (ed. 6) 491, 497 reads to this effect a dictum by Warrington, J., in *Kelly v. Selwyn* [1905] 2 Ch. 117; rejecting this argument, M. WOLFF, Priv. Int. Law (ed. 2) 538 f. § 512. But this decision concerns the question of notification, on which see *infra* II, 7.

²⁷ Lawrence, L. J., in *República de Guatemala v. Nuñez*, *supra* n. 23, at 697; approved by FREDERIC POLLOCK, 43 Law Q. Rev. (1927) 296.

²⁸ Lee v. Abdy (1886) 17 Q. B. D. 309, 313; Greer, J., and Scrutton, L. J., in *República de Guatemala v. Nuñez* (1926) 42 T. L. R. 625, 629, 95 L. J. Q. B. 955; [1927] 1 K. B. 669, 688; Chaugham, J., in *In re Ansiani* [1930] 1 Ch. 407, 420.

²⁹ See CHESHIRE (ed. 6) 495 f. who therefore emphasizes the "retrogression to the days when Private International Law of contracts was still inchoate and undeveloped."

³⁰ Bankes, L. J., in *República de Guatemala v. Nuñez* [1927] 1 K. B. at 686; Luxmore, J., in *Finska Angfartygs A/B v. Baring Brothers & Co.* (1937) 54 T. L. R. 147, 148. The case was, however, finally decided on the finding that the Russian proceeding was an unfinished direction by the government rather than an assignment not completed under the domiciliary Russian law, H. L. [1940] 1 All E. R. 20, 65 Ll. L. Rep. 189.

³¹ Lee v. Abdy, *supra* n. 28.

³² Headnote of *Nat'l Trust Co. v. Hughes* (1902) 14 Man. R. 41 concerning an analogous situation, quoted with approval in *In re Sawtell* [1933] 2 D. L. R. at 399.

3. United States

During the nineteenth century and sometimes even at present,³³ the law applicable to assignment has been regarded as a very uncertain matter, as in England. But now the courts are more often said to have settled upon a short and definite formula: voluntary assignment is governed by the law of the place where the assigning takes place, except that the question whether the debt is assignable is determined by the law of the place where it is made.³⁴ In various instances, however, the need for amplifying this formula has been evident. We may take an appropriate suggestion, for instance, from a remarkable dictum of Peaslee, C. J., in the New Hampshire Superior Court. A life insurance policy in a Massachusetts corporation was assigned for security by the insured, a resident of New Hampshire, to a New Hampshire bank, despite the fact that his daughters were beneficiaries. Massachusetts law was held not applicable:

"The rights of the insurer, or of any party against the insurer, are not involved. Nor is there any question as to the power of the assured to take this insurance from his children and give it to his creditors, or make it a part of his estate. The issue is whether his dealings with the policies in this state amounted to such action. The extent of the assignment made by the pledge of the policies as collateral security is the controlling factor in the case. This pledge was made in this state by and to local residents, and the designated beneficiaries also resided here. Such an undertaking is to be dealt with according to local law."³⁵

³³ See KOESSLER, "New Legislation Affecting Non-Notification Financing of Accounts Receivable," 44 Mich. L. Rev. (1946) 563, 614.

³⁴ See, e.g., LORENZEN, 6 Répert. 319 § 183 and in *Cases* (ed. 5) at 496; GOODRICH 292; PUTMAN, 1945 Annual Survey 44; 6 C. J. S. 1053 § 7; FREUTEL, 56 Harv. L. Rev. (1942) at 68 n. 160.

See also references in RG., 87 Seuff. Arch. 161 ff.

³⁵ *Barbin v. Moore* (1932) 85 N. H. 362, 364, 159 Atl. 409.

This distinction between the rights of any party flowing from the insurance contract and "the extent of the assignment" ought to be remembered.

The Restatement has made an attempt to establish more specific rules. Only assignability of the debt, again, is mentioned in § 348 as subject to the law of the place where the assigned contract was made; § 350 determines "the effect of an assignment of a contract right as between the assignor and the assignee" by the law of the place of assignment. Capacity of the assignor and formalities are subjected to the same law (§§ 351, 352). Finally, in application of the broad scope of the law of the place of performance in Beale's scheme, the law of the place where the assigned contract (*sic*) should be performed, decides "whether the right of an assignee can be destroyed by payment to the assignor" (§ 353), and "whether payment by the obligor to a second assignee destroys the right to performance of the first assignee" (§ 353). Beale later changed his mind with respect to §§ 353 and 354. In his treatise he advocates, for all questions involving priority among successive assignees, the law of the place of assignment.³⁶

Both these attempts at classification are incomplete and doubtful. The local contacts employed to localize both the debt assigned and the assignment are the familiar and misleading mechanical references. No regard is given to the promise to assign. Even so, the American doctrine has the notable merit of giving the transfer of debt a clearly independent function, if an exaggerated one.

4. Germany and Switzerland

The most comprehensive system has been developed and unanimously adopted by the courts and writers in Ger-

³⁶ 2 BEALE § 354.1; cf. MALCOLM, letter published by KUPFER and LIVINGSTON, 32 Va. L. Rev. (1946) at 925.

many.³⁷ It is contained in two rules. On the one hand, the law governing the obligation assigned determines not only whether the debt can be transferred, but also all other requirements of a transfer, and even the effect of the assignment on the debt. As the most important consequence, which forms the issue in the great majority of the numerous cases, the law of the debt assigned determines whether notice of the assignment is essential to the change of the person of the creditor. Therefore, a debt of a French domiciliary, governed by German law, does not need the formal *signification*, prescribed by the French Civil Code, article 1690,³⁸ regardless of where the assignment is made. Conversely, if a debt is governed by French law, the assignment wherever made needs signification (or a formal acknowledgment by the debtor) as an essential condition.³⁹ The law of the debt also governs a number of other problems which we shall examine later.

On the other hand, the law that governs the relationship motivating the assignment (*causa*) such as sale, giving in payment, security, determines the rights and duties arising as between the assignor and assignee. An often-mentioned consequence concerns the liability of a seller of a right for the existence of the debt and possibly for the solvency of the debtor.⁴⁰

The Swiss doctrine has espoused these rules.⁴¹

³⁷ FÖRSTER-ECCIUS, Preussisches Privatrecht § 11 n. 33; GEBHARD, Materialien 160 ff.; 2 ZITELMANN 304; NEUMEYER, IPR. § 33; GUTZWILLER 1616; LEWALD 270 §§ 328 ff.; NUSSBAUM, D. IPR. 265; M. WOLFF, IPR. (ed. 3) 151 f.

³⁸ OLG. Köln (Oct. 14, 1890) 2 Z.int.R. (1892) 161; (Nov. 4, 1892) 4 Z.int.R. (1894) 65; OLG. Colmar (June 23, 1905) Clunet 1908, 536.

³⁹ RG. (June 2, 1908) 18 Z.int.R. (1908) 449, Revue 1909, 298 with French exequatur, App. Paris (June 24, 1909) Clunet 1910, 162; RG. (March 23, 1897) 39 RGZ. 371, Clunet 1900, 634 (debt under Egyptian law, assignment under then French law of Cologne).

⁴⁰ RG. (Dec. 3, 1891) 2 Z. int. R. (1892) 162, Clunet 1892, 1039.

⁴¹ BG. (Sept. 17, 1892) 18 BGE. 516, 522; (Oct. 8, 1935) 61 BGE. II 242, 245; (Feb. 19, 1936) 62 BGE. II 108, 110, Clunet 1938, 963; 2 SCHNITZER (ed. 4) 659.

5. France

The decisions,⁴² none of which were rendered by the Court of Cassation, share the often-proclaimed opinion that the law of the debtor's domicile at the time of the suit governs assignment. The once almost solitary precursor of this theory, Guy Coquille (A. D. 1523-1603),⁴³ considered debts localized with the debtor because by his honesty or fraudulent manipulations, by the care or carelessness applied to his business, the obligor makes the claim valuable or fruitless.⁴⁴ The outstanding problem to which most decisions and literary utterances have been devoted, however, concerns the application of the French provisions prescribing notification of the assignment to the debtor. The contemporary authors agree, without believing in a fictitious situs, that the effects of an assignment for third persons, including the debtor, are made dependent by the Code on measures procuring publicity in the interest of "public credit." Technically, these provisions are regarded as prescribing formalities, subject to the law of the place where they should be performed.⁴⁵ These statements have often sounded as though assignments were governed entirely by the domiciliary law of the debtor. But the literature has become conscious of the importance of the law governing the debt, citing German decisions, and in prin-

⁴² Trib. Nancy (Mar. 25, 1890) *Clunet* 1891, 923; Trib. com. Seine (Mar. 5, 1892) *Clunet* 1893, 166; Cour Paris (Feb. 16, 1910) S. 1912.2.276, *Clunet* 1913, 555; Cour Paris (Nov. 18, 1927) *Clunet* 1928, 972, *Revue Crit.* 1934, 121.

⁴³ COQUILLE, *Questions et responses etc.* (1634) quest. 237; 1 LAINÉ 297; 2 *id.* 263.

⁴⁴ 2 LAINÉ 265, in an often-cited passage, approves.

⁴⁵ WEISS, 4 *Traité* 431; DESPAGNET 1140 § 396; BARTIN, *Traité* 760 § 371; Principes 31 § 374; PILLET, Principes 409; PILLET, *Traité* 760 § 371; NIBOYET 820 § 702; 2 ARMINJON §§ 141 f.; LEREBOURS-PIGEONNIÈRE (ed. 7) § 474; ARMINJON, *Droit Int. Pr. Com.* 505 § 308.

For Belgium, POULLET § 280.

For Japan, YAMADA, "Le droit international privé du Japon," *Clunet* 1901, 637.

Institute of International Law, Draft 1927, art. 2, 33 *Annuaire* (1927) III 198, 217.

ple also recognizes that the validity and effect of the assignment, i.e., the relation between assignor and assignee, must have its own domain. The law of the debtor's domicile seems to be retained for the relation between the assignee and the debtor.⁴⁶ This includes, e.g., the right of the debtor to set off a counterclaim that arose against the assignor.⁴⁷ Niboyet, finally, has advocated that the law of the domicile of the debtor be neatly restricted to the question of notification.⁴⁸

6. The Netherlands

While the last-mentioned theory combines elements of the French and German conceptions, the Dutch courts have lately combined regard for the debtor, as in French law, with an independent status for the transfer. They hold the transaction between assignor and assignee governed by its own law. Due to the argument, however, that a Dutch debtor cannot be subject to a foreign law by an act in which he does not participate,⁴⁹ the effect as to the debtor is determined by the law of his own domicile.⁵⁰

7. Comparison

Leaving aside the uncertain English choice of law and the abandoned situs theories, three systems are recogniz-

⁴⁶ See BÉQUIGNON, 5 Répert. 334 No. 7 and Note, Clunet 1937, at 784; BATIFFOL, Traité (ed. 3) 587 f. § 540, who, however, extends further the law governing the debt.

⁴⁷ This has been assumed by App. Colmar (Nov. 16, 1935) Clunet 1937, 781 and approved by the author of the Note, *ibid.*, although he criticizes that the decision (as usual) asserts the law of the debtor's domicile as the general principle of assignment. Cf. *infra* n. 95.

⁴⁸ NIBOYET 819 § 702; NIBOYET, 4 Traité 669, 679; see also DESPAGNET 1139 § 398.

⁴⁹ Rb. Utrecht (April 11, 1928) W. 11898; KOSTERS 803 ff.

⁵⁰ See the five cases in 1 VAN HASSELT 135 and the three in *id.*, Supp. 40, where assignment was in Germany between Germans and the debtor was in the Netherlands. In Rb. Haarlem (Feb. 22, 1927) W. 11664. German law was applied to the assignment as between a German assignor and a Dutch assignee, see *infra* p. 422, n. 102.

A provision to the same effect is contained in art. 21 of the Benelux Draft of 1951.

able. If adequately developed, they agree in distinguishing the relation, Assignor—Assignee, from that of Assignee—Debtor. But they disagree with respect to both the decisive contacts and the classification of problems. The American doctrine emphasizes the law of the place of assignment and gives it wide scope; the German doctrine resorts to the usual individualized contacts and broadly extends the influence of the law governing the original debt; and the French prefer the law of the place of the debtor's domicile at least with respect to the problems concerning notice of the assignment. Moreover, between assignor and assignee the Germans and Swiss emphasize the underlying contract (*causa*) in contrast to the theoretically abstract act of transfer, whereas in the Latin countries little distinction is made, and in the United States the promise to assign disappears behind the act of assignment when the choice of law is made.

All three systems are visibly defective, which explains the existing uncertainty. Roughly speaking, only in the United States and Germany has the doctrine developed shape. But the American formulations are inexhaustive and use the vague and mechanical contacts of *lex loci contractus* and the like. The German and Swiss conception has committed the mistake of determining who is the creditor in all respects by the law governing the debt merely because the debtor must be assured against a change in the governing law which might injure his situation. The governing law may, indeed, prevent the debt from being assigned at all or preclude assignment to the particular purchaser, which is, by the way, not a frequent occurrence in present business law (as compared with marital law and succession). Yet, where the debt is assignable, since modern law has adopted the institution of full transfer of debts either without knowledge of the debtor, or at least without his consent, the debtor has no legitimate interest whatever in the motive, form, and effects of an assignment. As a Dutch court said

quite adequately, the debtor may challenge a plaintiff because there was no valid assignment, but he has nothing to do with the events underlying the assignment.⁵¹ Hence, while the defenses of the debtor inherent in his contract must be preserved, nevertheless the debt may be transferred anywhere in the world and to anybody, without his consent as well as without interference from the original law of the debt.

III. CLASSIFICATION

I. Formalities

Although older requirements of form have vanished, the laws are divided in some respects, as on the effect of oral assignments. Writing is required, for instance, for an assignment at law in England, generally in Switzerland, and in many Latin jurisdictions. In the United States, except for local statutes of frauds, ordinary oral assignments for value are practically operative and irrevocable, although more doubts prevail when the transfer is made without consideration. The general conflicts rule, asserted by Beale, would strictly invoke the law of the place of the assignment on the question of form.⁵² But although this was the rule followed in old cases of general assignments for the benefit of creditors,⁵³ there is no corresponding authority for single assignments.⁵⁴ An analogous dictum by an English Judge has been justly criticized.⁵⁵

In the countries following the optional principle of *locus regit actum*, the transfer of a claim may comply with the

⁵¹ Rb. Maastricht (Feb. 7, 1935) N. J. 1936, No. 550.

⁵² 2 BEALE 1255.

⁵³ *Speed v. May* (1851) 17 Pa. St. 91; *Birdseye v. Underhill* (1888) 82 Ga. 142. Cf. *Barnett v. Kinney* (1893) 147 U. S. 476 and 2 BEALE 987 § 263.1.

⁵⁴ Of BEALE's (1255 n. 6) two American decisions allegedly in point, neither is concerned with simple debt. In *Capital Finance v. Metropolitan Life Ins. Co.* (1926) 75 Mont. 460, as BEALE notes (n. 5), the assignment was made at the place also considered determining the law of the assigned insurance policy.

⁵⁵ Scrutton, L. J., in *República de Guatemala v. Nuñez* [1927] 1 K. B. at 689. See *contra*: CHESHIRE (ed. 6) 493 f., also against the dicta by Lawrence, L. J., in the same case.

formalities (or formlessness) either of the law of the place where it is made or of the law governing its contents. A number of Continental writers, however, make the application of the principle dependent on its adoption by the law of the debtor as identified with that governing the assigned debt.⁵⁶ Hence, a French-governed debt would be transferable in the United States according to French formalities, even though the principle were not recognized here. This contention is one of the exorbitant inferences from the alleged paramount role of the law of the debtor or of the debt, but may be refuted also on the ground that the principle *locus regit actum* operates on its own merits at the forum itself.⁵⁷

It has been insisted, however, that the formalities prescribed by the law of the debt should always be observed in the interest of the debtor, so as to give him an easy opportunity to ascertain his creditor. A debtor owing under Swiss law should be able to rely only on a written assignment in accordance with article 165 of the Code of Obligations.⁵⁸ But this formality is merely one of the conditions for acquiring title. What the debtor needs in order to obtain certainty about the right and the identity of a claimant, is a different matter and may be conveniently left to a local law, either of the debtor's domicile or of the place of performance.

Formalities to be observed in an assignment, or in the appointment of a beneficiary, are often stipulated in insurance contracts. These agreements naturally participate in the law governing the contract;⁵⁹ they are no concern of *locus regit actum*.

The French provision (Civil Code, article 1690) that

⁵⁶ 2 ZITELMANN 394; VALÉRY 905; 2 FRANKENSTEIN 258.

⁵⁷ In this respect, see RAAPE, IPR. (ed. 5) 70 f., 508 illus. 1 and BGH. (Oct. 28, 1957) IPRspr. 1956-57 No. 32.

⁵⁸ GULDENER 34 f.

⁵⁹ *Infra* p. 417.

the debtor must be notified by *signification* or must accept the transfer in an *acte authentique*, has been consistently characterized in French conflicts law as constituting a formality,⁶⁰ without, however, subordinating it to the principle *locus regit actum*. In Germany, the question whether it is really a formal requirement and therefore is replaceable by domestic formlessness has been much discussed and unanimously answered in the negative.⁶¹ The requirement goes to the substance of the assignment and as such causes an outstanding problem,⁶² important because the French provisions are the model for numerous enactments and certain minority rules in the United States. Only the details of the intimation to be performed under French law by a *huissier* or the public recognition of acceptance by the debtor are subject to substitution by local equivalents.⁶³

An analogous question arises on the characterization of the various provisions for regulating priority of claims by means of recording, registration, or annotation in the ledgers of the assignor. Also, these provisions are certainly no mere formalities.⁶⁴

2. Capacity

In principle, the capacity required for the assignor and assignee has no relation to the original debt. While in most countries the personal law governs, American decisions have

⁶⁰ WEISS, 4 *Traité* 425; VALÉRY 517.

⁶¹ RG. (June 1, 1880) 1 RGZ. 435; (March 20, 1883) 10 RGZ. 273 and many times thereafter.

⁶² *Infra* pp. 430 ff.

⁶³ RG. (June 2, 1908) 18 Z.int.R. (1908) 449.

⁶⁴ *Cf. infra* p. 442. In an English decision, *In re Pilkington's Will Trusts* [1937] Ch. 574, *cf.* 9 *Giur. Comp. DIP.* (1943) No. 64, a deed of assignment for the benefit of creditors in Scotland was exempted from the duty of registration under the English Deeds of Arrangement Act, 1914, despite the English domicile of the debtor company. The court applied Scottish law as the law intended by the parties. If the court had considered registration as a formality, it would probably have only emphasized the Scottish place of executing the deed. In fact, the assignor was in Scotland, which would be decisive under the approach submitted *infra* p. 442.

generally preferred the law governing the assignment to that of a party's domicil.⁶⁵

New York, however, has sometimes claimed supremacy for its insurance statutes over the laws of the state of assignment. Thus an old New York statute provided that a married woman could not assign without the written consent of her husband a policy of insurance upon the life of her husband for her sole benefit if issued under the laws of New York.⁶⁶ In such case, it was held that her capacity should be governed neither by the state of the assignor's domicil nor by that of the place of assignment.⁶⁷ On the other hand, the Connecticut court, by unusual reasoning, avoided the application of this statute in a case where New York was the domicil of the husband and wife, and the policy was delivered to them there by the New York agent of the Connecticut insurance company. The court tenuously declared that either the law of New Jersey where the assignment was "completed and delivered" or the law of Connecticut where the contract of insurance was performable, governed, and under either law the assignment was valid.⁶⁸ The true choice should have been between New York law protecting its domiciliary and New Jersey as the alleged center of the assignment.

Under the French Civil Code, judges, prosecutors, sheriffs, solicitors, etc. cannot be assigned choses in action that might be in the jurisdiction of the court in whose

⁶⁵ Thus, *Miller, Executor v. Campbell* (1893) 140 N. Y. 457 (married woman, *lex loci cessionis* against law governing insurance); *Newcomb v. Mutual Life Ins. Co.* (1879) Fed. Cas. No. 10,147 (*lex loci cessionis*, also of the domicil of both parties, against the law governing insurance).

⁶⁶ New York: Laws 1879, c. 248.

⁶⁷ *Hanna Milhous v. Johnson* (1889) 21 N. Y. St. Rep. 382, 4 N. Y. Supp. 199: married woman, in Ohio, beneficiary of a New York policy, assigned it in Ohio for security without the express consent of her husband; the New York court declares the act void under its own statute, applied under peculiar criteria.

⁶⁸ *Connecticut Mutual Life Ins. Co. v. Westervelt* (1884) 52 Conn. 586, 592. The case wrongly goes under the head of "cessibility."

forum they exercise their functions.⁶⁹ This is a provision of exclusively domestic application.⁷⁰

How is the requirement of an insurable interest, by which American statutes restrict the persons able to acquire life insurance policies by assignment, to be classified? The American decisions treat it as a part of the law of the "place of assignment."⁷¹ This may be based either on the normal classification of capacity under the law of the contract, or on the idea of protecting the assignor who in every case was domiciled in the state of the assignment. Considering that the doctrine of this requirement is "a complex of rules of public policy designed to avert a number of harmful social and economic tendencies,"⁷² it may turn up primarily as an obstacle to assignability because of the nature of the debt, and pertain to the law of the original contract. Yet in any case, the states establishing the requirement may feel impelled to enforce their public policy.⁷³

3. Assignability

As noted before, the American doctrine concedes, apparently as the sole exception to the law of the assignment,

⁶⁹ C. C. art. 1597; see ARNDT, *supra* n. 1.

⁷⁰ See 2 BAR 85 n. 14.

⁷¹ *Manhattan Life Ins. Co. v. Cohen* (Tex. Civ. App. 1911) 139 S. W. 51, *aff'd* (1914) 234 U. S. 123: law of the place of assignment, also of the making of the insurance and the domicile of the assignor, against the domicile of the insurance company and the domicile of the assignee. *Haase v. First Nat'l Bank of Anniston* (1920) 203 Ala. 624, 84 So. 761: place of assignment and domicile of both parties to it.

⁷² EDWIN W. PATTERSON, "Insurable Interest in Life," 18 Col. L. Rev. (1918) 421.

⁷³ See *Griffin v. McCoach* (1941) 313 U. S. 498: public policy of Texas, domicile of the insured, may refuse to enforce the rights of beneficiaries who have no insurable interest despite the New York law of the insurance contract recognized by the lower Texas federal courts. HARPER, "Policy Bases of the Conflict of Laws," 56 Yale L. J. (1947) at 1175 n. 63, stresses the conflict with New York law and the interest vested under this law, but is sympathetic to the decision. On certain earlier decisions, see CARNAHAN, *Conflict of Laws and Life Insurance Contracts* (ed. 2, 1958) 463 f. § 89 with a strong argument for the liberal attitude.

that the transferability of a debt is controlled by the law governing the debt. Hence, it may be stated that on this classification all conflicts systems agree.⁷⁴

(a) *Legal restrictions on assignment.* Hostility to the institution of assignment or to the full transfer of obligatory rights has all but disappeared. But prohibitions are frequently imposed, whether on account of the special nature of certain debts, or for the protection of legal policies, or through contractual limitations, which are prevailingly held valid in the United States and abroad.

Thus we may note cases extending the law governing the debt to such questions as—whether a tort action may be assigned;⁷⁵ whether an unconditional beneficiary of an insurance policy may be replaced,⁷⁶ or replaced without his consent;⁷⁷ in particular, under what circumstances a wife as beneficiary of a life insurance policy acquires a vested right;⁷⁸ whether an insurance policy may be assigned without the consent of the insurer and may be pledged⁷⁹ to the company;⁸⁰ and whether an employee may assign his right

⁷⁴ WESTLAKE § 237; RG. (Nov. 28, 1887) 20 RGZ. 234; GEBHARD, *Materiellen* 160; DIENA, 2 *Dir. Com. Int.* 260; 2 ZITELMANN 394; NEUMEYER, *IPR.* 29; 2 FRANKENSTEIN 260 n. 85. *Contra*: EHRENZWEIG, *Conflict* 638 f.

⁷⁵ *Vimont v. Chicago & N. W. Ry. Co.* (1886) 69 Iowa 296, 22 N. W. 906, *aff'd*, 28 N. W. 612.

Switzerland: Similarly, for an alimony claim, BG. (Feb. 13, 1897) 23 BGE. I 136, 140.

⁷⁶ *Wilde v. Wilde* (1911) 209 Mass. 205.

Canada, Sask.: *In re Duperreault* [1940] 3 W. W. R. 385.

Switzerland: App. Zürich (Nov. 23, 1934) and BG. (March 7, 1935) 10 *Z. ausl. PR.* (1936) 587.

⁷⁷ *Haven v. Home Ins. Co.* (1910) 149 Mo. App. 291, 130 S. W. 73.

Contra: *Fourth Nat'l Bank of Montgomery v. Norfolk* (1929) 220 Ala. 344, probably to protect the woman, a citizen, but without invoking public policy.

⁷⁸ *N. W. Mutual Life Ins. Co. v. Adams* (1914) 155 Wis. 335, 144 N. W. 1108 grants the vested right to the husband; incidentally, the court eliminates classification of the problem as one of family law depending on the domicile.

⁷⁹ For the legal prohibitions in Italy, see VIVANTE, *Trattato Dir. Com.* § 1877; in Argentina, I. HALPERIN, *El contrato de seguro* (1946) 522.

⁸⁰ *Eagle v. N. Y. Life Ins. Co.* (1911) 48 Ind. App. 284.

to wages,⁸¹ once wrongly subjected to the law of the place of assignment.⁸²

Conversely, an analogous classification is suitable to a legal provision that the debtor cannot avail himself of a contractual agreement not to assign the debt, as against an assignee who did not know of this agreement at the time of the assignment.⁸³ Although the assignee is protected thereby, the debt is so directly affected that its law should govern.

(b) *Formalities or conditions stipulated.* The law governing an insurance contract applies when the policy requires written notice of assignment,⁸⁴ or when the by-laws of an insurance company make a change in the beneficiary void unless certain formalities are observed.⁸⁵ The gold bonds of the United States Treasury have been an outstanding illustration. The text printed on the bonds indicated as creditor a named person or his assignee registered in the books of the Treasury, and provided for the making of assignments in a foreign country before a diplomatic or consular officer of the United States. On the occasion of the assignment of such gold bonds by notarial instrument in Germany, the Reichsgericht had difficulty in interpreting these clauses and co-ordinating them with the German conflicts rules.⁸⁶ It is quite certain, however, that American law governed the entirety of the effects of these stipulations

⁸¹ *Coleman v. American Sheet & Tin Plate Co.* (1936) 2 N. E. (2d) 349 (statute of Indiana); see also *St. Louis etc. R. Co. v. Crews* (1915) 51 Okla. 744, 151 Pac. 879.

⁸² *Monarch Discount Co. v. Chesapeake and Ohio Ry. Co. of Indiana* (1918) 285 Ill. 233, in fact applying the law of the forum, and deciding against the loan company on other grounds such as usury. I do not regard this decision as justified by the lack of specifying the place of performance, as *BATIFFOL* 430 n. 4 suggests.

⁸³ Italy: C. C. (1942) art. 1260 par. 2.

⁸⁴ *Colburn's Appeal* (1902) 74 Conn. 463.

⁸⁵ *Brotherhood of Railroad Trainmen v. Adams* (1928) 222 Mo. App. 689.

⁸⁶ RG. (Nov. 5, 1932) 87 Seuff. Arch. 161 No. 87, IPRspr. 1933 No. 20, criticized by M. WOLFF, 7 Z.ausl.PR. (1933) 794.

and, according to the prevailing opinion, recognized their force as against third persons. If it were true that in the United States the law of the place of assignment governs such question, this would include a renvoi to the German law of the *locus contractus*.⁸⁷ But it is submitted that American law, as governing the original debt on every possible theory, extends to the contractual restrictions on its transfer.

(c) Under the *lex Anastasiana*, which continued in force in various parts of Germany before 1900, the assignee of a debt was not allowed to collect more from the original debtor than the consideration stipulated in the assignment.⁸⁸ By constant court practice, this rule was applied when it was included in the law governing the original debt.⁸⁹ The French Code, article 1699, and many codes following it, have maintained the late Roman rule with regard to debts in litigation. Continental conflicts literature is extremely divided in this regard, mainly because it is not clear whether the *retrait litigieux* serves primarily to protect the debtor against a virtual deterioration of his situation, to discourage unsound law suits, or to avoid exploitation of creditors by professional traders in dubious debts. Moved by this doubt, Pillet has preferred the *lex fori*.⁹⁰ In my opinion, this doubt should lead to the law of the assignment, since technically the effects of the transfer are modified.

(d) *Partial assignment*. Finally, whether a debt can be divided and partially transferred, is subject to the law of the debt. Thus, it was decided as early as 1840, in the case of a claim payable by a debtor in Maryland and assigned in Tennessee, that the assigned claim was enforceable in

⁸⁷ Thus, M. WOLFF, *ibid.*

⁸⁸ Cod. 4, 35, 22; 23.

⁸⁹ Oberapp. Ger. München (Jan. 7, 1845) 1 Seuff. Arch. No. 402; Prussian Obertribunal (Nov. 16, 1858) 30 Striethorst 353; 2 BAR § 276; 2 ZITELMANN 394; WALKER 431; 2 BROCHER 199.

⁹⁰ PILLET, 1 *Traité* 763; 2 *id.* 499 § 646.

equity in Louisiana to the extent that it would be in Maryland.⁹¹

4. Relation between Assignee and Debtor

An assignee has no more rights than his assignor. Hence the debtor can use defenses that would be available to him as against the assignor, in addition to those which he may have against the new creditor. The German doctrine is unanimous in declaring that, since the law under which the obligor owes cannot be changed by the act of other parties, all his defenses are determined by the law governing the debt.⁹²

It is scarcely believable that under American conflicts rules the law of the debt should be restricted to the question of its "assignability." In the above-quoted dictum of 1932, the Supreme Court of New Hampshire referred to the law of the original insurance debt in considering the rights of the insurer and/or any party claiming rights against him as well as the right of changing the beneficiary.⁹³ Defenses of lack or failure of consideration, of frustration of a condition or breach of contract,⁹⁴ are obviously determined by the same law. This law ought no less to govern defenses against the assignee on the ground of his own behavior or of setoff (if characterized as substantive) of the debtor's own counterclaims.

Compensation, setoff, and recoupment available to the debtor against the assignor at the time of assignment or

⁹¹ *Jackson v. Tiernan* (1840) 15 La. 485. The place of the payment was also the place of the debtor's domicil but not of the assignment, as *BATIFFOL* 430 n. 4 thought.

⁹² *WALKER* 490 and n. 12 simply concludes: the law controlling the debt also governs the relation between assignee and debtor.

⁹³ *Barbin v. Moore*, *supra* n. 35.

⁹⁴ No confirmation, though, seems to be afforded by *Bankers Life Co. v. Perkins* (1936) 284 Ill. App. 122, 1 N. E. (2d) 112, mentioned by *BATIFFOL* 431 n. 2.

before notice of it to the debtor, are clearly in the same class, provided they are considered to be substantive. Such counterclaims, hence, are subjected to the law of the debt by the Germans, to the law of the debtor's domicile by the French, and probably to the law of the forum in jurisdictions where they are regarded as merely procedural means of defense.

Illustration. Buschel in Berlin assigned a claim against a buyer in Strassburg to a bank in Berlin. The buyer countered the action of the assignee by claiming *une exception de compensation* against the assignor. The court of Colmar assumed that primarily under the French doctrine the law of the domicile of the debtor governed the problem; the defendant, having recognized the assignment by letter, would not be permitted to resort to compensation (C. C. art. 1295). The parties seemed to agree on the application of German law which perhaps governed the debt and allowed the debtor compensation (BGB. § 404); this right, however, was waived, as the court held.⁹⁵

The German doctrine includes in the law of the debt also the rules permitting the debtor in good faith to pay to the assignor or a wrong assignee, or to transact with him to the detriment of the assignee. We shall have to examine this point specifically.⁹⁶

5. The Promise to Assign

Limiting our discussion to cases where the assignment is based on an obligatory contract rather than on obligations *ex lege*, we have to deal with such transactions as sale of a debt, agreement to assign for accord and satisfaction or for security of payment, agency and partnership including the duty to confer claims acquired upon the principal or partner, etc. According to the distinction discussed in

⁹⁵ App. Colmar (Nov. 16, 1935) Clunet 1937, 781, cf. *supra* n. 47.

⁹⁶ *Infra* pp. 427 ff.

the beginning of this chapter (p. 399), the validity of such contracts is tested by their governing laws, not that of the assignments. The American decisions have not faced the question. They inquire into the efficacy of assignments in view of usury,⁹⁷ gambling,⁹⁸ and absence of valuable consideration,⁹⁹ or the lack of insurable interest.¹⁰⁰ But in the cases decided, the places of the promise to assign and of assigning were indistinguishable.

In the German doctrine, it has been characteristically regarded as a matter of course that the law governing the

⁹⁷ In *Runkle v. Smith* (1918) 89 N. J. Eq. 103, an interest in a trust in New Jersey was assigned as security for a loan to a loan company in Pennsylvania. It seems that the court localized both the loan and the assignment in Pennsylvania, although the court speaks only of the latter. The interest was excessive under both laws. In *In re Eby* (1929) 39 F. (2d) 76, the parties, in contracts including assignment of book accounts, stipulated for the law of Delaware although the Commercial Credit Co. was incorporated and had its home office in Maryland. The court localized "the contracts" either in Maryland ("last act") or Delaware, both having no usury law. It would seem that if the court incorrectly emphasized the assignment as such, it should reasonably have considered the law of North Carolina where the assignor was a merchant and kept his books. *Cf. infra* IV, 3.

Personal Finance Co. v. Gilinsky Fruit Co. (1934) 127 Neb. 450, 255 N. W. 558, 256 N. W. 511, *LORENZEN*, Cases 472 deviates by declaring the excessive interest on the loan for which the assignment was made as security, contrary to the settled public policy of the forum, the domicile of the debtor; perhaps the court had a hidden feeling that wages should not have been assigned for a small loan at 3½% a month. But juridically the dissenting vote was right.

⁹⁸ *Manhattan Life Ins. Co. v. Cohen* (1911) 139 S. W. 51: assignor, citizen of Texas, and the agent of the assignee made the agreement as to the assignment of two life insurance policies in Texas, also place of the insurance company. Under Texas law, it was a gambling contract. *Cf. Phillips v. Green* (1922) 194 Ky. 254: draft given in a gambling house to carry on gambling; *Bernstein v. Fuerth* (1928) 132 Misc. 343, 229 N. Y. Supp. 791: check endorsed on board a ship moving along the coast for a gambling loss, but no place of endorsement where gambling was illegal "was proved."

⁹⁹ *Glover v. Wells* (1891) 40 Ill. App. 350: assignment for security for a pre-existent loan which was held to be a sufficient consideration under Iowa law; evidently the entire arrangement took place in Iowa. *Colburn's Appeal* (1902) 74 Conn. 463: while the policy was governed by New York law and the prescribed written notice was observed, the question whether the transfer of the interest of the insured to his wife was for valuable consideration, depended on the law of Massachusetts where the couple was domiciled.

Contra, for the law of the debt: *GULDENER* 59, stressing the basic nature of consideration in common law, but forgetting that it regards only the relation Assignor-Assignee.

¹⁰⁰ *Supra* n. 71.

original debt should decide whether a change of creditor requires the existence of a valid underlying cause (e.g., promise) between assignor and assignee. The law governing the promise to assign (the "cause" of assignment), then, should determine whether this requirement is fulfilled. Since the Dutch courts are firm in classifying the conditions of assignment with the law governing the latter,¹⁰¹ the following Dutch case has been criticized in Germany:¹⁰²

A German in Germany made a loan to another German domiciled in Holland and assigned the claim to a Dutchman by correspondence. The debtor questioned that there was valid title, essential for the transfer under Dutch law. But the court held that the assignment was made in Germany where an assignment is valid by itself (as an "abstract" transaction) and it was immaterial, therefore, to inquire into the consideration. German writers object that if the loan was governed by Dutch law, the Dutch requirement of a cause was peremptory.¹⁰³

The decision was correct as to the classification. A debtor is not entitled to reject an assignee purchasing an entirely assignable claim under a foreign law. Whether the assignor or the assignee is the true creditor, is an exclusive matter for the law governing their relationship. The American view is in full harmony with this conception, which has an analogue in the English rule: A debtor may not decline performance to an assignee on the ground that there is no consideration for the assignment as between assignee and assignor.¹⁰⁴

Effects. The underlying transaction between assignor and assignee determines what accessory rights, liens, securities or preferences *ought* to be transferred together with the

¹⁰¹ *Supra* p. 409.

¹⁰² Rb. Haarlem (Feb. 22, 1927) W. 11664.

¹⁰³ LEWALD 272, followed by RAAPE, IPR. (ed. 5) 508 f.

¹⁰⁴ *In re* Westerton [1919] 2 Ch. 104; *Holt v. Heatherfield Trust, Ltd.* [1942] 2 K. B. 1; JENKS-WINFIELD § 287.

main object¹⁰⁵ and whether the grantor enters into a warranty for the existence of the debt, and possibly for the solvency of the debtor;¹⁰⁶ also what steps to enforce the debt must be taken by the assignee in case of legal or contractual warranty of solvency; for what period a warranty is presumed to last, and what may be recovered on this or other grounds from the assignor.¹⁰⁷

The law governing the internal relationship also decides whether a person is entitled to have a chose in action transferred on the ground of such claims as may belong to a principal, a partner, a surety paying the debt, a codebtor paying, et cetera.

6. The Transfer

Formation. Assignment may be conceived as a unilateral declaration by the assignor, but in any reasonable view requires at least tacit acceptance. The consent must be serious, not simulated.¹⁰⁸ These requirements have nothing to do with the original debt. Likewise, essentials, such as notice, recording, and registration, pertain to the orbit of the transfer, but not of the debt.

The same is true of the admission of a fiduciary assign-

¹⁰⁵ This is usually confused with the question whether such collateral rights actually follow the assigned right without an express clause.

¹⁰⁶ Bay. ObLG. (Oct. 19, 1891) 2 Z.int.R. (1892) 370, Clunet 1893, 904; RG. (Dec. 3, 1891) 2 Z.int.R. (1902) 162, 164, Austrian debt; German sale of it, no warranty of solvency contrary to Austrian Allg. BGB. § 1397. See also RG. (May 25, 1928) JW. 1928, 2013, IPRspr. 1928 No. 13. The literature underlines this point specifically.

¹⁰⁷ Cf. Austria: C. C. §§ 1398, 1399; Swiss C. Obl. arts. 171 par. 2, 173; Italy: C. C. (1942) art. 1267; Cuba: C. C. art. 1530.

In the decision of the Bavarian Supreme Court, *supra* n. 106, the assignor paid the assignee the deficiency, and after the debtor had come to fortune again, sued the assignee for recovery; also this incident was correctly subjected to the law of the sale.

¹⁰⁸ BG. (June 3, 1897) 23 BGE. II 818, 8 Z.int.R. (1898) 170 applied the law of the assignor, meant to be the law governing the act of transfer. But the same court (Nov. 24, 1906) 32 BGE. II 696 subjected the problem to the law of the debt, as also 2 FRANKENSTEIN 26 advocates.

ment for the purpose of collecting the debt,¹⁰⁹ and the conditions of a security assignment. Also, if the law of the assignment were to recognize a unilateral act of the assignor as constituting the transfer, this ought to suffice even though unknown to the law of the debt.¹¹⁰

This is contrary to the German and Swiss principle that a mode of transfer not permitted by the law governing the debt has no effect against the debtor; although the obligatory contract may follow a different law, its fulfillment by assignment should be amenable to the law of the debt. This principle is a curious obstacle to the international negotiation of claims, subjecting without any justification cause and transfer necessarily to different laws.¹¹¹ A doubt in this respect may arise in the case of future and conditional debts. Thus, where a French real-estate broker assigned his Swiss-governed claim for a conditional fee in France under French law, the Swiss Federal Tribunal classified the problem whether this claim was assignable, without hesitation under the law of the debt; on this ground the court was able to affirm its jurisdiction which is restricted to revising the application of Swiss law.¹¹² The American theory leads to the opposite result, since the law of the assignment is considered independent.¹¹³ The latter view is the

¹⁰⁹ *Moore v. Robertson* (1891) 17 N. Y. Supp. 554, assignment executed in England, but see *infra* n. 168.

Contra: OLG. Hamburg (Dec. 31, 1924) 34 Z.int.R. (1925) 447, though stating that such a trust is known to both English and German law, applies German law as the "national law" of the debtor. (Recognition of fiduciary assignment as a full transfer is not yet a matter of course; in Switzerland, doubts have been dispersed only by BG. (June 12, 1945) 71 BGE. II 167).

¹¹⁰ *Contra*: GULDENER 25 f.

¹¹¹ On this point, GULDENER 41, as the only Continental writer, has seen the right solution.

¹¹² BG. (Feb. 24, 1915) 41 BGE. II 132, 134.

¹¹³ In *Monarch Discount Co. v. Chesapeake and Ohio Ry. of Indiana* (1918) 285 Ill. 233, the assignability of future wages is determined under the law believed to govern the assignment, *cf. supra* n. 71. In the decision *In re New York, New Haven and Hartford R. Co.* (D. C. Conn. 1938) 25 F. Supp. 874, 876, it is not certain for what reason the assignment of a partly conditional right as collateral security is determined under New York law; probably because this choice of law was not disputed.

correct one, so far as classification is concerned and thereby the state competent to protect the assignor is indicated. The Dutch courts hold likewise.¹¹⁴ The objections against transfer of future or conditional debts are well known; they continue in a great number of countries and of American states to produce the requirement that the contract from which the debt should flow must exist at the time of the assignment.¹¹⁵ Historically, the reluctance to treat a half-completed chose in action as an object of disposition is quite comparable to the slow process by which a future crop was admitted as the *res* for a sale.¹¹⁶ In addition to remainders of this conceptual difficulty, there is always a suspicion of fraudulent acts to deprive creditors of an asset.¹¹⁷ Surrender of future means of livelihood or of entire stocks of assets has been disapproved also in the manifest interest of the assignor.¹¹⁸ But no interest whatever of the original debtor is involved. His situation remains unchanged, since the debt can only be enforced when it is mature.

Scope. Two cases may illustrate the question of the scope of an assignment:

A seller of merchandise in Le Havre, France, drew a draft on his German buyer and discounted it at his local banker. Did he impliedly assign to the banker his right to recover the price on the ground of the sale? Under French law, indorsement in fact transfers the *provision*, the claim of the drawer against the drawee.¹¹⁹ The Reichsgericht abandoned the rigid observance of German concepts¹²⁰ and followed the French law, excusing this application by reference to French business practice. French law was not

¹¹⁴ Hof Amsterdam (March 4, 1936) N. J. 1936, No. 746.

¹¹⁵ Restatement of Contracts 154; WILLISTON, 2 Contracts § 413, *cf.* § 1681 A.

¹¹⁶ See in the Roman development, PAULUS, Dig. 18, 1, 8.

¹¹⁷ Thus, in Germany see ARNDT, *supra* n. 1, 33 ff.

¹¹⁸ 2 WILLISTON 1183 and 5 *id.* § 1652.

¹¹⁹ C. Com. art. 116. See *supra* pp. 398-400.

¹²⁰ OLG. Hamburg (Dec. 15, 1900) 56 Seuff. Arch. 260, Clunet 1905, 669, had expounded these principles.

thought to be applicable because the debt was under German law, and notification therefore was declared unnecessary.¹²¹ Without such prejudice, it would have been obvious that French law governed the scope of the transfer. This result is laid down at present in the Geneva Convention on the conflict of laws relating to bills of exchange (article 6) as incidental to the law creating the draft.

Potter & Co. in Augusta, Georgia, drew a draft representing the price of fifty bales of cotton sold by them to a firm in Winterthur, Switzerland. The draft was successively endorsed to a broker, a firm in New York, and a banker in Paris who sent the paper for collection to a bank in Winterthur. The Paris banker sued the buyer exclusively on the basis of the sales contract. The assignments conditioning his right were inferred by the Appeal Court from the special usages of the cotton trade, whereas the Swiss Federal Tribunal recognized that American law governed the original endorsements and assumed that the lower court could, without so stating, base its recognition of the usages upon American law. The claim for the price itself was considered governed by the Swiss law of the debt.¹²²

A last example may show the effect of an assignment as between the parties :

An American case was decided upon the following assumptions.¹²³ Under the law of Louisiana, if the holder of a claim secured by a lien assigns part of this claim, the assignor loses his priority to the assignee insofar as the proceeds of the lien are insufficient to pay both assignor and assignee; under Mississippi law, assignor and assignee share the proceeds equally pro rata. The court rested its choice of law on the place of the assignment and could have supported this choice by the situs of the lands subject to the lien.

¹²¹ RG. (March 19, 1907) 65 RGZ. 357, Clunet 1908, 531; 1910, 227; cf. KUHN, Comp. Com. 258; GULDENER 46.

¹²² BG. (Sept. 17, 1892) Kindlimann v. Marcuard, Krauss & Cie., 18 BGE. 516.

¹²³ Couret v. Conner (1918) 118 Miss. 374.

IV. PROTECTION OF GOOD FAITH

I. Fundamental Distinction

Since a debtor should not be harmed by a transfer of the claim to a new creditor without his consent, it is a universal principle that he may deal with his original creditor, or with an assignee, so long as he may in good faith believe him to be the owner of the claim. The older legal systems prescribed, for this purpose, that notification to the debtor or his acceptance of the assignment should be an essential requisite of the transfer. Noncompliance with such provisions prevents the completion of the assignment and certainly belongs to the law governing its formation (*supra* II, 6).

By modern methods, mere agreement to transfer constitutes assignment. Separate rules have to safeguard the interest of debtors, despite the validly completed transfer,—rules forming a distinct complex closely connected with the debtor rather than with the parties to the transfer.

From the situation of a bona fide debtor, however, we have thoroughly to distinguish the somewhat analogous problems occurring when the claims of several successive assignees conflict with each other, or an assignee comes into competition with an attaching creditor of the assignor or with his trustee in bankruptcy. Confusion with the first-mentioned group of problems is facilitated by their twofold similarity: bona fide ignorance of a prior assignment may favor a later purchaser of a claim, and notification to the debtor often has been made a decisive factor also in acquisition of priority by an assignee or garnishor. In the older systems, best represented by the French Code, in fact, the same “*signification*” to or acceptance by the debtor, decisive for the debtor’s position, likewise determines the effects of assignment as to all other “third persons.” In England “it

is established, in the case of statutory and equitable assignments, that an assignee must give notice to the debtor in order to secure his title against later assignees."¹²⁴ In fact, English and some American courts make no distinction between conflicts involving protection of the debtor and those which concern priority between successive assignees. The German courts do not even see the problem. French writers emphasize strongly that notification to the debtor serves as a general measure of publicity, guaranteeing the notifying assignee priority of rank over any other claimant.¹²⁵ Insofar as this argument reaches unity of criterion for the effect of all assignees and other claimants, it has great force. But the "publicity" resulting from knowledge by the debtor is not very impressive. There is no law anywhere constraining a debtor to impart his knowledge to someone else, except in actual garnishment proceedings.

However, that there is a great difference of policy and purpose between protecting the debtor and marshalling priorities, becomes manifest in considering the modern form of assignment by formless agreement. Nothing can demonstrate this better than the most recent American development of the technique for ascertaining priority. From 1945, numerous new American statutes have established recording in public files or marking in the books of the assignor of accounts receivable as the method to secure priority of claims. These devices illustrate the fact that priority is a matter connected with the assignor rather than with the debtor.

These statutes, however, have been necessitated by another confusion ensuing upon a mysterious amendment of 1938 to the Bankruptcy Act. Transfers by an insolvent debtor to one of his creditors, in preference to others of the same class, for an antecedent debt are vitiated by Sec-

¹²⁴ CHESHIRE & FIFOOT, *Law of Contracts* (ed. 5, 1960) 427.

¹²⁵ BARTIN, 3 *Principes* 33 f. § 374; NIBOYET, 4 *Traité* 672 f.

tion 60(a) of the Act if made within a certain period before the petition for bankruptcy is filed. A transfer falls within the critical period if it is not "perfected" previously. The former Bankruptcy Act required for this purpose that recording or registering should be done if it was required or even only permitted "by law."¹²⁶ The amended test requires for perfection:

"That no bona fide purchaser from the debtor¹²⁷ and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein."

This formulation introduced a new test, the "hypothetical bona fide purchaser test," not defined in the Act. It is common opinion that even in the old version the federal provision referred to the state law applicable according to the rules of conflicts law, and this view is upheld upon the amended test.¹²⁸

To the surprise of many lawyers and the finance institutions concerned, the courts have applied the section to the assignment of book accounts for security, which are in most cases made without notice to the debtors. Such application by the Supreme Court of the United States in the *Klauder Case*¹²⁹ was the more striking, because the section deals with preferences given to antecedent debts to the detriment of other creditors of the same class and in the case at bar the bank assignees of the debt, with consent of a consortium of creditors, furnished new capital to the now bankrupt assignor. The assignment was held imperfect because under

¹²⁶ Judicial construction seems to have distorted this provision by giving publication a retroactive effect.

¹²⁷ Debtor, here, of course, means the bankrupt, not the person of whom we speak as debtor in our context.

¹²⁸ Mr. Justice Jackson in *Corn Exchange Nat'l Bank & Trust Co. v. Klauder* (1942) 318 U. S. 434, 437 with citations; Judge Goodrich in *In re Rosen* (1946) 157 F. (2d) 997; *McKenzie v. Irving Trust Co.* (1944) 292 N. Y. 347, 55 N. E. (2d) 192, aff'd (1945) 323 U. S. 365, 369, per Stone, C. J.

¹²⁹ The *Klauder Case*, *supra* n. 128.

the then law of Pennsylvania the debtors in their various states should have been notified, and therefore a subsequent assignee in good faith could have acquired a right superior to the bank.

This and other decisions, prejudicial to nonnotification financing of accounts receivable,¹³⁰ have provoked the large series of new statutes assuring measures of publicity. Their confusing variety adds to the present difficulties of the courts in interstate cases.¹³¹ Thereby the conflicts problem, unsolved thus far, has become particularly acute, and it would seem time for agreement on an adequate rule.

2. Protection of the Debtor

(a) *Municipal systems.*¹³² The debtor obtains his most secure position in those jurisdictions where, according to the repeatedly mentioned French model, notification by either the assignor or the assignee is rigorously required for completion of the transfer.¹³³ In English equity and in a

¹³⁰ See in particular, MALCOLM, "Explanation and Analysis of Massachusetts House Bill No. 642 relative to Assignments of Accounts Receivable and other Choses in Action," 30 Mass. L. Q. (1945) No. 2, 26; KUPFER and LIVINGSTON, "Corn Exchange National Bank and Trust Co. v. Klauder Revisited: The Aftermath of its Implications," 32 Va. L. Rev. (1946) 910; ALAN V. LOWENSTEIN, "Assignments of Accounts Receivable and the Bankruptcy Act," 1 Rutgers U. L. Rev. (1947) 1.

¹³¹ KOESSLER, "Assignment of Accounts Receivable," 33 Cal. L. Rev. (1945) 46, 86; *id.*, "New Legislation Affecting Non-Notification Financing of Accounts Receivable," 44 Mich. L. Rev. (1946) 563 at 600, 604. See on recent proposals, Note, "Inventory and Account Financing," 62 Harv. L. Rev. (1948) 588, 593 f. and n. 15. Moreover, see CRAIG, "Accounts Receivable Financing: Transition from Variety to Uniform Commercial Code," 42 B. U. L. Rev. (1962) 187; on conflict of laws, *id.* 206.

¹³² SCHUMANN, 2 Rechtsvergl. Handwörterbuch at 37; ARNDT, *supra* n. 1, 83 ff.

¹³³ See, e.g., England: Law of Property Act, 1925, s. 136; *Holt v. Heatherfield Trust, Ltd.* [1942] 2 K. B. 1 clarifies that the decisive time is when the debtor receives the written notice.

Italy: C. C. (1942) art. 1264 par. 1.

Mexico: C. C. art. 2047.

Portugal: C. C. arts. 789, 790.

Switzerland: C. Obl. art. 167.

number of codes, positive knowledge is equivalent to notification;¹³⁴ in contrast, the French Court of Cassation allows the debtor to resist an assignment of which no notice has been given, although known to him.¹³⁵ In some laws, including the United States, not even a debtor without knowledge is protected, if he has reason to inquire at the time of payment to his original creditor.¹³⁶ In Germany, the debtor is entitled to require presentation of a written assignment or a formal notice by the assignor.¹³⁷

The provisions vary greatly with respect to the form of notification. In the United States, it is immaterial who notifies and whether he does it orally or by writing. The French Civil Code demands a formal *signification* by the assignee employing a *huissier*, the enforcement officer, or an acceptance of the assignment by the debtor in an *acte authentique* (article 1690). A written document of assignment shown to the debtor is enough to be effective in the United States and Germany.¹³⁸

The French provision, however, following the *Coutume de Paris*, speaks only of the relation as between the debtor and third parties. A widespread theory contrasts the relation *inter partes*, between assignor and assignee, as independent of notification.¹³⁹ In the numerous countries following the French lead, it is often said accordingly that notification

¹³⁴ E.g., Austria: Allg. BGB. § 1395.

Cuba: C. C. art. 1527.

Germany: BGB. § 407.

Italy: C. C. (1942) art. 1264 par. 2.

¹³⁵ After a long controversy, Cass. civ. (June 20, 1938) D. 1939.1.26; (Nov. 27, 1944) Gaz. Pal. 1945.1.13, strongly criticized as illogical and inequitable by BOITARD, 43 Revue Trim. D. Civ. (1945) 119 f.

¹³⁶ Restatement of Contracts § 170; Switzerland: C. Obl. art. 167; Germany: broad judicial construction of § 407 *cit.*

¹³⁷ BGB. § 410.

¹³⁸ Restatement of Contracts § 170, comment to subsec. 2 and illus. 6; BGB. § 410.

¹³⁹ Arg. C. C. art. 1138; see ALBERT WAHL, Note, S. 1898.1.113. Against this dominant opinion, PLANIOL et RIPERT, 7 Traité (ed. 2) § 1128.

is not a requisite of validity of the assignment but a condition of its effect as to third persons.¹⁴⁰ In similar formulas, the present English literature states that to perfect title as between assignor and assignee no notice to the debtor is necessary, but notice serves to prevent the debtor from paying the assignor.¹⁴¹ The Supreme Court of Tennessee having proclaimed the minority rule essentially requiring notification, subsequently dispensed with it as between assignor and assignee.¹⁴² The meaning of these distinctions is not exactly the same everywhere and often doubtful.¹⁴³ But their mere existence helps to underline the dual relationship, too often disregarded in conflicts law.

In the United States, the prevailing system is closely analogous to the legal provisions of the German Code. As the Supreme Court expressed it, after one nonnotified assignment, a subsequent assignee takes nothing by his assignment because the assignor has nothing to give.¹⁴⁴ If Williston objects that according to the same decision an assignor retains the power to discharge the claim by settlement until notice is given to the debtor,¹⁴⁵ this is only a means to protect the debtor. The transfer of a claim resembles that of a chattel, the possession of which, retained by the vendor, helps a bona fide purchaser to acquire title. Until the debtor's good faith is broken, he may pay the

¹⁴⁰ See, e.g., for Argentina, C. C. arts. 1493 (1459), 1501 (1467); cf. I. HALPERIN, *El contrato de seguro* (1946) 522.

Brazil: C. C. arts. 1067, 1069 distinguishes even three effects: before notification as between the parties; after notification as to the debtor; and with regard to various requirements of publicity, as to other interested persons.

¹⁴¹ England: POLLOCK, *Contracts* (ed. 13) 176; *Gorringer v. Irwell India Rubber Works* (1887) 34 Ch. D. 128.

¹⁴² *Peters v. Goetz* (1916) 136 Tenn. 257, 188 S. W. 1144; *Naill & Naill v. Blackwell* (1932) 164 Tenn. 615, 51 S. W. (2d) 835.

¹⁴³ ARNDT, *supra* n. 1, at 89 denies any real importance to the distinction in France.

¹⁴⁴ *Salem Trust Co. v. Manufacturers' Ins. Co.* (1923) 264 U. S. 182, 197.

¹⁴⁵ WILLISTON, 2 *Contracts* 1258.

debt, or be released, or acquire defenses for value, irrespective of the transfer.¹⁴⁶

(b) *Conflicts rules.* Again, three systems are in dispute.

(i) *Law of the assignment.* American courts, subjecting an assignment to the law of the place where it is made, could be expected to include the provisions concerning notification. This has been the method of dealing with general assignments for the benefit of creditors in the last century when such transactions were frequent. A general assignment, good where made, has been deemed to be good everywhere, irrespective of a requirement of notice in other states,¹⁴⁷ although with certain reservations for other local creditors.¹⁴⁸ Also ordinary assignments have been treated likewise in a few decisions,¹⁴⁹ and by Beale.¹⁵⁰

(ii) *Law of the debt.* Squarely opposed, the established German doctrine asserts that it depends on the law governing the original claim, not only what effect an unknown assignment has on the debtor's position but even whether its transfer is completed by the agreement or only by notification. The literature has insisted upon this result with emphasis.¹⁵¹ As mentioned before, when a debt governed by French law is assigned in Germany, the solemnities of

¹⁴⁶ WILLISTON, 2 Contracts § 433; Restatement of Contracts §§ 167, 170.

¹⁴⁷ Train v. Kendall (1884) 137 Mass. 366; First Nat'l Bank v. Walker (1891) 61 Conn. 154; Barnett v. Kinney (1893) 147 U. S. 476.

¹⁴⁸ Cf. STUMBERG (ed. 2) 401 f. n. 60.

¹⁴⁹ Vanbuskirk v. Hartford Fire Ins. Co. (1842) 14 Conn. 582; Clark v. Connecticut Peat Co. (1868) 35 Conn. 303; Hanna v. Lichtenhein (1918) 182 Am. Dec. 94, 169 N. Y. Supp. 580.

To the same effect once in Germany, Oberapp. Ger. Lübeck (Nov. 29, 1855) cited by 2 BAR 81 n. 2 (at least where the *lex loci* was more favorable to the assignee) and in France, Trib. Seine (March 15, 1907) Clunet 1908, 1118, Revue 1908, 182 (superseded).

¹⁵⁰ 2 BEALE § 354.1, abandoning the position taken in Restatement §§ 353, 354; see MALCOLM, letter printed by KUPFER and LIVINGSTON, *supra* n. 36, at 925.

¹⁵¹ 2 BAR 82; GEBHARD, *Materialien* 162; 2 ZITELMANN 394; 2 FRANKENSTEIN 261; NEUMEYER, IPR. § 33; LEWALD 271 f.; NUSSBAUM, D. IPR. 265; GUTZWILLER 1616; M. WOLFF, IPR. (ed. 3) 151 f.; RAAPE, IPR. (ed. 5) 506 f.; KEGEL, *Kom.* (ed. 9) 577 note 251 before art. 7 EG. BGB.

signification have been held indispensable,¹⁵² while assignment in France of a German-governed debt is considered complete without any notification.¹⁵³ Accordingly, the law of the debt decides the effect of a payment by the debtor to his original creditor;¹⁵⁴ the debtor is supposed to rely on it.¹⁵⁵ The Swiss courts follow this view,¹⁵⁶ which has been recommended also for England¹⁵⁷ and France.¹⁵⁸

(iii) *Law of the debtor's domicile.* The French courts firmly apply the local law of the debtor's domicile,¹⁵⁹ allegedly as a general rule for assignments, but in fact dealing usually with the requisite of signification.¹⁶⁰ More or less in the same application, this theory is shared by most French and Italian writers,¹⁶¹ and has found favor also in England¹⁶² and sometimes in the United States.¹⁶³ Even the German Supreme Court has twice spoken of the debtor's domicile as if it were decisive by itself, instead of being only the presumptive place of performance of the debt;¹⁶⁴ and the Hanseatic Appeal Court has concluded that every debtor may rely on the protection afforded by such provisions as

¹⁵² See *supra* n. 39.

¹⁵³ See *supra* n. 38.

¹⁵⁴ WALKER 487.

¹⁵⁵ Germany: OLG. Hamburg (Jan. 29, 1906) 16 Z.int.R. (1906) 331.

¹⁵⁶ BG. (Oct. 8, 1935) 61 BGE. II 242; (Feb. 19, 1936) 62 BGE. II 108.

¹⁵⁷ FOOTE 296; CHESHIRE (ed. 6) 498; M. WOLFF, *Priv. Int. Law* (ed. 2) 538 § 512.

¹⁵⁸ BATIFFOL 429, 432.

¹⁵⁹ *Supra* n. 42.

¹⁶⁰ BATIFFOL §§ 530, 531; *cf.* NIBOYET, cited *supra* n. 48.

¹⁶¹ See citations *supra* n. 45.

Italy: Cass. Rome (Nov. 7, 1895) S. 1895.4.13; Clunet 1895, 664 speaks of the national law of the debtor.

¹⁶² *In re Queensland etc. Co.* [1891] 1 Ch. 536; [1892] 1 Ch. 219, C. A. In this connection, *Kelly v. Selwyn* [1905] 2 Ch. 117, 121 f., requiring notification, in contrast to New York law, makes sense, as it adopts English law, because an interest in an English trust is assigned. *Cf.* WESTLAKE 152.

¹⁶³ See PARMELE in 1 Wharton 796 and the cases collected *infra* ns. 166 ff.

¹⁶⁴ RG. (March 7, 1907) 65 RGZ. 357 stressed the fact of the debtor's German domicile, and RG. (Nov. 5, 1932) IPRspr. 1933 No. 20 subjects the requirements of assignment to American law because of the domicile of the debtor which was also deemed to be the place of performance.

the Belgian Civil Code, article 1690, as well as the German Civil Code, § 410, according to the laws and usages in his country.¹⁶⁵

The same current of thought can be found in American decisions, sometimes influenced, as in France, by the conflict of assignment and garnishment. Thus, in 1874, notice was declared necessary in Tennessee for the protection of its own citizens, even in the case of a foreign general assignment.¹⁶⁶ In an 1883 case, the Minnesota court stated that the assignment was executed in Illinois and as far as the rights of assignor and assignees were concerned *inter se*, they were governed by Illinois law, that is, they were valid without notification, but in a garnishment suit affecting attaching creditors, Minnesota, the debtor's domicile, "cannot permit the laws of another state to be imported and override the settled policy of our own laws. In such a case comity must yield to policy, otherwise . . . a citizen of our own state who had been debtor to a nonresident would never be certain to whom he was liable, for his liability would be as uncertain and variable as might be the domicile of his creditor."¹⁶⁷ A decision of a New York court held the collecting agent of English creditors, suing for tort, capable of standing in court as a fiduciary assignee, according to New York law.¹⁶⁸ This holding was not based on local procedures,¹⁶⁹ but on the argument that under New York law the assignment was full and complete, although it was executed in England and under English law its validity required a written notice to the debtor. English law "can-

¹⁶⁵ OLG. Hamburg (July 30, 1934) IPRspr. 1934 No. 15.

¹⁶⁶ *Flickey v. Soney* (1874) 4 Baxt. (Tenn.) 169.

¹⁶⁷ *Lewis v. Bush* (1883) 30 Minn. 244 at 247. Only at the end the opinion verges to the qualification of Minnesota also as place of performance.

¹⁶⁸ *Moore v. Robertson* (1891) 17 N. Y. Supp. 554.

¹⁶⁹ Also the precedents cited for the capacity to sue of an assignee appointed for the purpose of collection use substantive reasoning: Church, C. J., in *Sheridan v. Mayor* (1876) 68 N. Y. 30, 32; Ruger, C. J., in *Greenwood v. Marvin* (1888) 111 N. Y. 423, 440.

not control the law of this state," of which the defendants (the debtors) are residents. A more recent New York case may be mentioned as a parallel, although exclusively dealing with the priority problem. It was recognized that despite the facts pointing to New York as the place where the assignment was to be localized, Missouri law applied in granting priority to the second assignee giving first notice to the debtor, an insurance company of that state, the insurance contract having been made there with a resident to be performable there.¹⁷⁰ These additional factors, of course, may also support the application of the law of the debt or of the place of performance.

(iv) *Lex loci solutionis*. Finally, the Restatement intervenes on the ground of its theory that the place of performance always determines the person to whom performance is due. Consequently, this law, that is, the law governing performance of the original debt, determines whether the debtor can effectively pay to the assignor (§ 354). Such fragmentary rules at least indicate a tendency to abandon the application of the law of the assignment to this problem. Others have reached the same approach on the general principle of *lex loci solutionis*,¹⁷¹ which is the normal judicial rule in Germany because this law would generally govern the debt and effects of the assignment on the debt.

(v) *Rationale*. The problems regarding the protection of an innocent debtor are not solved adequately either by the Germans, indiscriminately applying the law governing the debt,¹⁷² or by Beale's ubiquitous law of the place of

¹⁷⁰ *Wishnick v. Preserves & Honey* (1934) 275 N. Y. Supp. 420; cf. CARNAHAN, *Conflict of Laws and Life Insurance Contracts* (ed. 2, 1958) 467 f.

¹⁷¹ BATIFFOL 433 § 537; STUMBERG (ed. 2) 261.

¹⁷² When 8 LAURENT 198, 200 § 131 declared that he did not understand why the law of the debt should govern as to third persons, 2 BAR 80 n. 1 (b) replied that Laurent stayed in the dark, because he assumed a statute real of a debt. But Bar and the other German writers have, in their turn, lumped too many things together under the law of the debt.

assignment. Take the simplest cases. Under the German approach, an American debtor does not effectively pay anywhere to any assignee without formal signification, if the debt is governed by Argentine law as in the case of a credit given by a bank in Buenos Aires. And according to Beale, a French debtor in Paris may effectively pay to an assignee if the latter purchased the claim in the United States, contrary to French law which would not recognize the payment.

We should think, on the contrary, that existence of a debt is one thing, transfer of a claim as an asset is another thing, and sure identification of the actual creditor is something still different. The German provision that the debtor may require a written instrument stating the assignment is an example. From the Swiss requirement of written assignment, it follows that a debtor domiciled in Switzerland must not pay without a written document or otherwise assuring guarantee.

Certainly a debtor must know that the possibility of foreign assignments imposes on him the risk incurred by ignorance of foreign laws. But it is legitimate for his domiciliary law to mitigate his difficulties.

Forced by the conflicts situation, we may discover that the principal rules in discussion are no part of the effects of assignment with which the codes naturally associate them. Recently, Judge Goodrich found that the privilege, if any, of a second assignee having notified the debtor, "comes not from his status as bona fide purchaser, but from his activities following his belated assignment."¹⁷³ The situation is changed after his assignment by a new event. We may say that the legal systems, each in its way, modify the result of their rules regulating assignment by a separate set of rules regulating the conditions and effects of an excused ignorance of these results by the debtor. It seems perfectly natural

¹⁷³ *In re Rosen* (C. C. A. 3d 1946) 157 F. (2d) 997 at 1001.

to think of the law at the debtor's domicile as competent to do so.

If, instead, the place of payment should be urged, it is true that the question concerning the right of the debtor to deposit the sum due in court or with a public office, differently treated by the laws, has the closest connection with the mode of payment.¹⁷⁴ But the debtor may well have, in addition, a special right of deposit in the case of a pretended assignment, dependent on the law of his domicile. More important, we should not forget that payment is not the only subject of this class of rules, which includes release, deferment of the time of performance, acquisition of counterclaims against the assignor, the effect of judgments, etc. Likewise, the debtor may be entitled to deal at any place with a pseudo assignee showing him a genuine token or written instrument of assignment, with effect against his true creditor.¹⁷⁵ At the same time, it may be seen again, that all these are not incidents of the original contract or of the assignment, to which they run counter.

It is true that the debtor may change his domicile whereas he cannot unilaterally change the place of performance. But the latter place is too often uncertain,¹⁷⁶ and has other well-known drawbacks.^{176a}

¹⁷⁴ For the law of the place of payment, WEISS, 4 *Traité* 398; DESPAGNET § 311. For the law of the debt, 2 ZITELMANN 399; WALKER 450.

¹⁷⁵ *Cf.*, for instance, Restatement of Contracts §§ 166, 167, 170, 173; German Civil Code §§ 406-410.

¹⁷⁶ In an interesting section of his work on Spendthrift Trusts (ed. 2, 1947) 114 § 113, GRISWOLD looks for a subsidiary conflicts rule for the application of the statutes restraining the beneficiary of a trust in disposing of his interest in life insurance proceeds. He decides in favor of the place where the proceeds are payable, but concedes that when the policy gives no clear indication of this place, it is difficult to choose between the domicile of the insurance company and the domicile of the beneficiary.

^{176a} EHRENZWEIG, Conflict 641 agrees that application of the debtor's domiciliary law "may furnish the most generally acceptable solution," whereas the Restatement (Second), Tent. Draft No. 6 (1960) § 353 suggests that the debtor be protected if either the law governing the obligation or the law governing the assignment grants such protection.

3. Priority of Assignees

(a) *Municipal systems.* Two opposite solutions are provided in the French and the German laws. In the former, not until notification is the assignment perfected as against all "third" parties, including the creditors of the assignor and subsequent assignees from the assignor. Also the new Italian Code seems to give absolute preference to the assignment first notified to the debtor or first accepted by the latter by an act provided with a certain date. The German Code simply perfects the transfer through the contract of assignment; the assignee hence has a complete priority over all other pretenders. Consequently, if the debtor is discharged in good faith by payment to a subsequent purchaser, really a pseudo assignee, the prior assignee is entitled to recovery from the second on the ground of unjust enrichment.¹⁷⁷

In the United States, there has been for a long time an "irreconcilable conflict" on the question whether notification is necessary for the priority of an assignment.¹⁷⁸ The federal courts, for a time, operating a separate doctrine of "general law" in diverse citizenship cases did not require notification, but reserved undetermined equitable exceptions for a second assignee where notice was given only by the latter.¹⁷⁹ At present, in the great majority of states, choses in action are transferred by the agreement between assignor and assignee, with full effect against all parties. Within this

¹⁷⁷ France: C. C. art. 1690; Germany: BGB. §§ 398, 408, 816 par. 2; Italy: C. C. (1942) art. 1265.

¹⁷⁸ 6 C. J. S. 1145, Assignment § 91. Cf. list for 1923 in 264 U. S. 191 ns. 3 and 5; and see the articles by KOESSLER, *supra* n. 131.

¹⁷⁹ Salem Trust Co. v. Manufacturers' Finance Co. (C. C. A. 1st 1922) 280 Fed. 803; rev'd (1923) 264 U. S. 182. The decision is superseded by the Erie Railroad v. Tompkins Case (1938) 304 U. S. 64, also n. 8 in 318 U. S. 437; but has been mentioned more recently as representing the "federal rule" expressed in Judson v. Corcoran (1854) 17 How. 612, by Chief Justice Stone in McKenzie v. Irving Trust Co. (1945) 323 U. S. 365, 373.

group, however, there are differences. In particular, the so-called "New York rule" agrees with the German conception, whereas according to the "Massachusetts rule" a subsequent assignee may retain what he collects on the ground of his notification.¹⁸⁰ The latter variant, adopted by the Restatement on contracts is usually explained by the assumption of negligence or estoppel on the part of the prior assignee, which, however, is nonexistent in nonnotification financing.

The more suitable new statutes have adopted the methods of filing in a public record, or notation in book accounts.¹⁸¹

(b) *Conflicts law*. In the jurisdictions directing priority among domestic claims by the test of notification, following some idea of publicity, the competition of foreign-governed claims is apparently subordinated to the same principle. On the other hand, in the German type of system if the law governing the first assignment recognizes its validity, the subsequent transfers are ineffective. Beyond these partial results, no certain conflicts rule is discoverable anywhere. In an English decision, the place of the debtor was preferred to all other local connections, without any convincing reason.¹⁸² Some examination of the problem involved has been occasioned by recent discussion in the United States on the following subject.

(c) *United States: Accounts receivable*. The scarce authority includes two cases in which the parties to a security transfer of accounts receivable stipulated for the law at the place of the financing bank, and in each case the court disregarded this stipulation. In the extravagant decision by a federal district court in *In re Vardaman Shoe*

¹⁸⁰ See the articles by KOESSLER, and that by KUPFER and LIVINGSTON, *supra* ns. 130, 131.

¹⁸¹ *Ibid.*

¹⁸² *In re Queensland Mercantile & Agency Co.* [1891] 1 Ch. 536, *aff'd* [1892] 1 Ch. 219.

Company,¹⁸³ it was held that such a clause could not be opposed to the trustee in bankruptcy, he being "a stranger to the contract."¹⁸⁴ The judge refers to the law of the assignor's place as the situs of the debt. In the remarkable decision in *In re Rosen*,¹⁸⁵ Judge Goodrich eliminated the agreement which most clearly referred to Pennsylvania law for all rights of the parties, validity, construction, and enforcement and "in all respects," for the reason that this clause was part of the general arrangement of financing and assigning, while the claims and even the contracts producing them were not yet all in existence. This was contrasted with the actual transfer, not of the claims which did not take place, but of the money collected by the debtor bank. But it would seem that the court was moved rather by the striking fact that routine had led the Philadelphia bank to a stipulation for Pennsylvania law manifestly disastrous to its own interests in view of the notification requirement,¹⁸⁶ which was in force in Pennsylvania at that time and was thereafter quickly repealed.¹⁸⁷ The pleadings themselves referred to the law of New Jersey, where the assignor carried on his business and the debtors were domiciled. No general conclusion against party disposition of the applicable law should, hence, be inferred from either case.

The same two decisions, however, in pointing to the assignor's place of business, provide us with a strong hint respecting the needed rule in the absence of stipulation for the applicable law. Thus far, every writer states that the courts are very inconsistent in this matter. A qualified ob-

¹⁸³ (1942) 52 F. Supp. 562, 565.

¹⁸⁴ See against this thesis, KUPFER and LIVINGSTON, *supra* n. 130, 32 Va. L. Rev. (1946) at 917.

¹⁸⁵ (C. C. A. 3d 1946) 157 F. (2d) 997, 999, aff'g (1946) 66 F. Supp. 174 on other motives.

¹⁸⁶ *Id.* at 998.

¹⁸⁷ Pennsylvania: 69 Purdon's Stat. (1941) § 561.

server has noted only with diffidence that the courts "confine their attention to the laws of either the borrower's domicile or the lender's domicile."¹⁸⁸ The immense increase of financing by assignment of existent and future business accounts should be bolstered by an absolutely sure and more adequate law.

The place of the debtor has, indeed, been unanimously discarded in recent American legislation. "It is virtually impossible to base a course of conduct upon the laws of the states of domicile of the account-debtors because the mechanical problems arising from any such theory of operation would be so complex as to be prohibitive."¹⁸⁹ This was said against the Supreme Court decision in the *Klauder Case*¹⁹⁰ and may likewise be objected to an old decision of the German Supreme Court.¹⁹¹ The place of the lending bank¹⁹² has no visible merits either.

The only suitable contact of accounts receivable is with the business place where the books are conducted. Two American courts, long ago, understood this need.¹⁹³ In the case of *In re Rosen*, the result reached was practically identical through the consideration that assignor and debtor made and had to perform their original contract in New Jersey and the actual assignment was to be localized there.¹⁹⁴ In *In re Vardaman*, the judge emphasized that the situs of the debt was at the debtor's place of business, although he

¹⁸⁸ MALCOLM, "Conflicts of Laws, Accounts Receivable," 30 Mass. L. Q. (1945) 38, 41.

¹⁸⁹ MALCOLM, *id.* at 41.

¹⁹⁰ *Supra* p. 429 n. 128.

¹⁹¹ RG. (March 23, 1897) 39 RGZ. 371, 374 f.

¹⁹² Thus, Note, "What Law Governs the Assignment of a Bank Account," 40 Harv. L. Rev. (1927) 989, 993.

¹⁹³ *Trust Comp. v. Bulkeley Union* (C. C. A. 6th 1906) 150 Fed. 510, and the result agrees with *Engelhard v. Schroeder* (1920) 92 N. J. Eq. 663: the parties resided in New Jersey, but the firm was in New York and New York law was applied as *lex loci contractus*.

¹⁹⁴ *Supra* n. 185.

pointed out that the result would not be different under the law of the place where the assignment was executed.¹⁹⁵

The situation is finally clarified by the weight accorded to recording or "book-marking" in the statutes. If these publicity measures in the state of the assignor were merely regarded as territorial, they would exclusively operate by public law within their jurisdiction. Such a theory would be irreconcilable with Section 60(a) of the Bankruptcy Act. It is indispensable that these provisions should be respected everywhere.

(d) *Other assignments.* The domicile of the assignor should be competent to determine priority in all cases. This is the true reason behind the situs doctrine.^{195a}

V. CONTACTS

The American doctrine overestimates the scope of the law that may govern the assignment, and is obscure on the scope of the law of the original debt. The German doctrine commits the opposite, and worse, mistake of extending the law of the debt, against reason, to the questions whether the transfer may be "abstract,"¹⁹⁶ what its form should be,¹⁹⁷ whether the transfer requires notification to the debtor or his knowledge,¹⁹⁸ at what time it may take place,¹⁹⁹

¹⁹⁵ 52 F. Supp. 562, 565 f., *supra* n. 183.

The rule advocated above has been adopted in the Restatement (Second), Tent. Draft No. 6 (1960) § 354 (2); see comment, *id.* at 177 ff., and note, *id.* at 180 f. Moreover, see FLANAGAN, "Assignments of Accounts Receivable and Conflict of Laws under the Bankruptcy Act," 2 Vand. L. Rev. (1949) 409; Comment, "Multistate Accounts Receivable Financing: Conflicts in Context," 67 Yale L. J. (1958) 402; EHRENZWEIG, Conflict 637 f. All of these authors urge the application of the law of the assignor's place of business, partly because the books will be kept there.

^{195a} More complicated rules have been furnished by EHRENZWEIG, Conflict 640 f. and by the Restatement (Second), Tent. Draft No. 6 (1960) § 354.

¹⁹⁶ LEWALD 272; RAAPE 277.

¹⁹⁷ LEWALD 273; RAAPE 277.

¹⁹⁸ LEWALD 271.

¹⁹⁹ LEWALD 273 § 332.

whether future and conditional claims are assignable,²⁰⁰ and connected problems.²⁰¹

These two best developed systems, furthermore, contrast in emphasis; Americans stress the actual transfer of a chose in action, Germans, the underlying relationship causing the transfer. Without doubt, it is desirable to have one conflicts rule covering the entire relationship between assignor and assignee, particularly in view of the theory prevailing in the majority of systems that an assignment is not valid without a valid promise to assign.

From these premises, we reach the following conclusions.

Assignee-debtor. The law governing the debt (by no means necessarily the law of the place of contracting) determines the rights and obligations between assignee and debtor, excepting the provisions respecting a debtor ignoring the assignment in good faith.

Assignor-assignee. Where assignor and assignee are domiciled in one jurisdiction and there enter into both the agreement to assign and the assignment, this determines the law in every opinion. Judge Learned Hand's proposal to subject voluntary assignments to the formula *lex loci contractus* contemplated precisely this situation.²⁰²

In the rare cases where promise and transfer occur at different places, the analogy to sales of chattels and also due regard to the interests of third persons in intangible things that have no visible situs, give prime consideration to the actual transfer. The American theory is right also on this point.

Where assignor and assignee are domiciled in different jurisdictions, the old idea that the debt is located at the

²⁰⁰ BG. (Feb. 24, 1915) 41 BGE. II 132.

²⁰¹ LEWALD §§ 333, 334.

²⁰² *New England Mutual Life Ins. Co. v. Spence* (C. C. A. 2d 1939) 104 F. (2d) 665, 125 A. L. R. 1281, CHEATHAM, Cases (ed. 4) 695.

assignor's domicile furnishes the most convincing test for the relationship between the parties to the assignment.²⁰³

This same test has been in particular deduced above from the needs of a transfer of accounts receivable for security, and more generally as the most advisable criterion for determining the priority of successive assignments by the original creditor.

Debtor's protection. With respect to the protection of a bona fide debtor, a third rule is desirable. The law of his domicile should determine the conditions and effects of his dealing with a person whom he is entitled to believe his creditor, although this person is not really his creditor. This contact, used by French and Dutch courts, is preferable to the law of the place of performance indicated in the Restatement (§§ 353, 354), a place often uncertain or left to the option of the creditor. Above all, the statutes are more or less understood to intend the protection of their domiciliaries and must be applied accordingly, if unnecessary conflicts are to be avoided.

²⁰³ With regard to the assignment of an insurance claim, the same opinion is suggested as a matter of course by BRUCK, *Privatversich. R.* (1930) 722.

Other Transfers of Simple Debts

I. TRANSFER OF CLAIMS BY LAW

1. Subrogation by Law¹

SUBROGATION, the substitution by law of one who pays a debt in place of the creditor, is related to the voluntary assignment which a third party satisfying the creditor may be entitled to request instead of discharge. For instance, a surety paying the creditor may demand such assignment under Roman law (*beneficium cedendarum actionum*). In fact, the analogy between such compulsory "voluntary" assignment and immediate transfer by force of law (or judicial proceedings) is rather close. Subrogation is merely a technical improvement in the interest of the payor securing his position, particularly in the case of the creditor's insolvency. Because of this functional similarity, the modern codes declare the rules of assignment applicable by analogy to the legal transfer of claims.² Whether the effect of a subrogation is a clear succession to the title or the practical equivalent, e.g., acquisition of the right of collection, is of no concern for our purpose.

It follows for the conflict of laws that subrogation is to be governed by the same law under which the payor might demand assignment of the debt. This is the law governing the contractual or legal relationship between the payor and

¹ Comparative municipal law: WENGLER, "Surrogation," 6 *Rechtsvergl. Handwörterbuch* (1938) 460, 483 ff. (subrogation of a person).

Conflicts law: GULDENER 125 ff.

² Germany: BGB. § 412.

Switzerland: C. Obl. art. 166.

the creditor, not the law governing the principal debt. Courts have sensed this better than some writers.

Illustration. Bales of Swedish cellulose, consigned to the Snia Viscosa Company in Milano, Italy, sank in Holland in fluvial transportation by a Swiss carrier. The buyer had insured the loss in Italy with Italian insurers and recovered from them. The insurers were allowed to take recourse against the Swiss carrier. Although the claim of the insured against the carrier was governed by Swiss law, this claim was transferred by subrogation to the insurer according to the Italian Commercial Code, then in force, article 438 paragraph 1. This provision did not restrict subrogation to tort actions as the Swiss law on insurance contracts, article 72, does. Swiss BG. (May 7, 1948) 74 BGE. II 81, 88.

Where, for instance, a surety pays to the creditor, it is the task of the law governing suretyship,³ and not of the law governing the principal debt,⁴ to determine whether the surety has to demand assignment before paying, or acquires the claim by virtue of the payment. This law includes conditions and effects, although the transfer of accessory rights thereby involved, according to the situation, may require additional consultation of other laws.⁵ Similarly, it has been held in Germany that a Belgian by paying customs duties to the Belgian state according to Belgian law, acquired the right of that state, effective in the German bankruptcy of the debtor.⁶

The law of the principal debt, of course, determines the transferability of the debt.⁷ The tendency of the German and Swiss doctrine to enlarge the role of this law, incon-

³ See particularly German RG. (April 23, 1903) 54 RGZ. 311, 316; LETZGUS, 3 Z.ausl.PR. (1929) 849; BATIFFOL 425 n. 6 § 541 and *Traité* (ed. 3) 677 § 626; DOMKE, *Clunet* 1938, 417; ARMINJON, *Droit Int. Pr. Com.* 485 § 293.

⁴ Thus 2 ZITELMANN 394; NEUMEYER, *IPR.* 29.

⁵ See PILLET, 1 *Traité* 176 for the problems; RILLING, *supra* Ch. 47 n. 1, 76-79.

⁶ OLG. Hamm (April 27, 1912) 23 Z.int.R. (1913) 358, *Revue* 1914, 460.

⁷ 1 FIORE § 196; 2 ROLIN § 979.

sistent with what is plainly suitable here, has nevertheless influenced a decision of the Swiss Federal Tribunal⁸ and its commentators.

A German engineer employed by the Swiss federal railroads was injured in the Swiss service and awarded compensation by the German board of accident insurance. According to the German law of social insurance, the tort claim against the Swiss railroads passed automatically to the German board. The Federal Tribunal acknowledged this effect of the law governing the relation between injured and payor, considering under Swiss law that the tort debt also was assignable and that although the debt was not *ipso jure* transferred to the social insurance office, the institution of subrogation was familiar. From this decision, writers have inferred the proviso that the law governing the transfer can operate only if the law of the debt recognizes the transfer.⁹

Even this restricted reference to the debtor's law is un-

⁸ BG. (Feb. 28, 1913) 39 BGE. II 77, 2 Praxis 171.

More recent decisions of the Swiss Federal Tribunal affirm that, in principle, subrogation is governed by the law of the relationship between creditor and subrogee; see BG. (Jan. 20, 1948) 74 BGE. II 81; BG. (Sept. 22, 1959) 85 BGE. II 267, *Revue Crit.* 1960, 345 with Note by AUBERT, *Clunet* 1961, 228; *App. Bern* (Feb. 26, 1963) 100 *Z. bern. J.V.* (1964) 270. For criticism, see KELLER, "Anwendbares Recht hinsichtlich der Subrogation des Schadenversicherers," 56 *SJZ.* (1960) 65.

In contrast with these decisions, a French court has refused to apply a Swiss statute providing for subrogation in favor of a social security fund which had compensated the Swiss victim of a traffic accident in France; see *App. Besançon* (May 14, 1959) *Clunet* 1960, 778 with Note by BREDIN and *Revue Crit.* 1960, 67 with Note by LOUSSOUARN; see also EHRENZWEIG, *Conflict* 442.

⁹ LEWALD 277 § 336, followed by RAAPE, *IPR.* (ed. 5) 509 f. (the German law can only order the transfer and it was up to the Swiss law to carry it out); M. WOLFF, *IPR.* (ed. 3) 152 and *Priv. Int. Law* (ed. 2) 545 § 518. GULDENER 139 even criticizes the decision because it should have applied only Swiss law.

Recently a German author has urged the acknowledgment of subrogation only if both the law of the principal debt and the law of the relationship between payor and creditor grant subrogation in the specific case; see HOFFMEYER, "Zur Aktivlegitimation ausländischer Ladungsversicherer bei Regressklagen," 125 *Z. Handelsr.* (1962) 125. This article, incidentally, affords a useful comparative survey of legal provisions concerning subrogation in matters of marine insurance.

necessary and confusing. It suffices that under the law governing the debt, it can be transferred to any other person. If it is transferable, the debtor has no justifiable interest in the form and the modalities of the transfer, and still less has the law of the debt any bearing.

The wrong approach was followed by a Dutch decision in an analogous case. Two German postal officials serving on through trains were injured in accidents on Dutch territory and pensioned under the German social security scheme. The Appeals Court of Amsterdam rejected the recourse of the German board against the Dutch railroads, because Dutch law did not acknowledge subrogation in analogous cases and therefore the tort obligation was satisfied by the award of pensions granted by the board to discharge its own liability.¹⁰

This naïve reasoning overlooks the entire modern development of concurrence of debts where the ultimate loss falls on one codebtor. In the conflicts field, it demonstrates the mistake of allowing the law of the debt to interfere.

A different answer is contained in a French decision.¹¹ A Dutch car owner, insured against fire with an English company, lost the car in a fire at a French garage. The company paid the damage to the owner and recovered from the garage company. The insurance contract was deemed to be governed by Dutch law and produced legal subrogation (Dutch C. Com. article 284) at the time of the payment.

¹⁰ Hof Amsterdam (April 12, 1921) N. J. 1922, 801.

Contra: Rb. Utrecht (May 7, 1952) N. J. 1953, 276, Clunet 1957, 476, Revue Crit. 1954, 784 with Note by BATIFFOL; in this case the court applied Belgian law granting subrogation of a proprietary right to a movable situated in Holland and covered by a Belgian insurance contract. On the other hand, see Hof Arnhem (Nov. 29, 1955) N. J. 1956, 231 and Rb. Leeuwarden (Dec. 13, 1960) N. J. 1961, 330; in these analogous cases subrogation was denied according to Dutch law. For a discussion, see SAUVEPLANNE, "De subrogatie in het internationaal privaatrecht," *De conflictu legum* (Nederl. Tijds. Int. R., Special Issue October 1962) 413 and BATIFFOL, *Traité* (ed. 3) 677 § 626.

¹¹ App. Riom (Jan. 29, 1932) Gaz. Pal. 1932.1.707, Revue gén. des assurances terrestres 1932, 295 with note by FERROULD.

The French-governed obligation of the garage company was ascertained as soon as plaintiff showed himself to be regularly subrogated under Dutch law. This result conforms to our own conclusions, but the court based it on obscure reasoning and the alleged rule for "quasi contracts" that the law of the place of the generating fact, that is, of the payment, governs.¹²

Likewise, in another case involving insurance against risks of carriage, a New York insurance company was recognized as subrogated to the insured because it had paid the client in France and subrogation at that time had become known to French law.¹³ If the lawyers concerned had cared to consult the law of New York, they would probably have reasoned otherwise.

Considering the great and ever-increasing importance of subrogation in modern relationships, its fate cannot be reasonably made dependent on the accidental place of payment. Subrogation flows from the law governing the underlying obligation,¹⁴ which we have found also to influence the law granting recovery of unjust enrichment. Where, for instance, an injured driver of an automobile has released the tortfeasor but cashed the insurance money, he is bound to refund this money, according to American views.¹⁵ How could this rest on the law of the place of the payment? The relationship insurer-insured dominates the entire problem.

In the case of accident insurance, we have found earlier

¹² See PERROULD, *ibid.*, and *contra: supra* p. 378.

¹³ Trib. civ. Seine (Jan. 2, 1935) *Revue gén. des assurances terrestres* 1935, 346 and note by PERROULD, also approved by PICARD et BESSON, 1 *Traité* 624 § 305.

¹⁴ This should be true even in a system where subrogation, e.g., of the insurer, is merely based on the law plus the payment, in minimizing the (insurance) contract, as in the doctrine of the Italian courts on the ground of former C. Com. art. 438, see Cass. Ital. (Feb. 19, 1937) 39 *Dir. Marit.* (1937) 80 and note by BERLINGIERI.

¹⁵ See on this and related questions, BILLINGS, "The Significance of Subrogation in Automobile Insurance Practice," *Ins. L. J.* 1948, 707.

that a direct action by the injured party against the insurer, when granted by the law of the place of the accident, ought to be allowed elsewhere.¹⁶ It is added here that if the insured has been satisfied by the insurer, their relationship determines the transfer of the tort action.

This would also seem to furnish the right solution to the recent controversy whether an insurer against liability is subrogated in a claim based on the Federal Tort Claims Act of 1946,¹⁷ which assimilates the United States as wrongdoer to private persons. The Act presupposes that an individual in an identical case would be liable under the law of the place where the loss or damage occurred. It is entirely unjustified to require another federal law to extend the right to sue especially to a subrogee.¹⁸ At least one circuit court has recognized the subrogation.¹⁹ Where a transferable claim arises from the tort according to the law of the place of wrong, its transfer to the insurer by operation of law depends simply on the law governing the insurance contract.

One difficult problem should be briefly noted. Subrogation as respects the same debt is often granted by statute to persons differing in their relationships to the debtor. For instance, it has been discussed in Germany that the Code entitles a surety paying the creditor to avail himself of a mortgage securing the debt,²⁰ but the Code also subrogates the owner of the mortgaged property if he is not the principal debtor to the creditor, apparently including the right

¹⁶ See Vol. II (ed. 2) pp. 263 f.

¹⁷ 60 Stat. 842 § 410(a), 28 U. S. C. § 931 (a). See BRENTON, "The Case for Subrogees under the Federal Tort Claims Act," *Ins. L. J.* 1948, 189.

¹⁸ Thus, as claimed by the government and sustained in several decisions dismissing actions by insurers, *Old Colony Ins. Co. v. United States* (D. C. S. D. Ohio 1949) 74 F. Supp. 723; *Cascade City, Mont. v. U. S.* (D. C. Mont. 1947) 75 F. Supp. 850; *Aetna Cas. & Surety Co. v. U. S.* (D. C. E. D. N. Y. 1948) 76 F. Supp. 333.

¹⁹ *Employer's Fire Ins. Co. v. U. S.* (C. C. A. 9th 1948) 167 F. (2d) 655 reversing *Rusconi v. U. S.* (D. C. S. D. Cal. 1947) 74 F. Supp. 669.

²⁰ BGB. §§ 774, 412, 401.

against the surety.²¹ Can such owner recover from the surety? Is this a question of who first manages to pay? Or is it a case of equal distribution? Prevailing German opinion has recognized that the surety's position is superior; he may recover from the owner but the latter cannot recover from him.²²

Analogous delicate questions have been raised in the United States;²³ some judicial decisions have been justifiably criticized. Thus, a tortfeasor without doubt is responsible to the subrogated insurer. Hence, in the better opinion, the insurer of one of two tortfeasors may recover from the other tortfeasor half of what he pays to the injured party.²⁴ An employer paying compensation to an employee ought to have recourse against the insurer of a workman's accident.²⁵ Other cases are more doubtful.

In conflicts law, the difficulty is increased at least in the cases, probably infrequent, where the persons potentially entitled to subrogation enter into the connection independently of each other.

However, modern legal science ought to solve the municipal problem in a uniform manner, establishing a gradation of liabilities, preliminary to the rank of rights subject to subrogation.

2. Other Transfers by Law

*"Provision."*²⁶ The only topic ordinarily attracting attention in the Continental literature on this subject has been

²¹ BGB. §§ 1143, 1249, 412, 401.

²² STROHAL, 61 Jherings Jahrb. (1912) 59 ff.; RG., 76 Seuff. Arch. 135.

In Austria followed by 2 EHRENZWEIG 1 § 293 and n. 36; 2 *id.* 2 § 311 n. 20.

²³ LANGMAID, "Some Recent Subrogation Problems in the Law of Suretyship and Insurance," 47 Harv. L. Rev. (1934) 976, also in Legal Essays in Tribute to Orrin Kip McMurray (1935) 245.

²⁴ LANGMAID, *id.* 998 (264) against decisions.

²⁵ LANGMAID, *id.* 1007 (272) against decisions.

²⁶ Basic: ERNST E. HIRSCH, Der Rechtsbegriff Provision im französischen und internationalen Wechselrecht (1930) 146 ff.

the transfer of the so-called "provision" to the successive endorsees of a bill of exchange under French law and those following the French doctrine. The rights to funds covering the draft and belonging to the drawer, including obligatory rights such as claims or credits due him by the drawee, are transferred to the payee by the negotiation of the bill and successively to the endorsees with every further endorsement.²⁷ But this means only that the holder of the bill is entitled to such claims as the drawer may happen to have against the drawee at the time of maturity to the extent of the amount indicated in the bill. Text and construction make it clear that this is not an ordinary implied assignment; it does not necessarily have a present object and does not prevent the drawer from disposing of the funds before maturity. Hence, it is a transfer created and peculiarly conditioned by law. And this law is correctly and prevailingly identified with that governing the creation of the bill of exchange, which is, in the predominant opinion, rightly or wrongly, the law of the place of issue.²⁸ That this law also should intervene in transferring the right of cover from one endorsee to the other, although the endorsement is governed by the law of its own place, has seemed impossible

²⁷ France: C. Com. art. 116, as amended by Law of Feb. 8, 1922.

Italy: Law No. 48 of Jan. 15, 1934, art. 1.

Scotland: British Bills of Exchange Act, 1882, s. 53 (2).

The problem was discussed formerly in American courts but has been liquidated by the Uniform Negotiable Instruments Act, § 127, *cf.* 5 U. L. A. § 127, and for the distinction of transactions to be observed, *Guggenhime & Co. v. Lamantia* (1929) 207 Cal. 96, 99, 276 Pac. 995.

²⁸ HIRSCH, *supra* n. 26, at 162.

France: Cass. civ. (Feb. 6, 1900) S. 1900.1.161, *Clunet* 1900, 605; 4 LYON-CAEN et RENAULT § 644.

Italy: CAVAGLIERI, *Dir. Int. Com.* 373 ff.

Germany: OLG. Kolmar, decisions cited by HIRSCH, *supra* n. 26, 168, 170.

Contrarily, in Illinois cases, before the uniform law, the law of the place of payment has been applied. *National Bank of America v. Indiana Banking Co.* (1885) 114 Ill. 483, 2 N. E. 401 concerning a check, in which case there are doubts on the correct localization, see HIRSCH, *supra* n. 26, at 154. *Abt v. The American Trust & Savings Bank* (1896) 159 Ill. 467, 42 N. E. 856 (draft).

Cf. also Vol. IV (ed. 1) pp. 144 ff., 232 f.

to some dissenters,²⁹ while the German courts look for circumstances suggesting a tacit assignment of the accessory right.³⁰

The prevailing simple solution was inserted in the Geneva Convention of 1930,³¹ adopting the controversial rule that rights once acquired by the first endorsee pass to each successor, without regard to the respective rule of the place of endorsement, and that such rights correspondingly revert in the case of recourse for nonpayment. Of course, the drawee has his normal defenses against any transferee; this is no exception to the rule.

The connection with the doctrine of negotiable instruments justifies this solution which, in itself, would be exorbitant.

A General Rule? Some statutes, that of Texas being apparently the last left in this country, provide that the beneficial interest of a spouse granted him in an insurance on the life of the other spouse automatically returns to the grantor in the event of divorce. In an older case, such effect of a Hawaiian divorce decree was disregarded in California in a matter of jurisdiction.³² In another case, it was held that the law governing the insurance determines whether the right of the beneficiary is lost by a divorce.³³ But more

²⁹ DIENA, 3 *Dir. Com. Int.* §§ 217, 223; GAETANO ARANGIO-RUIZ, "La cambiale nel diritto internazionale privato," 12 *Studi di diritto internazionale* (Milano 1946) 238, arguing on the analogy of voluntary assignment; see for other writings, GULDENER 50 f.

³⁰ RG. (March 19, 1907) 65 RGZ. 357, and other decisions, see HIRSCH, *supra* n. 26, at 168 ff.

³¹ Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange etc., art. 6: "The question whether there has been an assignment to the holder of the debt which has given rise to the issue of the instrument is determined by the law of the place where the instrument was issued." HUDSON, 5 *Int. Legislation* 554.

³² McGrew v. Mutual Life Ins. Co. of N. Y. (1901) 132 Cal. 85, 64 Pac. 103, criticized by 2 BEALE 1254 because the woman and the policy had been under the jurisdiction of the Hawaiian court from the beginning.

³³ Pendleton v. Great Southern L. I. Co. (1929) 135 Okla. 40, 273 Pac. 1007; 2 BEALE 1212 n. 2.

recently, the Second Federal Circuit Court decided by a majority that the designation of the wife as beneficiary in an insurance contract made in New York state, giving an irrevocable right under New York law, was destroyed as an effect of divorce in Texas where the spouses had moved. Judge Learned Hand based this decision on a general rule; he held that there was no reason why a legal transfer should not be subject to the same conflicts rule as a voluntary assignment, and thus to the law of the place of assignment, which he assumed should govern.³⁴ That this rule should sanction the surprising effect of the exorbitant Texas rule on a right irrevocable under a New York insurance contract, has been convincingly criticized.³⁵ In the rule itself, the reference to the mechanical law of the place of assignment should be eliminated. Apart from this, however, it may be contended that an expropriation of a debt does not depend upon the permission of the law governing the debt, unless the right is personal. But the local contacts appropriate in this matter can scarcely be stated in terms of one simple conflicts rule.³⁶

II. TRANSFER OF LIABILITY³⁷

The most important situations involving a change of debtor occur in connection with inheritance and transfer of an enterprise,³⁸ both of which belong primarily to the doctrines of property.

³⁴ *New England Mutual Life Ins. Co. v. Spence* (C. C. A. 2d 1939) 104 F. (2d) 665.

³⁵ See Clark, J., dissenting opinion *id.* 668 ff.; Note, 49 *Yale L. J.* (1939) 335.

³⁶ LETZGUS, 3 *Z.ausl.PR.* (1929) 852; GULDENER 111 ff.; RILLING, *supra* Ch. 47 n. 1, 71.

³⁷ BRINER, "Die Schuldübernahme im Schweizerischen Internationalprivatrecht," 127 *N. F. Zürcher Beiträge zur Rechtswissenschaft* (1947).

³⁸ RG. (March 27, 1905) 15 *Z.int.R.* (1905) 306 does not contribute much: a German bought a business in England taking over all assets and liabilities; the obligations arising have been naturally subjected to English law.

On comparative aspects of transfer of enterprises: BAYITCH, "Transfer of Business. A Study in Comparative Law," 6 *Am. J. Comp. Law* (1957) 284.

By voluntary act of the debtor, an individual debt cannot be transferred to another debtor without the creditor's assent. He can, where his duty is not strictly personal, accept the promise of another person to perform the duty.³⁹ Such assumption by agreement, taken as merely constituting a relation between the debtor and his substitute (the ex-promisor) participates in the law of the sale, lease, or other transaction in which it is included, or may be subject to an independent law.

Modern laws, however, have brought forth various institutions resulting in the addition of a new debtor ("cumulative" assumption of liability), or the replacement of the old by the new debtor ("privative" assumption of liability). In the latter case, the idea that the new promisor succeeds in place of the old obligor without any other change of the substance of the obligation and its accessories, is more or less developed. Whereas the German Civil Code has established a fullfledged succession in the debt by agreement of the new promisor either with the creditor, or with the old debtor plus consent of the creditor,⁴⁰ the French doctrine, in the absence of sufficient provisions of the Code, has approached the desired results by adjusting institutions like novation, delegation, third-party contracts.⁴¹ In the United States, direct action by the creditor against the new debtor has been provided by using novation and reducing the new obligation to the conditions and amount of the original liability,⁴² or by construing the creditor as the beneficiary

³⁹ This is what is usually termed assignment of liability; 7 HALSBURY 302 § 420; Restatement of Contracts § 160 (3); German BGB. § 329: "Erfüllungsübernahme"; Swiss C. Obl. art. 175: usually termed "Interne Schuldübernahme."

⁴⁰ Germany: BGB. §§ 414, 415: "Schuldübernahme"; Switzerland: C. Obl. art. 176; Mexico: C. C. (1928) art. 2051: cesión de deudas.

⁴¹ PLANIOL et RIPERT, 7 Traité Pratique (ed. 2) §§ 1142-1145; cf. in the Italian C. C. (1942) arts. 1272, 1273.

⁴² Restatement of Contracts §§ 427, 428; WILLISTON, 3 Contracts § 1865.

of the assignment of liability,⁴³ or under certain conditions by operation of law.⁴⁴

Again, in the German doctrine, the law of the original debt has been applied to determine conditions and effects of the acts and agreements in question.⁴⁵

Illustration. Two women, domiciled nationals of Czechoslovakia, purchased in 1922 a house in Dresden, and by agreement assumed personal liability on a debt secured by a mortgage. Although they discharged it by payment in depreciated marks, they were held subject to the German law of revalorization, because the debt was governed by German law. Their domicil, important under other circumstances, was considered immaterial.⁴⁶

But, quite as a promise of suretyship and an assignment of right, any agreement introducing a new promisor of the original debt, has an independent existence. A proper law governing it may follow from a stipulation for the applicable law or be inferred from the circumstances. As in the other types of transactions mentioned, of course, the law governing the original debt is presumably the most closely connected law.⁴⁷

To presume, to the contrary, that the new promise should

⁴³ Restatement of Contracts §§ 135, 136; CORBIN, "Contracts for the Benefit of Third Persons," 46 Law Q. Rev. (1930) 12.

⁴⁴ Restatement of Contracts § 164. See in particular, GRISMORE, "Is the Assignee of a Contract Liable for the Non-Performance of Delegated Duties?" 18 Mich. L. Rev. (1920) 284, 287 ff.

⁴⁵ Germany: RG. (June 13, 1932) JW. 1932, 3810; WALKER 494.

Switzerland: 2 SCHNITZER (ed. 4) 660.

⁴⁶ RG. (Oct. 17, 1932) IPRspr. 1932 No. 34. NUSSBAUM, D. IPR. 267. The case of assumption of a mortgage debt on the occasion of purchase of land, specifically regulated in BGB. § 416, has been simply subjected to *lex situs* by RG. (March 22, 1928) JW. 1928, 1447, but the mortgage debt is not necessarily under *lex situs*, cf. 2 BEALE 946 and n. 7.

⁴⁷ This view was propounded by 2 ZITELMANN 395; 2 FRANKENSTEIN 268, although they postulated the personal laws of the two debtors and complicated the problem by their formulations.

In cases where the buyer of land has assumed the mortgage debt, the *lex situs* may reasonably apply; thus the German RG. (Jan. 12, 1887) 4 Bolze No. 22, and the Austrian OGH. (June 26, 1930) JW. 1931, 635.

be governed by the law of the domicil of the new promisor, as the Swiss Federal Tribunal has done,⁴⁸ is an instance of exaggerated emphasis on the debtor's domicil.

The law governing the original debt, it is true, determines whether the original debtor is discharged. But even when the new promise is governed by another law, practical difficulties are improbable since discharge and new promise are essentially connected, by one or the other construction, in every legal system.⁴⁹

III. NOVATION

The problem may be illustrated by adding foreign elements to an American case:⁵⁰

Sharp had a contract with the baker Voight to deliver flour. Voight sold his bakery to Manfre and notified Sharp that he had to deal exclusively with the successor. Sharp acknowledged this letter and wrote Manfre insisting on strict compliance with the contract terms. But later Sharp demanded cash payments and in their absence refused delivery. The court held that by his letters Sharp discharged the old contract totally and substituted a new contract of analogous content with Manfre. The court preferred the view that the old contract was rescinded to construing a novation as some courts would have done.

If Sharp should be in state X and Voight in state Y and the laws of X and Y differ on the question of interpreting

⁴⁸ Swiss BG. (Nov. 11, 1941) 41 Bl. f. Zürch. Rspr. 100 reported by BRINER, *supra* n. 37, 56, dealing with cumulative assumption of liability, but apparently applicable "a fortiori" to transactions freeing the original obligor, see BRINER, *supra* n. 37, at 68.

⁴⁹ See on these problems M. WOLFF, IPR. (ed. 3) 153 f.; BRINER, *supra* n. 37, 44 f.

Cf. also M. WOLFF, Priv. Int. Law (ed. 2) 458 § 441 and *Re United Railways etc., Ltd.* [1959] 1 All E. R. 214, 228 ff. (C. A.); the court relying on M. WOLFF, *op. cit.*, ruled that the discharge of the original debtor is necessarily determined by the proper law of his debt, but the learned judge did not express a concluded opinion on the question of which law should govern the substitution of a new debtor. (*Id.* at 233.)

⁵⁰ *Manfre v. Sharp* (1930) 210 Cal. 479, 292 Pac. 465.

the intention of the parties or on a presumption of survival of the original debt, which law governs? The problem has come up in Europe in the case of the peculiar Swiss certificate of deficiency issued to a creditor who has not been satisfied because of the debtor's insolvency. This certificate creates a new title for enforcement, not subject to limitation of time.⁵¹ A French court has termed this transformation a novation.⁵² In a Swiss case, the creditor of a French-governed debt claimed that the amount originally expressed in French francs was transformed by novation into Swiss francs as of the time when the certificate was issued. The French currency had declined afterwards. The Federal Tribunal, however, stated that the conversion of the sum had been made merely for the purpose of the first enforcement. It was then asked whether the fact that the defendant had consented to the conversion at the time created a contract of novation in favor of the amount in Swiss francs appearing in the certificate. The court denied this under Swiss law, held applicable either as that of the assumed place of contracting or as that intended by the parties.⁵³

The agreement, thus, was subjected to an independent law rather than to the (French) law governing the principal debt. But the problem concerned the interpretation of the agreement of the parties, not the permissibility of novation. Since novation is known in practice to every system, the Swiss solution is obviously correct in the case at bar of an agreement between the two original parties to the obligation.

More complicated cases may cause doubts. But it may be generally said that the extinguishing effect depends on the law of the debt, although the new obligation is governed

⁵¹ Switzerland: A Federal Enforcement and Bankruptcy Act, art. 149 par. 5; on the international force of the imprescriptibility, see *infra* p. 528.

⁵² App. Colmar (May 31, 1933) *Revue Crit.* 1934, 468.

⁵³ BG. (June 3, 1947) 73 BGE. II 102, 105.

by its own law,⁵⁴ that may or may not be identical with the first. It is important that we should treat all transactions modifying an obligation under analogous principles, since they are overlapping and varying in the different systems.

IV. JURISDICTION FOR GARNISHMENT⁵⁵

Although enforcement of a claim is a topic of adjective law, forcible satisfaction of money obligations by resort to obligatory claims against third persons is frequently included in treatises on conflicts law. Certain problems of jurisdiction present international interest and have influenced other important subject matters, such as war seizures. Close historical and systematic connections with the traditional *situs* doctrines are evident.

However, this exceptional discussion of a jurisdictional and procedural subject merely involves the transfer, for the purpose of execution, of a debt from the creditor to his own creditor. This includes seizure of the debt only so far as it is preparatory to this transfer. We are not dealing with attachment in any other function, such as founding jurisdiction or as a conservatory measure, despite the historical and practical connections between these institutions.

Orderly garnishment proceedings (as contrasted with interim proceedings for conservatory⁵⁶ purposes) should con-

⁵⁴ PILLET, 2 *Traité* 214, generally followed. A similar contrast between the effect of discharging the old and creating a new obligation is made with respect to deeds and judgments, see M. WOLFF, *Priv. Int. Law* (ed. 2) 549 § 524, subjects not to be dealt with here. Private autonomy is recognized by ROLIN, 2 *Principes* §§ 989 ff., DESPAGNET § 313; its limitation, 2 ARMINJON § 156.

⁵⁵ BEALE, "The Exercise of Jurisdiction *In Rem* to Compel Payment of a Debt," 27 *Harv. L. Rev.* (1913) 107; RHEINSTEIN, "Die inländische Bedeutung einer ausländischen Zwangsvollstreckung in Geldforderungen," 8 *Z.ausl.PR.* (1934) 277; RABEL, "Situs Problems etc.," 11 *Law and Cont. Probl.* (1945) 118, 126, *infra* n. 79.

⁵⁶ As to this latter, the older Continental tendency connected with the *situs* theory regarding the court at the creditor's domicile as the competent forum (see also Chirkasky v. Pride, 41 *Harv. L. Rev.* (1927) 924), has been given up. The forum makes its jurisdictional rules freely and largely, *cf.* ANZILOTTI, *Rivista* 1908, 180.

sist in a desirable system of three phases. The garnishee would be (1) forbidden to pay his debt to his creditor, the original debtor; he would be (2) finally ordered to pay it to the garnishor; and (3) the original debtor would at least be duly notified of any measure that may affect his interests.

If appropriate international co-operation existed, these three steps could be carried out conveniently even though two or three countries were involved. Such harmony, however, is far from being established, and not even within the United States is the justified postulate achieved, expressed by Stumberg, that the proceedings should be conducted against both the creditor and the debtor in their respective jurisdictions.⁵⁷

1. Domicil of the Original Debtor

As things stand, the old idea that a claim is situated at the domicil of the creditor and therefore must be attached there, is often recognized in domestic law but is rarely observed in taking jurisdiction for garnishment. Some states of the Union seem still exclusively to permit garnishment at the domicil of the original debtor.⁵⁸ The Swiss courts, considering a debt situated at the place of the creditor's domicil, take jurisdiction when the original debtor is domiciled in the forum,⁵⁹ and also when he is domiciled abroad and the garnishee is domiciled in the forum;⁶⁰ but as a recent decision has made clear, garnishment is ordered only under

⁵⁷ STUMBERG (ed. 2) 109.

⁵⁸ *Louisville and N. R. Co. v. Nash* (1897) 118 Ala. 477, 23 So. 825; STUMBERG (ed. 2) 107 n. 33 adds: "*cf.* apparently in accord, *Beasley v. Lennox-Haldeman Co.* (1902) 116 Ga. 13, 42 S. E. 385; *Bullard and Hoagland v. Chaffee* (1900) 61 Neb. 83, 84 N. W. 604; *cf.* 38 C. J. S. 338 § 125."

⁵⁹ BG. (Dec. 9, 1930) 56 BGE. III 228, 230 referring to 53 *id.* III 45 and citations.

⁶⁰ The older decisions of the Federal Tribunal on jurisdiction for attachment, up to (March 11, 1930) 56 BGE. III 49, 50, recognizing this, have been interpreted as including garnishment; really they deal with provisional attachment. See 2 SCHNITZER (ed. 4) 889 n. 153 and GULDENER, *Internationales Zivilprozessrecht* 180.

the condition that official notification to the debtor by letter rogatory is effected.⁶¹

Most systems, at present, localize the debt in connection with the debtor's debtor rather than with the original debtor. They disagree, however, on the exact localization: whether the domicile of the garnishee or the place where he can personally be sued.

2. The Garnishee's Domicil

In the prevailing Continental doctrine, it is recognized by tradition from the statistes that the situs of a debt for the purpose of executive attachment is at the domicile of the debtor.

France. This proposition has found its clearest expression in France.⁶² The reasoning rests on the old twofold ground that the court at the debtor's domicile has general jurisdiction over him (*actor sequitur forum rei*) and that his movable assets, the objects of enforcement, are deemed to be assembled there (*mobilia ossibus inhaerent*). Modern authors know that to speak of situs is figurative but add that the domicile is the most readily ascertainable of all places involved.

The French Court of Cassation has rigorously carried out this theory in international relations. On the subject of executive attachment and garnishment (*saisie-arrêt* and *saisie-exécution*), it maintains that the court of the garnishee's domicile has exclusive jurisdiction for seizing the debt. If the original debtor is domiciled in France but the garnishee is domiciled abroad, no French court has jurisdiction, just as in the case of seizure of other property situated

⁶¹ BG. (Feb. 20, 1942) 68 BGE. III 10, 14.

⁶² WEISS, 4 *Traité* 430; GLASSON, MOREL et TISSIER, 4 *Traité de procédure civile* (ed. 3, 1925-36) 1166; LEREBOURS-PIGEONNIÈRE (ed. 7) § 474.

in a foreign country.⁶³ In a part of the literature, the situs theory is even taken more literally and either explained by a statute real⁶⁴ or anchored in the territorial nature of enforcement.⁶⁵

Germany. Section 23 of the German Code of Civil Procedure on jurisdiction, construed by the courts as a general principle for the situs of debts, localizes debts at the debtor's domicil. On this basis, jurisdiction in attachment and garnishment⁶⁶ is assumed when the garnishee has his domicil in the forum; this excludes recognition of foreign jurisdiction even at the domicil of the original debtor.⁶⁷ Correspondingly, a garnishment at the domicil of the garnishee in a foreign country is recognized,⁶⁸ when it is not in conflict with a domestic measure.⁶⁹

Where the garnishee is domiciled abroad but the original debtor has his domicil in the forum, in one opinion the forum on grounds of comity should not render a garnish-

⁶³ Cass. civ. (May 12, 1931) S. 1932.I.137, D. 1933.I.60; Cour Paris (Dec. 13, 1932) Clunet 1934, 1207. Consequently, courts in Alsace have assumed jurisdiction at the domicil of the garnishee, applying their own local civil procedure differing from the French; see App. Colmar (March 23, 1938) Koechlin v. Risacher, 19 Rev. Juridique d'Alsace et de Lorraine (1938) 587.

On jurisdiction in the Netherlands, see POLENAAR, *Procesrecht* (1937) 273 ff., 83.

⁶⁴ See LEREBOURS-PIGEONNIÈRE (ed. 4) § 357, criticizing this theory because local sovereignty, rather than the statute real, is respected. More recent editions of this treatise do not refer to, and comment on, the theory mentioned.

⁶⁵ NIBOYET, Note, S. 1932.I.137.

⁶⁶ "Forderungspfändung" and "Überweisung," the latter either as assignment at the nominal sum in lieu of payment (an Zahlungsstatt) or for collection (zur Einziehung), ZPO. §§ 829, 835.

⁶⁷ REICHEL, "Internationale Forderungspfändung," 131 Arch. Civ. Prax. (1929) 293. Cf. RG. (June 2, 1923) 107 RGZ. 44, 46 (on war seizures).

⁶⁸ RG. (Oct. 12, 1895) 36 RGZ. 355: the debt is situated not at the place of performance in Germany, but at the domicil of the (debtor's) debtor either in Rumania or in Vienna; RG. (June 18, 1907) 63 Seuff. Arch. 41 No. 27: the debt is situated in Switzerland at the domicil of the debtor's debtor and subject to the local power of enforcement. RG. (May 16, 1933) 140 RGZ. 340 restates energetically the principle.

Austria: Jurisdictionsnorm § 99 par. 2.

⁶⁹ STEIN-JONAS, ZPO. § 829 I 3.

ment order; this would even violate international law.⁷⁰ This opinion has been rejected.⁷¹ In the prevailing view confirmed by the Reichsgericht, the order, notified to the original debtor, is valid within the forum if notice can be served on the garnishee within the forum or abroad.⁷² This service, however, is an essential part of the proceedings, the efficacy of which therefore normally depends upon the co-operation of the foreign state, which is not likely to be granted.⁷³

The guaranties provided in the domestic sphere to safeguard the interests of all parties involved are deficient in the international field. *Res judicata* and the effects of notice of suit to a third party and of failure to give such notice usually are not effective beyond the borders of the state where garnishment is sought or, on the other hand, the debtor is in litigation with the garnishor or the garnishee.⁷⁴ This may or may not be in the interest of the various parties.

Remarkably, in the United States, the emphasis on the domicil of the garnishee has had some following.⁷⁵

3. Personal Jurisdiction over the Garnishee

The common law doctrine seems also to derive from certain statist teachings. A basic difference from the Continental variant is due to interpretation of the Roman rule,

⁷⁰ See HUGO KAUFMANN, JW. 1929, 416; KG. (April 5, 1929) JW. 1929, 2360.

⁷¹ JONAS, JW. 1932, 668; STEIN-JONAS, ZPO. § 829 I 3; RHEINSTEIN, *supra* n. 55, 282-284.

⁷² RG. (May 16, 1933) 140 RGZ. 340.

Similarly, Austria: OGH. (Aug. 12, 1927) 9 SZ. 516 No. 174.

⁷³ Austria and Czechoslovakia: Exekutionsordnung of May 27, 1896, RGBL. No. 79, § 294; WALKER 490; OGH. (Dec. 23, 1925) 7 SZ. 1006 No. 406.

Germany (itself): STEIN-JONAS, ZPO. § 829 I 3.

Switzerland: 2 SCHNITZER (ed. 4) 890.

Other countries: 1 Z.ausl.PR. (1927) 407.

⁷⁴ See RG. (July 3, 1903) 55 RGZ. 236, 239; (Sept. 26, 1913) 83 RGZ. 116.

⁷⁵ MINOR 287 § 125.

actor sequitur forum rei, as basing personal jurisdiction upon the presence or submission of the defendant rather than upon his domicile. When the English courts in garnishment proceedings abandoned the *in rem* theory of the custom of London⁷⁶ and analyzed the situation of simple debts in terms of personal jurisdiction, they emphasized the place where the debt is "properly recoverable." It is not exact, however, that personal service on the garnishee is the only requirement. The courts consider, as it seems, all the circumstances. Thus, Lord Scrutton, in a leading case where the theory was applied to the war seizure of a deposit in a London bank,⁷⁷ pointed out that the debt arose in London and that the original debtor made an appearance in the lawsuit and submitted to the jurisdiction, obtaining a benefit thereby. Lord Scrutton thought that any foreign country would recognize such jurisdiction. In fact, in another case of war seizure concerning life insurance policies, Atkins, then L. J., states as a rule derived from the ecclesiastical authorities:

"That in the case of an ordinary individual . . . for a long time the situation of a simple contract debt under ordinary circumstances has been held to be where the debtor resides; that being the place where under ordinary circumstances the debt is enforceable, because it is only by bringing suit against the debtor that the amount can be recovered."⁷⁸

Hence, the mere fact that the third debtor, the New York Life Insurance Company, had a branch office in London was not held sufficient to locate the debt because this was only one of several places of business,^{78a} but something more

⁷⁶ BEALE, 27 HARV. L. REV., *supra* n. 55, at 112; 1 BEALE 458.

⁷⁷ SWISS BANK CORP. v. BOEHMISCHE INDUSTRIAL BANK [1923] 1 K. B. 673, 682.

⁷⁸ NEW YORK LIFE INS. CO. v. PUBLIC TRUSTEE [1924] 2 CH. 101, 119.

^{78a} For a Dutch decision to the same effect, see H. R. (Nov. 26, 1954) N. J. 1955, No. 698, 4 NEDERL. TIJDS. INT. R. (1957) 96: the obligation of a Dutch corporation to pay salary to one of its employees working at a branch office in Indonesia was deemed not to be subject to garnishment in the Netherlands.

was needed for the localization of the debt; in the instant case, this additional element was found in the promise included in the policy to pay sterling in London. "That right is situate in this country, and only in this country." Uncertain as the law in England remains, it seems that a mere temporary sojourn of the garnishee, in the absence of the original debtor, would not induce an English court to render a garnishment order. All judges in the last-mentioned case regretted that they had to decide without having the policy holders in court, who should have been necessary parties—a point worth noting.

*United States.*⁷⁹ American courts, in the great majority, have construed the proceedings as directed against a debt located for jurisdiction purposes wherever the garnishee could validly be served with process. The debt is where the garnishee may be sued personally by his creditor. Under the Full Faith and Credit Clause, as the Supreme Court has stated in approving this view, any other state must recognize the double effect of the proceedings, divesting the original debtor and investing the garnishor.⁸⁰ The courts, conformably, take jurisdiction wherever the garnishee is found and process is personally served on him within the state, although it is sometimes required in addition that his debt be payable there.⁸¹

Normally, of course, a debtor is found at his domicile. Moreover, in several states domicile is sufficient for assuming jurisdiction even in the absence of the debtor; this approaches the Continental reasoning. As explanation, it is

⁷⁹ When I wrote first on the matter ("Situs Problems in Enemy Property Measures," 11 Law and Cont. Probl. (1945) at 126), Professor SUNDERLAND aided me with enlightening remarks, which I am using again with gratitude.

⁸⁰ *Harris v. Balk* (1905) 198 U. S. 215; *Louisville and Nashville R. R. v. Deer* (1906) 200 U. S. 176; *Baltimore and Ohio R. R. v. Hostetter* (1915) 240 U. S. 620; Restatement § 108.

⁸¹ *State ex rel. Fielder v. Kirkwood* (1940) 345 Mo. 1089, 138 S. W. (2d) 1009.

said that the domicil is the situs of the debt fixed by the legislature, or that it is the actual, as distinguished from the legal, situs, or that the debt is treated as a fund in the hands of the debtor at his domicil.⁸²

But the fact that domicil does increasingly determine jurisdiction and that this seems to enjoy interstate effect if fair notice is given to the debtor,⁸³ only increases the number of jurisdictions having power to dispose of the debt.

The American writers⁸⁴ have noted two defects of this mechanism, more serious than the Continental shortcomings because they apply primarily to the relation among sister states.

The original debtor is not necessary to the essential judicial proceedings. It is generally desired that he should be notified of a garnishment proceeding. But not even this requirement of fair justice is rigorously observed in all courts. The Restatement is satisfied with a reasonable attempt to give notice. If notice is given, he is supposed to appear at any place in the vastness of the United States where his alleged creditor happens to find and sue his alleged debtor. Federal interpleader⁸⁵ may force him to similar sacrifices. If he is not made aware of the proceedings, he will probably be able to defend against full faith and credit of the judgment, and ought to be able also to deny that it is *res judicata* against him.⁸⁶ But not always is he certain of such protection.

The risk imposed upon the garnishee, on the other hand, is the following.

⁸² MINOR 287 ff. § 125; STUMBERG (ed. 2) 107 with citations.

⁸³ See Mr. Justice Holmes in *McDonald v. Mabee* (1917) 243 U. S. 90 and comment by STUMBERG (ed. 2) 78.

⁸⁴ BEALE, 27 Harv. L. Rev., *supra* n. 55, 120; GOODRICH § 68.

⁸⁵ See the interesting complications described by CHAFEE, "Federal Interpleader," 49 Yale L. J. (1940) 377, 423.

⁸⁶ GOODRICH 146 § 68; but *cf.* the restricted formula in 38 C. J. S. § 577.

4. Double Payment of the Debt

English and American courts have dealt with cases where a garnishee objected that he may be compelled to pay the same debt again if his creditor should sue him in a foreign country where the domestic garnishment is not recognized as *res judicata*. Where this danger was convincingly proved, the garnishment order has been denied.⁸⁷ When proceedings are pending in another state, American courts are anxious to protect the garnishee against double proceedings by divergent methods, such as abatement of the action, stay pending foreign decision, or mere suspension of enforcement.⁸⁸

The German Supreme Court did not believe that it possessed such discretionary power.

A German seller had a claim for the price of delivered locomotives against a Portuguese buyer and owed the commission fee to the Portuguese broker. The claim of the broker against the seller was garnished in Germany by a German creditor of the broker. The court rejected the defense of the garnishee seller that in Portugal the broker had garnished the price owed by the buyer who was forced to pay.⁸⁹

In view of this situation, an authoritative German writer has contended that actual exercise of foreign jurisdiction should be recognized, when under its compulsion a debtor

⁸⁷ England: *Martin v. Nadel* [1906] 2 K. B. 26 and *cit.*

Canada, C. App. Ontario: *Richer v. Borden Farm Products Co.* (1921) 49 O. L. R. 172, 64 D. L. R. 70 and *cit.*

Quebec: *The Equitable Life Assur. Co. v. Perrault* (1882) 26 L. C. J. 382, 385, 389; *Harris v. Cordingley* (1899) 16 Que. S. C. 501; *Fraser v. The Beyers-Allen Lumber Co. etc.* (1913) 45 Que. S. C. 42; JOHNSON (ed. 2) 976 ff.

United States: *Parker, Peebles and Knox v. Nat'l Fire Ins. Co. of Hartford* (1930) 111 Conn. 383, 150 Atl. 313; *cf.* Notes, 40 Yale L. J. (1930) 139; 69 A. L. R. (1930) 609. *Weitzel v. Weitzel* (1924) 27 Ariz. 117, 230 Pac. 1106; *Clark-Wilcox Co. v. Northwest Eng. Co.* (1943) 314 Mass. 402, 50 N. E. (2d) 53.

⁸⁸ Note, 91 A. L. R. 959, 964; 5 Am. Jur. 34 §§ 698 f.

⁸⁹ RG. (Nov. 3, 1911) 77 RGZ. 250; *cf.* RHEINSTEIN, *supra* n. 55, 287 n. 1; 2 FRANKENSTEIN 265 who approves the decision.

has paid either to his creditor despite a German attachment or to the creditor of his creditor on the ground of foreign attachment.⁹⁰

5. Conclusion

Evidently, no system has been found suitable to organize harmonious international proceedings. One difficulty is non-recognition of foreign seizures, another the hardships for individual parties to appear in foreign jurisdictions. In both respects, however, improvements have been found in part and could be amplified. A common basis of recognition is afforded by the widespread idea that a debt may be seized at the domicile of the debtor.⁹¹ It seems exaggerated that in the United States mere feasibility of service of process, whatever its merits as a foundation of personal jurisdiction, suffices to create rights to the detriment of out-of-state creditors.

On the other hand, the methods by which the American courts are enabled to avoid the danger of double payment by the garnishee ought to be followed in the civil law courts. The promising development of federal interpleader is another progress mitigating the difficulties of the parties involved.

Notification to the foreign original debtor should be required more distinctly and more forcefully.

⁹⁰ JONAS, JW. 1932, 668 and STEIN-JONAS, 2 ZPO. § 829 n. VI 3; VII 1 b. On the defenses based on unjust enrichment, see RHEINSTEIN, 8 Z.ausl.PR., *supra* n. 55, at 288 and n. 1.

⁹¹ See particularly RHEINSTEIN, *supra* n. 55.

Setoff and Counterclaim (Compensation)¹

“*COMPENSATIO est debiti et crediti inter se contri-
butio*,”² is a definition from the end of the classical Roman period. At that time, as it seems, it had become a general habit to allow a defendant in a lawsuit a defense by claiming against the plaintiff a debt due by the latter to the defendant.³ The history of this institution before and after this momentous stage has been agitated and has led in the modern codes to related but differentiated regulations, all parts of substantive private law. In England, an entirely independent doctrine slowly emerging shows various parallels to the Roman development, but has remained original and, in contrast to the Continental systems, confined within the framework of judicial procedure.

In this matter, we must separate not only the two groups of municipal bodies of law but also their application in conflicts law.

I. ANGLO-AMERICAN LAW

1. Institutions Involved

The English methods of setoff and counterclaim are clothed in terms of procedural remedies to be used by a

¹ SACERDOTI, “Des conflits des lois en matière de compensation des obligations,” *Clunet* 1896, 57; TOSI-BELLUCCI, “La compensazione nel diritto internazionale privato,” 84 *Archivio giuridico* (1910) 9; DÖLLE, “Die Kompensation im internationalen Privatrecht,” 13 *Rheinische Z. f. Zivil- und Prozessrecht* (1924) 32, with illustrations; DE NOVA, *L'estinzione delle obbligazioni convenzionali nel diritto internazionale privato* (1931) 209; GRAF, *Die Verrechnung im internationalen Privatrecht* (1951). *Comparative municipal law*: GERHARD KEGEL, *Probleme der Aufrechnung: Gegenseitigkeit und Liquidität, rechtsvergleichend dargestellt*, 13 *Beiträge zum ausländ. und int. Privatrecht* (1938).

² MODESTINUS, *Dig.* 16, 2, 1.

³ BONFANTE, *Istituzioni di diritto romano* (ed. 8) 401.

defendant against a plaintiff. A rich and differentiated development from this origin in the United States has produced a variety of regulations of setoff, recoupment, and cross action, and of the so-called counterclaim in the "code states," comprising setoff and recoupment. The many statutory changes, differences between state and federal jurisdictions, and the influence of equity have resulted in a progressive adjustment to practical needs. Perhaps for the same reasons, however, the subject is so loaded with particularistic complications that no serious effort has ever been made to reconsider the entire matter from the viewpoint of substantive law. It still remains in the common opinion a topic of procedure, subject, as a matter of course, to the law of the forum.

Following the language of the Restatement of the Law of Contracts, we shall speak of "setoff and counterclaim," or more briefly, according to English models, of "setoff," to cover the ground taken in civil law by *compensatio*. The exceptional rules on bankruptcy and judgment debts must be reserved. Mutual accounts by agreement are a separate topic to be discussed later.

English and American lawyers are extremely firm in asserting that setoff and its associates are procedural institutions. As a particularly impressing feature, there is no extrajudicial setoff, except in case of insolvency. A debtor:

"Cannot, in the absence of agreement, apply a set-off in reduction of his debt, on a tender of the residue; but he may avail himself of such set-off by way of defence or counter-claim in an action by the creditor."⁴

Undoubtedly, many a time thoughtful judges and writers have penetrated behind the procedural aspect into the situation of the parties. No one, in fact, denies that under the conditions of the law the parties have a *right* to a setoff.

⁴ JENKS-WINFIELD § 216.

The well-known dictum of Judge Mack (1923) may be remembered:

"The right of a counterclaim and set-off having been first introduced as a part of our procedural law, halting recognition is just beginning to be given to the fact that the right as between litigants is something more than a procedural convenience and is really a requirement of substantive justice. That the right of set-off and counterclaim is regarded in our law today as affecting, in important aspects, the substantive relations between the parties, is clearly seen in the rules as to the assignment of choses in action being subject to existing set-offs or counterclaims."⁵

The Contracts Restatement is the most eloquent testimony to the substantive nature of the party relations involved. Nevertheless, its classification as procedural seems unchallenged.

2. Conflicts Principle

In consistency with their general attitude in the municipal sphere, common law lawyers do not hesitate to state the simple rule that setoff and counterclaim follow the law of the forum.⁶ To preclude excessive application, the meaning of this rule has been clarified by Minor: how the defense is pleaded and what effect the plea has is regulated by the procedural law of a court, but the validity and effect of

⁵ The Gloria (D. C. S. D. N. Y. 1923) 286 Fed. 188, 192. Rosenberry, J., in Shawano Oil Co. v. Citizens State Bank (1936) 223 Wis. 100, 269 N. W. 675: "A right of offset is more than a procedural matter. Under § 331.07 the plaintiff was entitled to set off . . . upon the payment of its note."

⁶ England: MacFarlane v. Norris (1862) 2 B. & S. 783; Meyer v. Dresser (1864) 16 C. B. (N. S.) 646, 664; WESTLAKE § 346; FOOTE 555; DICEY (ed. 6) 859, 865 Rule 193. In contrast with the sixth edition of Dicey's book, the seventh edition takes the position that setoff, but not counterclaim, may also directly attach to the plaintiff's claim and consequently be governed by the *lex causae*; see DICEY (ed. 7) 1102 Rule 204.

United States: STORY § 575; WHARTON § 788; MINOR § 211; 3 BEALE 1606 § 593.1, citing decisions from 1846 to 1932; GOODRICH 192.

each claim is measured according to the law governing it.⁷

Only on an express or implied agreement of the original parties to an instrument, may setoff be considered an equity attaching to the instrument.⁸

3. Foreign Compensation in Common Law Courts

How should civil law compensation, a substantive institution, be treated in a common law court? Authority is scarce. But the oldest American decision relating to the matter recognized a setoff allowed in a sister state and expressly stated that the setoff "does not relate to the form of proceeding but goes to the merits of the case; and shews, that no recovery ought to be had. So far from relating to the form of the remedy, it shews there ought to be no remedy."⁹ This line of thinking seldom has been followed,¹⁰ but may be regarded as allowing a common law court to admit an allegation that compensation has been achieved under the law of a civil law country.¹¹ At least, the writers seem in agreement that foreign discharge of an obligation by compensation is recognizable.¹² Moreover, if two debts

⁷ MINOR 525 § 211.

⁸ MINOR 526; FALCONBRIDGE, *Conflict of Laws* (ed. 2) 371 n. (g).

⁹ *Vermont State Bank v. Porter* (1812) 5 Day (Conn.) 316 at 321; 5 Am. Dec. 157.

¹⁰ United States: *Fidelity Insurance, Trust & Safe-Deposit Co. v. Mechanics' Savings Bank* (C. C. A. 3d 1899) 97 Fed. 297, 56 L. R. A. 228: the statutory liability of a stockholder, resident of Pennsylvania, to the creditor of an insolvent Kansas corporation would have been extinguished by the claim of the stockholder against the corporation for the payment of bonds under Kansas law, governing both claims; this equitable defense is recognized. To interpret it as a defense at law, in order to serve in the federal court, has been disapproved. See *Anglo-American Land, M. and A. Co. v. Lombard* (C. C. A. 8th 1904) 132 Fed. 721, 733.

¹¹ England: *Allen v. Kemble* (1848) 6 Moo. P. C. C. 314, 321: discharge of a debt by compensation under Roman Dutch law was recognized, although the decision is inconclusive with respect to the conflicts rule, FALCONBRIDGE, *Conflict of Laws* (ed. 2) 372.

¹² DICEY (ed. 7) 812 illus. 3. See also EHRENZWEIG, *Conflict* 437, who urges permitting a setoff granted by the very same foreign statute under which the plaintiff is suing. But why should this technicality matter?

face each other in compensable condition according to French law governing both debts, their extinction may be claimed by either party in an American court. It is immaterial where either debt arose. But if the two debts are governed by different laws, it may be doubtful which law, or whether both simultaneously, should be applied. This is a problem very controversial in Europe, which we must consider later.

On the other hand, it has been concluded that the law of the forum is free to authorize, by its judicial discretion, a setoff not permissible in the governing foreign law.¹³

4. Application in Civil Law Courts

The Continental literature, aware of the different characterization of setoff and compensation in the unanimous Anglo-American view has responded by assuming that the English and American remedies are inapplicable in civil law courts. Generally, it seems to be felt that such a court has to apply the law of the forum, on an assumed *renvoi* from the governing law.¹⁴

This solution has been challenged, however. In a thorough comparative study, conforming to the standards reaffirmed in the present work, Gerhard Kegel¹⁵ has examined the general function and two of the main conditions of compensation and the common law remedies in question. As a result of his analysis, the author states that, under present concepts of analytical jurisprudence, counterclaim in England, New Jersey, Arkansas, and Connecticut is in fact a strictly procedural defense, but English and American setoff and recoupment, and counterclaim in the code states, contain a mixture of substantive and procedural elements. He draws this conclusion from the common roots of setoff in judicial

¹³ M. WOLFF, *Priv. Int. Law* (ed. 2) 456 f. § 439.

¹⁴ NEUNER, *Privatrecht und Prozessrecht* (1925) 59, 133; DÖLLE, *supra* n. 1, at 34.

¹⁵ KEGEL, *supra* n. 1, esp. 41 ff.

practice and in bankruptcy law which is a substantive institution, the analogous structure of setoff in bankruptcy and insolvency cases, the language of certain decisions, and the existence of extrajudicial setoff in installment sales and bank accounts. Despite some doubts, the author is inclined to think that it should be possible to extract the substantive rules and apply them in a civil law court.¹⁶ For instance, conflicts law as understood on the Continent, may be able to observe the rules usual in a specific American court on the question whether the defendant may plead a debt which is owed by or owing to certain third persons.¹⁷ In contrast, the requirement of a liquidated sum, where it still exists, is so dominated by procedural convenience as to dissuade us from transplanting it to a foreign forum.¹⁸ This interesting inquiry deserves to be extended to the remaining problems. Some day a common platform will be found.

In the meantime, so long as no American court applies the rules of another state on this subject, it will be inadvisable for a civil law court to proceed differently. The difficulty of extracting the substantive rules or of ascertaining the actual law of an American state is very great.¹⁹ Any attempt to transform setoff and counterclaim into pure private law, seems premature. In the phase reached by these institutions up to the present time, foreign conflicts law ought to leave them totally unobserved.

All European writers seem to agree, however, that in a case governed by English or American law compensation

¹⁶ KEGEL, *supra* n. 1, 48 f.

¹⁷ *Id.* at 153.

¹⁸ *Id.* at 174.

¹⁹ As an example, it may be considered that in the United States, even where a claim barred by a statute of limitations may be used for pleading setoff, various theories exist concerning the effect of the plea. While the question whether a claim barred by limitation may be pleaded is substantive in the Continental view, the effect of a successful plea, in an American court, representing a claim exceeding the plaintiff's demand regards the extent of the bar procedurally conceived. For three different solutions of the latter problem, see WOOD, 1 Limitations 307 ns. 15-17.

is not effective except if invoked as a defense or by cross-action in court.²⁰ In such cases, the court treats compensation as pleaded exclusively on the ground of a procedural party declaration, not on the ground of an extrajudicial act and, hence, applies its own procedural rules involving unconditional and conditional compensation,—the latter occurring when the defendant avails himself of his counterclaim only on the condition that the plaintiff's claim is held effective. The private law of the forum serves to fill the gaps left by the procedural rules.

II. CIVIL LAW

1. Institutions Involved

“*Compensatio*” of debts appears in various kinds, the most important of which are at present effectuated either by operation of law or by extrajudicial informal declaration of either party. “Legal compensation” stems from the unconsidered generalization, in the *Corpus Juris*, of a classical dictum, “*ipso iure compensatur*,” which had been said of a certain type of banker who was compelled by the Praetor, in suing customers, to restrict his petitions to the balance of current accounts.²¹ This slogan, as finally adopted in the French and Austrian Civil Codes and many subsequent laws,²² means that the two debts extinguish each other at the first moment of their coexistence in compensable condition. Although this construction still produces its consequences if the compensation is considered “definitely” established,

²⁰ DÖLLE, *supra* n. 1, 42.

²¹ GAIUS IV §§ 64-68; LENEL, *Edictum perpetuum* § 100; Dig. 16, 2, 21; C. 4, 31, 14; PERNICE, *Labeo*, Vol. II, 1, 279; LENEL, *Palingenesia Paulus* No. 1273.

²² Argentina: C. C. art. 818.

Austria: C. C. §§ 1438 ff.

Brazil: C. C. art. 1009.

France: C. C. arts. 1290 ff.

Italy: C. C. (1865) art. 1285; C. C. (1942) art. 1241 says even expressly: “i due debiti si estinguono.”

Portugal: C. C. art. 768.

its peculiar automatic working has been abandoned. The defendant in a lawsuit must invoke the fact of the compensation or be deemed to renounce it and revive the discharged debt.²³

The modern type of compensation proclaimed by the German Civil Code²⁴ rests upon a declaration of one party to the other, either extrajudicially or in pleading. When this is done, the effect is retroactive so that the debts are deemed extinguished as of the first moment of their simultaneous existence in the condition required for setoff. Thus, in both the French and German systems, for instance, the running of interests of any percentage is terminated on both sides from that time.

The conditions in the civil law systems also are roughly the same, to the extent that two persons must be reciprocally and personally bound by obligations, existent and enforceable, to the payment of money or other fungible things of like nature.

These parallels in operation and prerequisites have afforded a sufficient basis for the dominant conflicts doctrine in Europe, comprising all Continental laws in a joint conflicts rule concerning compensation.²⁵ What the rule should prescribe is another question.

2. Conflicts Theories

As usual, a variety of theories has been set forth.²⁶ At present, only three deserve mention and only two of these seriously compete for prevalence.

²³ 2 COLIN et CAPITANT 123; PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) § 1290.

²⁴ Germany: BGB. § 387.

Japan: C. C. art. 505.

Switzerland: C. Obl. art. 120.

²⁵ TOSI-BELLUCCI, *supra* n. 1, 26-28, often cited.

²⁶ See the critical surveys by 2 ARMINJON § 155; DE NOVA 181 ff. An individual theory has also been hinted at by 2 PONTES DE MIRANDA 234.

As in common law, the law governing the debt will determine whether it is in existence, mature, liquid, and enforceable,²⁷ if the law or laws controlling the compensation require these conditions. We are interested only in what law or laws are in fact controlling.

(a) *Lex fori*. The law of the forum has been postulated, sometimes invoking the common law, by a series of authors. Some have had in view lawsuits exclusively;²⁸ others have assumed that the connection with procedural rules should prevail,²⁹ or that the court ought to be able to decide according to equity.³⁰ These views have repeatedly been criticized and are commonly rejected. Characterization of compensation as a remedy or as procedural is regarded as a grave mistake.³¹

(b) *Laws of both debts cumulatively*. Many French authors,³² supported by Zitelmann and other writers,³³ have required that when claim and counterclaim are governed by different laws, compensation must be simultaneously authorized and made effective by each law. They argue that discharge of both debts requires consent of both laws. Although the principal claim depends only on its own law, the counterclaim is not extinguished unless the law governing it so provides, and without such extinction not even the

²⁷ E.g., RG. (July 1, 1890) 26 RGZ. 66: French-Rhenish law is consulted for the question whether a legacy claim is *exigible*. It was wrong that OLG. Frankfurt (April 27, 1923) JW. 1924, 715 applied German bankruptcy law to decide premature compensability of a debt in a Dutch bankruptcy.

²⁸ 2 BAR 91 (with important qualifications); VALÉRY 1008 § 700; and to some extent in an elaborate way, SACERDOTI, *supra* n. 1, at 57.

²⁹ WALKER 515; see also VAREILLES-SOMMIÈRES §§ 415-418.

³⁰ ROLIN, 2 Principes 578 §§ 996-998.

³¹ See especially TOSI-BELLUCCI, 84 Archivio giuridico (1910) at 47 ff.; DE NOVA 147 ff.

³² SURVILLE 380 § 267; PILLET, 2 Traité 215 § 502; 2 ARMINJON § 155; and others.

³³ 2 ZITELMANN 397 ff.; KOSTERS 812; see for Brazil the citations by 2 PONTES DE MIRANDA 233, *cf.* ESPINOLA, 2 Lei Introd. 624 n. (b). DÖLLE, *supra* n. 1, 32; DE NOVA 234 ff.; GRAF, *supra* n. 1, at 74 ff., 93 ff.; two German decisions cited by LEWALD § 348 (b).

principal claim would be discharged. Against the objection that this method gives preference to the law according to which setoff is not effective,³⁴ it has been replied that favoring the less exacting law would harm the authority of the more severe law; either law has "equal authority."³⁵

The precise meaning of this theory seems to vary. In the most consistent variant, however, the entire problem whether compensation by unilateral act is effective in the individual situation, must be decided by both laws. The total facts are tested by both legal systems cumulatively.³⁶ We shall see what this means.

(c) *Law of the principal claim.* A vigorous third theory, at present prevailing in the German and Swiss doctrine, is satisfied with the observance of the provisions which govern the claim against which compensation is declared. If the law governing the principal debt predicates that the debt is discharged, this is all that is needed.³⁷ Or in terms of procedure, the law that governs the debt sought to be enforced and alleged to be discharged by setoff, is competent.

The followers of this theory effectively refute the main argument of the adversaries, viz., that because of the nature of compensation both laws must agree in extinguishing both debts. The party claiming the setoff avails himself of a means of discharge by which a unilateral use of a counterclaim is substituted for payment. This must be permissible under the law determining the modes of discharge. Insofar,

³⁴ CERETTI, *Obblig.* 148.

³⁵ DE NOVA 164 f.

³⁶ Thus expressly, DÖLLE, *supra* n. 1, 40; and seemingly, 2 ARMINJON 343; DE NOVA 240; BATIFFOL 450 § 567.

³⁷ BAR, *Lehrbuch* 118; 2 BAR 91; NEUMEYER, *IPR.* 29 (in principle); M. WOLFF, *IPR.* (ed. 3) 150 f.

Germany: ROHG. (June 4, 1873) 10 ROHGE. 226; RG. (July 1, 1890) 26 RGZ. 66; OLG. Augsburg (Nov. 6, 1917) 36 ROLG. 105.

Danzig: OLG. (Feb. 28, 1934) 10 Z.ausl.PR. (1936) 107.

Switzerland: BG. (Oct. 26, 1937) 63 BGE. II 383, 384, and *cit.*; *id.* (June 26, 1951) 77 BGE. II 189, 190 f.; *id.* (June 24, 1955) 81 BGE. II 175, 177; 2 MEILI 35 § 107; SCHOENENBERGER-JAEGGI No. 366.

however, as this party employs his own claim, he does so not by any forcible method of self-help, but by a voluntary disposition, to which he is entitled under the law governing his claim. It remains merely to ask whether this law frees the debtor; this will always be true, since the creditor has received satisfaction, except when setoff is not known to this law.³⁸

3. Rationale

The arguments used for the two antagonistic Continental opinions have not sufficed to convince either party. It would seem that these theories are too much dependent on the municipal doctrines, and moreover that they are framed in all too general terms.

Where the axiom, *ipso iure compensatur*, is the basic concept, as in France and Italy, it might be natural to assume that automatic termination of two debts by "law" presupposes approval by both laws. This idea, however, should have been discarded when it was settled that one of the parties must act to set the mechanism of the double discharge in motion.

The modern German doctrine, on the other hand, may be inclined to consider the claim to be discharged by declaration of the debtor as the main problem. Also some common law writers may think that, if any law other than the law of the forum is considered, it is the law governing the debt sued upon. But the matter is not so simple.

In fact, the subject is so involved as to suggest future special investigation. Only some of the problems may be illustrated here.

Although we surmise that the mode of operation by procedural defense or extrajudicial declaration is immaterial, and disregard the variety existing in the effects of compen-

³⁸ LEWALD 283 f.

sation, the conditions to be fulfilled are still not all susceptible of the same treatment.

(a) The innumerable provisions by which compensation is excluded because of the nature of a debt may be divided into two classes: prohibitions to discharge a certain debt by compensation and prohibitions to use a certain debt as a means of compensation—thus concerning compensation *against* a debt and *through* a debt. But both groups defy the double-law theory.

On one side, certain claims are privileged so that they cannot be extinguished without consent of the creditor except by actual payment or equivalent satisfaction. Thus, according to the various systems, a debtor may not be discharged by setoff, for instance, from a debt grounded on tort (or intentional wrong, or unlawful possession); from a judgment debt; from restitution of a deposit (or a bank deposit); from an unattachable debt such as an obligation to pay wages may be, etc. The debtor may not set off *against* such a claim. It is not true, however, that the obligation in these cases is not "susceptible of compensation." The *creditor* of such an obligation based on tort, deposit, or wages is not prohibited, in principle, from extinguishing it by using a debt of his own; this is permitted by the law governing his privilege, and a fortiori by a law without such prohibition.

An exception confirms the rule. Although the provisions concerning compensation merely state that there can be no unilateral compensation against an unattachable debt or a debt of certain wages, it has been inferred from other sources of law in Switzerland that a wage earner cannot dispose of his wages insofar as they represent his minimum living standard.³⁹

³⁹ v. TUHR, Allg. Teil Schweiz. Oblig. R. § 78 n. 76; I OSER-SCHOENENBERGER 638 III.

Even so, it is exclusively the law governing the employment which prevents the employer, and by exception the employee, from disposing of the claim for wages.

Illustrations. (i) A, an employee of B, owes B repayment of a loan. Under the law governing the employment, B is not entitled to satisfy his claim by withholding wages. A, under the law governing the loan, is entitled to compensate it by setting off his wage claim, usually even including future claims. But, by exception, the law governing the employment also precludes A from resorting to this right of compensation.

(ii) A has deposited a sum of money with B. Under the French Civil Code, article 1293 n. 2, a depositary is not allowed to set off any claim of his own. French law, however, permits the depositor to set off his own claim. German law has no such prohibition. It has been deduced from the double-law theory that B cannot set off, even though the deposit be governed by German law, if B's counterclaim against A is under French law. This result has been advocated, although in this case either law would permit the compensation.⁴⁰

It seems logically and practically sufficient, however, that a prohibition by a law should apply to the case for which it is meant.

On the other side, claims of a certain origin or affected by certain occurrences, are considered too weak to discharge a normal claim. Thus, a debtor may not compensate for his debt through a claim barred by limitation of action, or by an exception of fraud or informal release. Again, it appears that the law of the claim to be discharged, here the blameless claim, is alone material.

Illustration. Jackson sued his employer for back salary and commissions; the defendant moved for setoff by cross-action on a claim for conversion; this claim was not yet barred by limitation at the time of the action, but the period lapsed during the trial. Under such circumstances, two

⁴⁰ DÖLLE, *supra* n. 1, 40.

Texas decisions have held setoff accomplished by operation of law; two are of the contrary opinion.⁴¹ If there were equally different solutions in two civil law jurisdictions, the law under which the suit is brought alone could decide the time when limitation will bar counterclaim.

Hence, prohibitions on compensation, either against or through a claim of a certain nature, are determined in principle by the law of the principal claim.

(b) This principle is not adequate for the requirement of reciprocity, that is, the condition that claim and counterclaim should exist between the same parties or persons equivalent to them.

Illustrations. (i) Suppose the principal debt is governed by New York law, whereas the surety has bound himself under the law of Cuba. The former law prohibits,⁴² the latter allows,⁴³ the surety to use a counterclaim of the debtor against the suing creditor. We have found earlier that the relationship between the principal and the surety should be consulted, in addition to the law of the suretyship.⁴⁴

(ii) Under German law, a debtor may compensate against a subassignee such counterclaims as he acquired against the assignee before notice of the subassignment, even though he did not know of the assignment until he heard of the subassignment.⁴⁵ He cannot do so if his debt is governed by English law and the subassignee was without notice of the counterclaim.⁴⁶

Should he be permitted to discharge his German-governed debt by an English-governed counterclaim against the as-

⁴¹ See *Birk v. Jackson* (Tex. Civ. App. 1934) 75 S. W. (2d) 918 and Note, 13 Tex. L. Rev. (1935) 540.

⁴² *Gillespie v. Torrance* (1862) 25 N. Y. 306.

⁴³ Cuba: C. C. art. 1197.

⁴⁴ *Supra* Ch. 47 ns. 48-51.

⁴⁵ Commentaries to BGB. § 406.

Switzerland: v. TUHR, Allg. Teil Schweiz. Oblig. R. 752.

See also *Wyman v. Robbins* (1894) 51 Ohio St. 98, 37 N. E. 264.

⁴⁶ *In re Milan Tramways Co.* (1884) 25 Ch. D. 587.

United States: Restatement of Contracts § 167 (3); 18 Minn. L. Rev. (1934)

signee? It is repugnant to the common law that a creditor should free a debtor against his will.

In all such cases where three parties are involved, mere observance of the law governing the principal debt is insufficient.

(c) Exclusion of unliquidated debts from setoff, as provided in the Latin systems, under the influence of the *Corpus Juris*, has led to the following problem:

Illustration. A has a German-governed claim against B who opposes an Italian-governed unliquidated counterclaim. The latter is available for compensation under German law, though possibly needing special procedural treatment until verification; this would suffice under the theory invoking only the law of the debt to be discharged.⁴⁷ Compensation has been declared excluded, however, under the two-laws theory, because Italian law is supposed to require "liquidity" in the interests of both parties.⁴⁸

Historically, the requirement of liquidity served the purpose that plaintiffs should be protected from being exposed to vexatious delay of the suit by fictitious or unsubstantiated allegation of exceptions. More emphasis has been attributed in modern times in France to the idea that compensation is a means of abbreviated double payment—"paiement abrégé." This theory excludes debts of uncertain existence or amount from the function of paying as well as being paid. But such an idea does not necessarily affect compensation against a debt governed by a law admitting illiquid debts.

Since liquidity is generally regarded also in Latin laws as a substantive requirement for legal compensation, the one-law theory seems to suffice.

A different aspect is presented by the Anglo-American requirement of liquidity excluding from setoff debts which must be assessed by a jury. As a matter of procedure, the

⁴⁷ RAAPE, IPR. (ed. 5) 517.

⁴⁸ DE NOVA 167 n. 2.

common law requirement pertains to the law of the forum. And so does the French judicial compensation, which may intervene after the defendant's counterclaim has been ascertained in the proceedings.

Conclusion. In most respects, it would seem that the law of the principal debt should exclusively permit or prohibit the use of compensation against the principal debt and determine the availability of the specific opposite claim for compensation. This theory is, however, not correct in all respects. More research is necessary to clarify this subject.

III. CONTRACT OF COMPENSATION

Nothing in the above-discussed doctrines affects voluntary agreements providing for the compensation of either existing or future debts. They have not always been held licit,⁴⁹ but are now everywhere permitted, and subject to their own law or that of the main contract to which they are ancillary.

The Continental writers are almost unanimous in following the intention of the parties.⁵⁰ In England, the right of setoff has been recognized when based on an express term of the original contract but it is not settled whether it may subsequently be agreed.⁵¹

The most prominent example is afforded by running accounts. The working of book accounts with periodical balances and acknowledgments is extremely controversial in theoretical construction, and certainly shows fundamental differences between common law and Continental practices.⁵²

⁴⁹ *Crews v. Williams* (1810) 2 Bibb (Ky.) 262 and other old decisions.

⁵⁰ DIENA, 2 *Dir. Int. Com.* 152 § 124; *id.*, 2 *Principi* 263; DESPAGNET 921 § 316; TOSI-BELLUCCI, *supra* n. 1, 73 n. 2; 2 MEILI 36 speaks of the contractual exclusion of compensation.

⁵¹ FOOTE 556; HIBBERT 189.

⁵² See the excellent article by ULMER, "Kontokorrent," 5 *Rechtsvergl. Handwörterbuch* 194, 216.

It would seem that these multiple differences ought not to affect the formation of a conflicts rule. But this is an unsolved problem,⁵³ except for one important case. When a private individual keeps a running account with a bank, his relationship is covered as a whole by the law of the place where the bank office or branch involved is situated.⁵⁴ The Swiss Federal Tribunal has clearly stated this solution with regard to the relation flowing from a current account.⁵⁵ It was embarrassed, however, when both parties to the account were professionally engaged in banking; in the particular case, the court clung to the law of the forum invoked by both attorneys.⁵⁶

⁵³ 2 BEALE § 322.1 argues exclusively from the viewpoint of *lex loci contractus*.

⁵⁴ Cf. *supra* Ch. 34 ns. 56 ff. and FICKER, 4 Rechtsvergl. Handwörterbuch 473 No. 4.

⁵⁵ BG. (Nov. 22, 1918) 44 BGE. II 489, 492; (Oct. 26, 1937) 63 *id.* II 383, 385.

⁵⁶ BG. (Oct. 26, 1937) 63 BGE. II 383, 386.

CHAPTER 52

Statutes of Limitation

I. PRELIMINARY OBSERVATIONS

1. The Problem

THE conflicts law with respect to limitation of action by lapse of time has been discussed since the thirteenth century, and in this long history, "all possible and also impossible ideas have found advocates."¹ "Few arguments have been so much discussed and have occasioned so many varied and disparate opinions as that concerning the law controlling limitation of action."² Although the truth of these statements is all too apparent to students of conflicts laws, only two main systems have stayed in competition. They correspond almost exactly with the division between common law and civil law. In British jurisdictions and in the United States, in principle "limitation of actions" is said to affect the "remedy" only and to belong to the procedural law of the forum; every court applies the domestic statute of limitation, in principle excluding all foreign statutes. In the countries of the civil law, after long drawn-out debates, it is at present uniformly recognized that limitation of "action" is a misnomer and that it affects the substantive right; prevailingly, it is determined by the law governing the obligation.

This contrast is notorious. Excellent surveys of the world literature in older and recent writings have tended to uni-

¹ I VAREILLES-SOMMIÈRES 261; quoted by DE NOVA 96 § 17.

² DIENA, I *Dir. Com. Int.* 440.

form conclusions in favor of the substantive classification.³ At least one energetic article has come forth to vindicate the viewpoint of the common law.⁴ The Institute of International Law in 1926 reached a sensible proposal for uniformly applicable rules.⁵ Must we go again over all this territory?

Unfortunately, it is still necessary to do so. Too much in the debates going on for so many centuries has been a strange mixture of obsolete legal terminology and concealed policy considerations; the policies have been too often one-sided or confused; and the provincial lawyer's thinking has usurped undue privilege. The subject, thus, has become an outstanding illustration of the necessity for an unbiased and supernational discussion.

Our inquiry, however, has to start with the municipal law. This exception from the habits of this present work does not include an inconsistency of methods. Although conflicts law ought to have its own standards and evaluations, analytical research serving the formation of uniform conflicts rules always requires investigation of similarities and dissimilarities of the various systems, and furnishes a particularly useful help when it reveals substantial analogies. In this matter, objective criticism discovers vital analogies despite different labels, concepts, and characterizations,

³ On the present doctrine in Continental literature, particular mention is due to JEAN MICHEL, *La prescription libératoire en droit international privé* (Thèse, Paris, 1911) (second edition, Paris, unavailable), the substance of which Michel has condensed in 1 *Répert.* 292 ff.; DE NOVA, *L'estinzione delle obbligazioni convenzionali* (1931) 97-137; BATIFFOL §§ 575 ff., 586.

Other (selected) special treatments: WUNDERLICH, *Zur Lehre von der Verjährung nach internationalem Rechte*, in *Festschrift für Ernst Heinitz* (Berlin 1926) 481-512; SCHOCH, *Klagbarkeit, Prozessanspruch und Beweis im Lichte des internationalen Rechts* (1934) 52 ff., 110 ff.; SCHLINK, "Die internationalprivatrechtliche Behandlung der Verjährung in den Vereinigten Staaten," 9 *Z.ausl.PR.* (1935) 418; PHILONENKO, "De la prescription extinctive en droit international privé," *Clunet* 1936, 259, 513.

⁴ I am speaking of the impressive article by AILES, "Limitation of Actions and the Conflict of Laws," 31 *Mich. L. Rev.* (1933) 474-502.

⁵ Viennese Meeting, 1924, 31 *Annuaire* (1924) 182.

which, together with their influence on practical solutions, must be questioned as a first step to a sound conflicts law.

It is to be borne in mind that we are here concerned exclusively with the rules concerning ordinary obligations, and not claims flowing from property rights or obligations arising out of family relations or succession.

2. Historical Note

In order to gain an objective view of the problem, a few historical facts should be kept in mind.

In the ancient Roman common law (*ius civile*), most actions were "perpetual," whereas the praetorian actions were often limited to a year (*annus utilis*).⁶ Greek practice developed a rebuttable presumption against the existence of a debt after a long time,⁷ probably the model of a late Roman practice known to us by an imperial edict for Egypt.⁸ Theodosius II subjected the old perpetual actions to a *praescriptio longi temporis*, resulting in their "extinction" of the action and this prescription went over into Justinian's compilation.⁹ Almost all features of the modern provisions on "limitation of actions"—the English term itself is borrowed from Theodosius and Justinian—are contained in the Corpus Juris: commencement of the period when the action is born, causes and effects of suspension and interruption, revival, and so forth.

An important modification, however, was worked out in England after the civil war¹⁰ and in secular disputes in civil

⁶ See, e.g., BUCKLAND, *A Textbook on Roman Law* (ed. 2, 1932) 689.

⁷ PARTSCH, *Longi temporis praescriptio* 118 f.

⁸ Papyrus Flor. No. 61, 1, 45 (85 A. D.); for an application, see Papyrus Oxyrhynchos No. 68 (131 A. D.).

⁹ C. Theod. 4, 14, 1, 3 (A. D. 424); C. Just. 7, 39, 3, 2: *hae autem actiones annis triginta continuis extinguuntur, quae perpetuae videbantur, non illae quae antiquitus fixis temporibus limitantur.*

¹⁰ See ANGELL 310 § 285 on the development through *Brown v. Hancock* (1628) Cro. Car. 115, 79 Eng. Re. 701; *Tankersley v. Robinson* (1629) Cro. Car. 163, 79 Eng. Re. 742; *Stile v. Finch* (1634) Cro. Car. 381, 79 Eng. Re. 932.

law; the effect of the lapse of time, originally operating automatically, was changed into a mere defense to be pleaded by the defendant at his pleasure.¹¹ The influence of canon law and English equity jurisdiction may be neglected in a discussion restricted to obligations.¹²

Byzantine, Continental, and English sources all speak of "action" as the object of limitation. The meaning of the word is indicated by the long and firm doctrinal tradition coming from classical Roman law and represented by the category of *jus quod pertinet ad actiones*,¹³ co-ordinate with the law of persons and the law of things. Roman and English professional legal practice started from a few formulas of procedure to be used in certain cases. The progress consisted in increasing the number and refining the use of these formulas until the procedure *extra ordinem* in one system and equity in the other became the means of new developments. But not withstanding the dissolution of formalism and the enrichment of the system, the ancient jurisconsults and the English jurists until the nineteenth century¹⁴ considered the decision of lawsuits as the object of all their efforts, and the question under what conditions a petition (action) could be judicially recognized and enforced as their central problem.

¹¹ In canonist procedure since the end of the fourteenth century, the court took notice *ex officio*. The German doctrine adopted the defense theory as late as the nineteenth century. See ERNST HEYMANN, *Das Vorschützen der Verjährung* (1895) and KIPP, 45 *Z. Handelsr.* (1896) 608.

¹² The comparatively few cases in which *laches* has been applied not to property claims but to suits for restitution, do not directly apply the statute of limitation, see Restatement of Restitution § 148. The recent judgemade German "*Verwirkung*" (see comments on § 242 BGB.) is analogous and clearly substantive. Whether also the equitable institution of *laches* is substantive—as I assume and a Note in 79 *U. of Pa. L. Rev.* (1931) 341 evidently implies—and whether therefore it is to be applied by foreign judges, is an interesting question to be discussed under the general problem of broad judicial discretion exercised upon foreign authorization.

¹³ GAIUS IV 1 ff.; Just. Inst. 4, 6 ff.

¹⁴ PLUCKNETT, *A Concise History of the Common Law* (ed. 5, 1956) 381 f. defines the process of separation of law and procedure since the eighteenth century and concludes: "Much experimentation is going on, both in England and America."

Actio, hence, technically the acting of the plaintiff in introducing and pursuing his claim, in the classical texts covers both the procedural activity of the plaintiff and his right to win his cause. An *actio in personam* particularly is a formulary means of proceeding, but it is also an obligatory right: "*Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi.*"¹⁵

The pandectists, though slowly continuing the work of the *Corpus Juris* in the transformation of the system of actions into a system of rights, nevertheless retained the double-sided concept of action. In the nineteenth century, the "law of actions" was conceived as the borderland between private and procedural law, including the effects on the rights in issue of the commencement of a suit and the judgment. The development of "action" in the English technical language seems obscure, but may have followed similar lines. A late testimony, however, is furnished by the English Sale of Goods Act and its American parallel. After having described in four parts the sales contract and its contents, these acts in a "Part V, Actions for Breach of the Contract" include the "remedies" of the seller and the buyer as to the price, rescission, general damages, etc., but contain almost nothing referring to procedure. Breach of contract, just as commission of a tort, produces rights for the injured party. While these rights are referred to as actions and remedies, these terms consider the rights as objects, but not as means, of procedure.

Holdsworth, it is true, thinks that it is reasonably clear from the words of James I's statute "that the statute affected not the right under a contract but the right to enforce it."¹⁶ This can scarcely have been the idea. By prescribing that the actions should be commenced and sued upon within six years, or otherwise its enforcement would

¹⁵ CELSUS, Dig. 44, 7, 51; Just. Inst. 4, 6 pr.

¹⁶ 8 HOLDSWORTH 65.

be denied, the statute destroyed the only form in which the right appeared in the legal world. When later, in 1698, the court of the King's Bench said of a claim, "It is a debt though barrable by pleading of the statute,"¹⁷ it meant only to save the claim for accounting in an administration proceeding before an ecclesiastical court. Subsequently, other effects of the debt were recognized. But the contrast between right and remedy was superimposed on the statute.

The two elements of "action" were finally disjoined by the German Pandectist, Windscheid.¹⁸ He distinguished "*Anspruch*"—claim or pretense in precarious translations—and right to sue or "*Klagerecht*." *Klageverjährung*, limitation of action, thenceforth was replaced by *Anspruchsverjährung*, limitation of claim. The ensuing German and later the Italian scholars have devoted an enormous amount of thought to both of these basic concepts. The German Civil Code, precisely at the place where it indicates the object of limitation of action, defines the *Anspruch* as "the right to demand from another person an act or a forbearance" (§ 194). While this means, in application to property, that the various rights flowing from a violation of property right are barred in contrast to the ownership, mortgage, etc., which is not necessarily affected, in the better opinion an obligatory right is identical with an *Anspruch* and object of limitation. Recent literature leaves no doubt that in any case the object affected by limitation is the right and not the procedural power of a plaintiff. Rather, it has been emphasized that the attempt of Windscheid and the German Code to save the elements of the Roman *actio* by inserting the "claim" between the substantive right and the procedural right of enforcement, has failed; it would simply be the

¹⁷ *Wainford v. Barker* (1698) 1 Raym. (ed. 4, 1790) 232.

¹⁸ WINDSCHEID, *Die Actio* (1856).

right that is affected by limitation.¹⁹ But this is immaterial for our purpose.

What matters is that the law of limitation as well as the meaning of action have undergone important modifications, although the Anglo-American legal language has persisted. Naïve students of the statutes of limitation are continuously misled by this terminology, although erudite jurists certainly should not need to be warned.

It seems opportune to make one more general observation. American discussions have shown meritorious endeavors to clarify the relationship between substance and procedure. Through Walter Wheeler Cook's writings, it has been recognized that the line of delimitation between these two fields may vary according to the purposes of the rules of law to be subordinated. From this acknowledgment of the relativity of terms, seemingly some scholars have concluded that the concept of procedure is flexible to the degree that it does not possess any general meaning. A further inference may be that a domestic statute of limitations is "procedural" in the meaning of conflicts law, although a foreign statute may be substantive. All this is mistaken. There is no ground for contending that for the purpose of conflicts law—that is, for the question whether domestic or foreign law should apply—several concepts of procedure are necessary or useful. The main, and probably the exclusive reason for discussing the scope of procedure in this field is afforded by the universally recognized principle that foreign private law is potentially applicable but foreign procedural law is not. The idea underlying this principle is simple and although it needs certain exceptions, it does not call for subtle conceptual distinctions. The idea

¹⁹ See CARNELUTTI, "Appunti sulla prescrizione," 10 Riv. Dir. Proc. Civ. (1933) I 32; BETTI, *Diritto processuale civile italiano* (1936) 166 f. § 38.

The literature on the procedural part of *actio* has produced an overwhelming variety of opinions.

is this: Every court wants to administer justice in the forms and methods regulated for proceedings at the forum. Court and parties are not to be disturbed in their observance of the legal rules prescribing the steps to be taken for instituting, pursuing, and terminating lawsuits. This includes, indeed, rules limiting the time in which a procedural act such as pleading, objection, offer of evidence, or appeal must be made.²⁰ Whether it also includes the right of a defendant to withstand the exercise of a superannuated substantive right by opposing to the cause of action a counterright on the same plane—"A plea of limitation is an answer to the merits"²¹—, is the problem of conflicts law to be discussed in the next chapter.

II. MUNICIPAL CONCEPT

I. Main Features of Limitation

The specialists of conflicts law sometimes seem to be entirely unaware of the fact that limitation of action has the same structure under all the statutes of the world. Whatever the influence which the *Corpus Juris* or the statist doctrines may or may not have exercised on English courts, it is a strange mistake to attribute the rift in the conflicts rules to a substantial cause. There are local deviations from the over-all picture²² but, roughly, the institution is universally organized on the following lines.

(a) *Lapse of time.* The period of limitation starts to run when the cause of action is completed (*actio est nata*).

²⁰ Unanimous opinion, relating to the "peremption d'instance," see for France, 2 ARMINJON 345, VALÉRY 1010; for Italy, DE NOVA 120, 193 n. 1; for the Netherlands, MULDER 232. In Louisiana, the term seems to be used as equivalent to a time period destroying the right, cf. Hollingsworth v. Schanland (1924) 155 La. 825, 99 So. 613, that is, "déchéance" in the French language, below.

²¹ WOOD, 1 Limitations 304 § 63a.

²² For the United States, cf., e.g., Credit Manual of Commercial Laws (1945) 267.

The march of time is suspended by infancy and other individual incapacity to litigate. It is interrupted, in the language of Justinian, when debtors "acknowledge the debt whether by payment or otherwise" (*debitum agnoverint vel per solutionem vel per alios modos*, C. J. 8, 39, 4).

(b) *Defensive remedy*. Contrary to original ideas, the court takes notice of a completed limitation only if the defendant avails himself of the bar, in the form prescribed by the procedural law, such as a special plea.²³ The German Code, emphasizing the substantive character of this defense, expresses it in the terms of a private law "exception," that is, the debtor's right to refuse performance,²⁴ which operates outside judicial proceedings as well as in court.

Even apart from extrajudicial acts employing the defense, the procedural disposition of the effect of limitation is a most characteristic point of the law of limitation. Under the influence of moralistic and natural law conceptions, it has become traditional to explain that it must be left to the conscience of the debtor whether he will resort to a defense regarded as immoral by some social philosophers. However, barons returning from exile after the English civil war, probably had good reasons for acknowledging their old debts.²⁵ Preserving credit, desire for a test, and other considerations looking to the future usually are active motives.

With all statutes recognizing the defendant's right to dispose of the bar,²⁶ it is difficult to believe that the state claims a paramount interest in avoiding stale claims so as

²³ WOOD, 1 *Limitations* (ed. 3) § 7.

²⁴ BGB. § 222 par. 1.

²⁵ This is a suggestion by HESSEL E. YNTEMA.

²⁶ England: See POLLOCK, *Contracts* (ed. 13) 511 f.

United States: 53 C. J. S. 958 § 24 n. 49; 34 Am. J. 318 § 405 n. 9.

Austria: Allg. BGB. § 1501.

France: C. C. art. 2223; cf. DALLOZ, *Répert.*, Prescription Civile Nos. 47 ff.

Germany: BGB. § 222: right to refuse performance.

to insist on the application of its own statute of limitation. Certainly, courts are glad to be spared the difficult ascertainment of old causes of action. But a public policy so stringent as has been vindicated in support of the Anglo-American theory is scarcely reconcilable with the fact that the protection of the statute is in the discretion of the defendant. As it is said in France:

Prescription is not absolutely a means of public policy; it does not go beyond the sphere of the particular interests of the creditor and debtor. Moreover, it involves an evaluation of moral nature; certain consciences would not admit they were liberated without having paid, whatever the age of the debt. If, then, the debtor insists on paying, it would be wrong to consider that he contracts a new debt or that he makes a gift to the creditor.²⁷

(c) *Waiver*. This character of the bar by limitation is confirmed by the almost universal rules that a debtor is free to waive a completed limitation by agreement²⁸ and the widely held opinion that parties may in advance agree on a shorter period than the statutory period.²⁹ Although the codes usually do not allow the parties to enlarge the period or to waive the bar before it is acquired, courts have often favored party autonomy.³⁰

²⁷ PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) 797 § 1380.

²⁸ Austria: Allg. BGB. § 1502.

France: PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) 804 § 1387.

Italy: C. C. (1942) art. 2937 par. 1.

Switzerland: C. Obl. art. 141 par. 1 (*a contrario*).

Anticipatory waiver of prescription is invalid.

²⁹ United States: *Order of Travelers v. Wolfe* (1947) 331 U. S. 586, 608 n. 20 emphasizes the extraterritorial effect.

France: Constant practice; BAUDRY-LACANTINERIE et TISSIER § 96; "an astonishing permission," PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) 762 § 1349.

Germany: BGB. § 225 sent. 2.

Italy: On the controversy, see DE NOVA 98 n. 2.

Switzerland: On the possibility of extinguishing the debt of contractual limitation, see OSER-SCHOENENBERGER art. 129 n. 1.

³⁰ For France, see PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) 764 § 1350.

On evasion through choice of law, permitted by German courts, see *infra* p. 528 n. 103, *cf.* p. 515.

(d) *Effect*. What is the effect of a judgment dismissing the claim on the ground of limitation? Fine considerations of this problem were expounded by Story in his personal remarks in *Leroy v. Crowninshield*.³¹ But in his treatise, Story borrowed from Boullenois³² the idea that such judgment merely abates the action, since it denies but the remedy.³³ This was mistaken. The old scholars disputed the question whether the defense of prescription belonged to the *exceptiones ordinatoariae* (procedural) or to the *decisoriae* (substantive). The first were objections to the court taking cognizance of the complaint because a prerequisite condition of the proceeding was missing. The latter exceptions went to the merits. Some authors considered prescription as substantive for the reason that it was an *exceptio peremptoria*; this argument was correctly refuted by Boullenois, whom Story quoted comprehensively.³⁴ But on the other hand, this exception was also not to be stamped as procedural because of its preliminary character, i.e., preventing the court from looking into the other merits.³⁵

Since Baldus, old and modern Italian and French authors have prevailingly categorized this exception among the *decisoriae* and the judgment as going to the merits.³⁶ Boullenois was part of a minority to which, it is true, Ulric Huber belongs.³⁷ Story³⁸ was perhaps misled by Pothier's remark³⁹

³¹ (1820) 2 Mason 151, Fed. Cas. No. 8269.

³² BOULLENOIS, 1 *Traité de la personnalité et de la réalité des loix* (1766) 82 ch. 3 obs. 23 p. 530.

³³ STORY § 576.

³⁴ STORY § 579 p. 720, giving a translation.

³⁵ Correctly, WOOD, 1 *Limitations* 304 § 63a.

³⁶ On Baldus, Salicetus, Paulus de Castro, Dumoulin, and the entire literature to the end of the 16th century, MICHEL 27-31; Burgundus, MICHEL 39; the great majority of successors of d'Argentré, *id.* 63 f.; the 19th century, *id.* 137-142.

³⁷ HUBER, *De conflictu legum* § 7 (Guthrie tr. Savigny 511). On VOET, father and son, see *infra* Ch. 53 ns. 12, 13.

³⁸ STORY § 580 and notes.

³⁹ POTHIER, *Prescriptions*, Introduction, sect. II § 30 par. 1; *Obligations* § 687. Pothier did say, however, that the creditor conserves his claim but has no action any more, a proposition that puzzled Bugnet; cf. POTHIER's description of *ins de non-recevoir*, *Procédure Civile*, sect. I § 35.

that in France the judgment of dismissal took the form of "*fin de nonrecevoir*." The category of a nonreceivable demand half-way between an action "*mal fondée*" and an action "*déboutée d'instance*" corresponds with defenses various in nature, which were joined together by the French science of the seventeenth and eighteenth centuries for certain procedural ends.⁴⁰ It happens that this complex group of defenses, affected by a procedural reform of 1935,⁴¹ has recently been the object of a new discussion and apparently approaches its dissolution. There is no doubt where in this new development *prescription* belongs. The Court of Cassation has expressly declared it to be "a means of defense on the merits" ("*un moyen de défense au fond*").⁴²

This is the universal practice, including the United States.⁴³ Only because in England and this country limitation has territorial effect, this *res judicata* is said to be restricted to the forum.⁴⁴ Correspondingly, when an action is dismissed by a foreign court on the ground of limitation, the action may be brought again at the forum.⁴⁵ Evidently, this reasoning is wrong when the foreign court means to dismiss the suit with prejudice.

Merely "procedural" obstacles to a favorable decision have no effect on the cause of action. With the traditional antithesis of remedy and debt or cause of action, there can be no doubt that a judgment on the merits affects more than the remedy.

Perhaps, the question may be raised how a dismissal on

⁴⁰ See the informative article by BÉQUET, "Etude critique de la notion de fin de non-recevoir en droit privé," 47 *Revue Trim. D. Civ.* (1947) 133.

⁴¹ Decret-Loi, Oct. 30, 1935, D. 1935.4.421; C. Civ. Proc. art. 192, amended.

⁴² Cass. civ. (Feb. 23, 1944) S. 1944.1.117 at 120 with note by MOREL.

⁴³ United States: WOOD, 1 Limitations 304 § 63a; FREEMAN, 2 Judgments 1538 § 726.

Civil law: MICHEL 144.

⁴⁴ *Bank of United States v. Donally* (1834) 8 Pet. S. C. 361; *Warner v. Buffalo Drydock Co.* (C. C. A. 2d 1933) 67 F. (2d) 540.

⁴⁵ *Harris v. Quine* (1869) L. R. 4 Q. B. 652; DICEY (ed. 7) 1104 No. 7.

the ground of failure of jurisdiction should be characterized. But thus far, this question seems outside discussion of our subject.

(e) *Natural obligation*. Finally, in all systems the true kind of limitation leaves intact some important effects of the debt. There remains in the language of natural law and Lord Mansfield⁴⁶ a "moral" obligation, usually designated by the Romanistic term a natural, or by some pandectists and Sir Frederic Pollock an imperfect, obligation. The debtor may still discharge the barred debt by payment, not as a gift; he cannot recover such payment at all or only under specified conditions. He can revive it to full effect by a new promise or an acknowledgment (at common law without new consideration);⁴⁷ also, the debt may be secured by pledge, mortgage, or suretyship, or insurance, etc.

Anglo-American lawyers have assumed that these residual effects are due to the fact that the debt is intact and only the remedy is affected. American decisions have, for instance, concluded that the creditor may still claim foreclosure of a mortgage as only the remedy is alleged to be eliminated.⁴⁸ But the German Code which more than any other has accentuated that the debt itself is affected by the exception, fully recognizes this particular effect after the debt is barred.⁴⁹ Legal effects cannot depend on how we describe the weakening of the creditor's right. "A statute transforming an enforceable debt into a natural obligation, is not a procedural rule."⁵⁰

⁴⁶ See 8 HOLDSWORTH 26.

⁴⁷ On the change of background in history, see HOLDSWORTH, 39 *Law Q. Rev.* (1923) 146 and 8 *History* 39.

⁴⁸ *First Nat'l Bank of Madison v. Kolbeck* (1945) 247 *Wis.* 462, 19 *N. W.* (2d) 908, Note, 161 *A. L. R.* (1946) 886. The concurring vote of Fowler, J., is significant: as long as there is no payment of the debt, there is no extinguishment of it; without a debt there can be no mortgage.

⁴⁹ BGB, § 223 par. 1.

⁵⁰ DREYFUS, *L'acte juridique en droit international privé* (Thèse 1904) 377.

2. Limitation and Preclusion

Modern Continental laws have developed in contrast with limitation (*prescription*) a concept of preclusive periods of time (*déchéance* or *délai fixe*, *Ausschlussfrist*). Preclusion seems to me a good term to indicate this group. Its most typical characteristics are that the time runs without suspension and interruption, as in the ancient *actiones perpetuae*, and that judicial notice is taken of the preclusion of action, at least when the lapse of time is on the face of the pleadings.⁵¹ Usually these periods are short and intended to precipitate some act such as giving notice of defects, consent, or an overdue performance. Where the bringing of an action is conditioned by a time limitation, the distinction of this group from limitation is the more delicate as many transitory types exist in between. Suspension because of impossibility of suing, for instance, may be excluded in limitation cases and allowed in preclusion cases. Each single statute must be properly investigated.⁵² Continuous attempts, it is true, have been made in the common law countries, in conflicts law, to distinguish an operation of the law "extinguishing the right" from limitation as restricting the exercise of the right, a contrast that has retained a few followers also on the Continent.⁵³ This served to establish the possibility for a period of time to affect the right. But the formula is wrong.

What is more, conflicts law cannot establish any distinction between the varying shades of municipal institutions.

⁵¹ France: PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) 818 ff. §§ 1402 ff. Germany: ENNECCERUS-NIPPERDEY (ed. 14) 994 f. § 230 III.

Italy: C. C. (1942) arts. 2964 ff.; ENRICO GIUSINI, *Decadenza e prescrizione* (Univ. Torino, *Memorie dell'Istituto Giuridico* II No. 54) 63.

⁵² BAUDRY-LACANTINERIE et TISSIER §§ 36 ff.; PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) 820 f. VAN BRAKEL, 1 *Nederl. Verbintnissenrecht* (1942) 263.

⁵³ 12 AUBRY et RAU 534, 535 n. 9; BAUDRY-LACANTINERIE et TISSIER 35. Apparently also MODICA, 1 *Teoria della decadenza* (1906) 178 (according to GIUSINI, *supra* n. 51, at 11).

No satisfactory line can be drawn to determine which of the foreign statutes responds to the usual, domestic, type of limitation of "action" and which not. Carrying out such a distinction "would lead to incertitude and injustice."⁵⁴ It is unnecessary if all limitations are classified into the scope of the law governing the contract.⁵⁵

Evidently, the convenience of a simple comprehensive rule has also motivated a provision of the Treaty of Versailles. Each state participating in a clearing of prewar debts was declared to be responsible for the payment of debts due by its nationals, except—among other cases—"in a case where at the date of the outbreak of the war the debt was barred by the laws of prescription in force in the country of the debtor."⁵⁶ This English draft, intending to reproduce the French version ("*la dette était prescrite*"), included not only a "debt due" in the case of a limitation of action under English concepts but also all other time restrictions.⁵⁷

In American law, limitation of action is sharply distinguished in theory from time periods for the exercise of a right, the lapse of which extinguishes the right. But in practice the difficulties of classification are certainly not less than in Europe. Where the distinction has become significant in conflicts law the result is unhappy.⁵⁸

3. Right and Remedy^{58a}

Although customarily used by Anglo-American courts and noncritical lawyers, the antithesis of right and remedy

⁵⁴ BATIFFOL 455 § 578.

⁵⁵ MICHEL 150 ff.; DE NOVA 192 (120).

⁵⁶ Treaty of Versailles, Annex § 4 to art. 296 (b); Annex § 4 par. 1.

⁵⁷ RABEL, *Rechtsvergleichung vor den Gemischten Schiedsgerichtshöfen* (1924) 55 f.; followed by WUNDERLICH, *supra* n. 3, 492.

⁵⁸ Cf. GOODRICH 203 on the difficulty of determining whether a limitation is on the right; and *infra* pp. 519-521.

^{58a} See MORINEAU, "Rights and Remedies," 8 *Am. J. Comp. Law* (1959) 263; NIEDERLÄNDER, "Materielles Recht und Verfahrensrecht im internationalen Privatrecht," 20 *RebelsZ.* (1955) 1.

was employed in the nineteenth century only by a few Continental advocates of the *lex fori*.⁵⁹ In fact, the entire idea is unique. Who would describe the debt of a minor as a right unimpaired by the fact that he cannot be sued on it?

For a sound construction of the legal phenomenon presented in our case of an actionless debt, its two sides ought to be considered. A debt that can be enforced in court if the defense of limitation is not affirmatively pleaded, certainly survives the running of the period of time.⁶⁰ But if it is awkward after the lapse of time to deny the existence of a right, it is still less reasonable to think it unaffected by the absence of the faculty of unconditional judicial enforcement. The correct description of the situation is very simple. "*Le droit du créateur n'est pas éteint mais transformé.*"⁶¹ The German and Swiss Codes express the same truth by stating that limitation of action affects the "claim."⁶²

A rapidly increasing number of leading Anglo-American scholars have professed their disapproval of the procedural or remedial theory. Lorenzen has expounded his criticism in an authoritative article.⁶³ Westlake was in opposition.⁶⁴ Falconbridge calls both right and remedy ambiguous and misleading terms.⁶⁵ Stumberg considers procedure to be the method of presenting the facts, whereas limitation concerns the legal effect of a fact upon a right.⁶⁶ Cheshire⁶⁷ and

⁵⁹ PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) 734 § 1325 remarks that this is a rather muddled idea.

⁶⁰ POLLOCK, *Contracts* (ed. 13) 511.

⁶¹ PLANIOL et RIPERT, 7 *Traité Pratique* (ed. 2) 808 § 1393.

⁶² BGB. § 194; cf. ENNECCERUS-NIPPERDEY (ed. 14) 996 § 231.

Switzerland: See OSER-SCHOENENBERGER 640 f.

⁶³ LORENZEN, "The Statute of Limitation and the Conflict of Laws," 28 *Yale L. J.* (1918) 492, Selected Articles 352.

⁶⁴ WESTLAKE § 238. See also GUTHRIE in his translation of Savigny 267 ff.

⁶⁵ FALCONBRIDGE, *Conflict of Laws* (ed. 2) 284.

⁶⁶ STUMBERG (ed. 2) 147.

⁶⁷ CHESHIRE (ed. 6) 685; "English law is unfortunately committed" to this view.

Beckett,⁶⁸ as well as Goodrich⁶⁹ and several judges⁷⁰ have declared to the same effect. From Story in his first decision⁷¹ to Wharton⁷² and the just-mentioned writers, the rule has been upheld exclusively because it "is now too firmly settled to be shaken" (Wharton). But knowing the truth ought to have consequences.

American doctrine has utilized this inveterate antithesis of right and remedy for various purposes, but quite unnecessarily. Thus, the requirement that a time limit on the "remedy" must be pleaded specially, has not been extended to the defense of "extinction" of the right by lapse of time.⁷³ In reality, the difference is that between an exception opposed to a correct cause of action and the denial of the cause of action. Both positions are taken in purely procedural manner. They might not have been distinguished at all if the historical special treatment of limitation of action had not been looked upon with disfavor.

Also the fact that federal courts in diverse citizenship cases have now to follow the substantive law of the state courts but preserve their procedural rules, has nothing to do with the opposition of right and remedy. The proof is that the state statutes on limitation apply.⁷⁴ Even when a

⁶⁸ BECKETT, 15 Brit. Year Book Int. Law (1934) 66, criticized by MENDELSSOHN-BARTHOLDY, 16 Brit. Year Book Int. Law (1935) at 31 n. 2, by arguments opposed in the present book.

⁶⁹ GOODRICH 201.

⁷⁰ *Gilpin v. Plummer* (C. C. D. C. 1812) Fed. Cas. No. 5451; *Cochburn, C. J.*, in *Harris v. Quine* (1869) L. R. 4 Q. B. 652. See also Note, 9 U. of Chi. L. Rev. (1942) 723.

⁷¹ *LeRoy v. Crowninshield* (1820) 2 Mason 151.

A curious attempt to refute Story's doubts has been made by Mr. Justice Wayne in *M'Elmoyle v. Cohen* (1839) according to the report by ANGELL 59, but the passage is not included in 13 Pet. S. C. 324, 327 (38 U. S. 169, 172). Angell's praise of these polemics against the better informed Story seems unaccountable.

⁷² 2 WHARTON 1271 § 545.

⁷³ *Lewis v. Mo. Pacific R. Co.* (1929) 324 Mo. 266, 23 S. W. (2d) 100; and see 54 C. J. S. 491 § 357 n. 21.

⁷⁴ *Guaranty Trust Co. v. York* (1945) 326 U. S. 99, 105, 107, 111; see cases

federal statute creates a liability without adding a time limitation, the general state statute is resorted to.⁷⁵ Federal law may incorporate state "remedies" as well as "substance."

4. Contrasting Legislative Policies

It has been an easy temptation to explain the Anglo-American doctrine by a peculiar conception of the purpose of limitation. Following other propositions of this kind, it has recently been said that in civil law an exception based on limitation flows from the obligation itself, but at common law a plea of limitation is made in the interest of justice.⁷⁶ This contrast begs the question of the conflicts law. The municipal regulations contain nothing to cause any difference in the relation between limitation statutes and conceptions of justice.

Another recent writer asserts that a deep-seated difference exists throughout French, English, and German laws between short and long periods of limitation; although short limitations are unmistakably a part of substantive law, the long periods, in his opinion, concern procedure.⁷⁷ Again, no proof is afforded.

Indeed, as usual, it is not true that different policies govern in the several jurisdictions or in the variants of the same institution. All municipal laws in this matter are guided by a complex of motives. It is in the public interest

cited by Goodrich, J., in *Anderson v. Andrews* (C. C. A. 3d 1946) 156 F. (2d) 972; PUTMAN, 1945 Annual Survey 53, 1946 *id.* 62.

⁷⁵ Federal antitrust laws: *Seaboard Terminals Corp. v. Standard Oil Co.* of N. J. (D. C. S. D. N. Y. 1938) 24 F. Supp. 1018; federal liability of National Bank stockholders: *Helmets v. Anderson* (C. C. A. 6th 1946) 156 F. (2d) 47; *Anderson v. Andrews* (C. C. A. 3d 1946) 156 F. (2d) 972; and see *Holmberg v. Armbrecht* (1946) 327 U. S. 392; *cf.* PUTMAN, 1946 Annual Survey 62.

⁷⁶ MENDELSSOHN-BARTHOLDY, "Delimitation of Right and Remedy," 16 *Brit. Year Book Int. Law* (1935) 20 at 31 n. 2. He adds another distinction, contrary to the facts found here.

⁷⁷ PHILONENKO, "De la prescription extinctive en droit international privé," *Clunet* 1936, 259, 513 at 527, 532, 545.

that peaceful situations should not be disturbed after a long time. A debtor should not be forced to answer claims of obscured origin. He should not have to preserve instruments, receipts, and accounts for an unlimited time. Witnesses and documents may disappear. The courts should not be troubled with difficult determinations of fact. The creditor may have been negligent in the enforcement or be deemed to have waived his claim. The debt may have been discharged in fact without receipt. This mixture of considerations prevails everywhere without discernible variants.⁷⁸ It also colors all particular statutes with only one known exception.⁷⁹

5. Comparative Conclusion

In municipal law, limitation of action always affects the right, and the degree of this effect is no suitable criterion for distinctions. In this domain of internal effect, statutes of limitation belong to substantive, as contrasted with adjective, law. If the common law theory as formulated by past undeveloped scholarship is to be justified, and not respected simply because it exists, the reasons must be found in the field of conflicts policy.

On the side of the literature supporting the Continental theory, however, some unfounded views have been expressed. It has often been claimed that in contrast to England, Continental limitation of action "extinguishes" the obligation⁸⁰ and this term, as used in fact in the French Civil Code, has found much favor in other codes.⁸¹ But as we have seen, it can only be said in French law that the de-

⁷⁸ This is also the opinion of BATIFFOL 455 § 576.

⁷⁹ *Infra* Ch. 53 p. 514 on French C. C. art. 2275.

⁸⁰ E.g., DIENA, I *Dir. Com. Int.* 443; DE NOVA 132.

⁸¹ C. C. art. 1234: "Les obligations s'éteignent. . . . Et par la prescription, qui fera l'objet d'un titre particulier."

The new Italian Code starts its provisions on "prescrizione e decadenza," saying "Every right is extinguished by prescription, when the holder does not exercise it during the time determined by law," art. 2934.

fendant may avail himself of the bar and that the judgment dismissing the action is *res judicata* on the merits. There are little-noted problems in modern law concerning the time when the obligation finally becomes ineffective in and outside of court. Yet an obligation enforceable so long as the debtor does not react, or generating any of the effects of a natural obligation, is not dead.

It has also been contended in supporting the Continental conflicts rules that the debt carries in itself from its beginning the germ of its destruction through lapse of time.⁸² This argument could correctly be denied from the American side; it is a "false premise that there is some immutable, preordained duration" of the effectiveness of a debt.⁸³ The proof is that the law governing limitation may change, which is an important point for the doctrine of conflicts. In view of the structure of this legal institution, there is also no reason in the arguments of Savigny that failure to incur the lapse of time is a condition of the validity of the obligation,⁸⁴ or of Lainé that limitation is a modality inherent in the obligation.⁸⁵

In fact, the right of a debtor to bar the action of his creditor, by invoking its limitation by lapse of time, is always a substantive right, even though the lapse of time does not extinguish the claim and is not inherent in the debt.

⁸² E.g., I FRANKENSTEIN 595; DE NOVA 132 § 24.

⁸³ AILES, *supra* n. 4, 500.

⁸⁴ SAVIGNY § 574 at notes (t) ff.; his specified arguments, however, are still excellent.

⁸⁵ LAINÉ, 19 Bull. Soc. Législ. Comp. (1889-90) 55.

Statutes of Limitation: Comparative Conflicts Law

I. THE CONFLICTS THEORIES

I. Procedural Theory

(a) *Anglo-American principle.* The English courts have laid down the principle generally followed in all common law jurisdictions as well as in Scotland.¹ An English court applies exclusively the English statutes of limitation. An action barred by these is not allowed, even though the claim is governed by foreign law under which no bar is incurred;² correspondingly, a claim barred only under the governing foreign law is admissible;³ this even when the claim has been dismissed abroad on the ground of limitation of action there.⁴ The abundant American authority has unhesitatingly followed this model.⁵

(b) *Former Continental following.* The territorial conception, which the English approach suggests, once induced numerous scholars and courts in France, Germany, and else-

¹ DICEY (ed. 7) Rule 204 (3) and p. 1092; GOODRICH 201 § 82.

² *British Linen Co. v. Drummond* (1830) 10 B. & C. 903; *The Alliance Bank of Simla v. Carey* (1880) 5 C. P. Div. 429.

Scotland: *Don v. Lippmann* (1837) 5 Cl. & F. 1.

Canada: *Rutledge v. U. S. Savings & Loan Co.* (1906) 37 S. C. R. 546; *Quaker Oats Co. v. Denis* (1915) 8 W. W. R. 877, 24 D. L. R. 226.

³ *Huber v. Steiner* (1835) 2 Bing. N. C. 202.

Scotland: *Fergusson v. Fyffe* (1846) 8 Cl. & F. 121.

Canada: *Bowes Co. v. American Ry. Express Co.* (1924) 26 O. W. N. 290.

⁴ *Harris v. Quine* (1869) L. R. 4 Q. B. 652.

⁵ WHARTON 1245 § 535 n. 4; MINOR § 210; 3 BEALE 1620 § 603.1. On the early cases, see AILES, "Limitation of Actions and the Conflict of Laws," 31 Mich. L. Rev. (1933) 474 at 488; Restatement §§ 603, 604.

where, to profess a procedural doctrine.⁶ Their influence has practically disappeared.⁷

(c) *Present following.* It is difficult to ascertain in what countries the old theory, expressed in decisions and by writers, has been maintained to the present time. This has been reported for the Czechoslovakian in contrast to the Austrian construction of their identical codes,⁸ and was probably once the practically prevailing attitude in the Soviet Union.⁹ It has also been contended for Hungary¹⁰ and the Islamic states.¹¹

2. The Situs Theory

It has been taken for granted since Story's writings that the Anglo-American conflicts theory in this matter continues the doctrine of the Dutch statistists. This is not entirely exact. And the true story seems to explain the strange attitude preserved by the French courts. Paul Voet, discussing the standing question involving the case where the statutes of limitation at the domicils of the debtor and the creditor state different periods of time, gave this opinion :

“Respondeo, quia actor sequitur forum rei, ideo extraneus petens a reo, quod sibi debetur, sequetur terminum statuti

⁶ See the list of writers and decisions in MICHEL 111 ff.; WEISS, 4 *Traité* 399 n. 1; MICHEL, 10 *Répert.* 296 Nos. 33, 34. The most influential of these writers was LABBÉ, *Note*, S. 1869.1.49.

⁷ *Infra* n. 30. The German courts, applying German common law, defied the procedural theory of the Prussian Supreme Court, FÖRSTER-ECCIUS, 1 *Preussisches Privatrecht* 67.

⁸ LAUFKE, 7 *Répert.* 208 No. 176.

⁹ MAKAROV, *Précis* 262 f.; and more simply, for interterritorial law, in 7 *Z.ausl.PR.* (1933) 165. According to 1 LUNZ 198 f. the Soviet law is now following the modern theory that limitation of action is governed by the *lex causae*.

¹⁰ Kurie P. IV 4641/1933, 11 *Z.ausl.PR.* (1937) 173 No. 4, in a special case; and generally as reported in OLG. München (Feb. 2, 1938) *H. R. R.* 1938, 1402. However, SZÁSZY, *Droit international privé comparé* (1940) 553 mentions Hungary among countries following the law of the contract. *Accord*, RÉCZEI 299 f.

¹¹ 2 ARMINJON 350.

praescriptum actioni in foro rei. Et quia hoc statutum non exserit vires extra territorium statuentis, ideo, etiam reo alibi convento, tale statutum objicere non poterit."¹²

The first sentence says that the court at the debtor's domicil applies its own statute of limitation because it is the law of the place where the debtor must be sued. This is confirmed by Jan Voet:

“. . . spectandum videtur tempus, quod obtinet ex statuto loci, in quo reus commoratur,"¹³

and explained by the latter through reference to his distinction between movable and immovable property.¹⁴ A personal action is a movable, hence deemed situated at the domicil of the creditor. However, for the purposes of bankruptcy proceedings and limitation of action, the contrary position is preferable because the judge of the place where the creditor must sue the debtor, has the power to prevent the creditor from exacting the debt:

“Nam et debitum necdum exactum magis esse in potestate judicis, ubi debitor, quam ubi creditor domicilium fovet vel ex eo manifestum est, quod creditor forum competens et judicem debitoris sequi debeat.”

This discussion, couched in traditional terms of a standard problem, is not yet based on the procedural construction of limitation, but clearly on the doctrine placing immovables under the *lex rei sitae*, movable chattels under the *lex domicilii* of the owner, and disputing whether personal actions belong to the latter group. In his second sentence, Paul Voet started to consider a case outside of the alternative of the creditor's and the debtor's domicils, where the debtor is sued at a place other than his domicil, but he contented him-

¹² PAUL VOET, *De statutis*, s. 10, cap. un., § 1, citing only GABRIEL, *Commun. conclus.*, lib. 6, conclus. 11.

¹³ JAN VOET, *Comm. ad Pand.*, lib. 14, tit. 3, § 12.

¹⁴ *Id.*, lib. 1, tit. 8, § 30.

self with the statement that the statute of the debtor has no application.¹⁵

In the Netherlands, it was only Huber who on the strength of two Frisian decisions and contrasting the forum with the *lex loci contractus* rather than with the domicile of the creditor, acceded to the theory that "*praescriptio*" like "*executio*" does not belong to the "validity" of the contract but to the time and mode of bringing an action.¹⁶

In France, Boullenois, the chief authority relied upon by Story, argued on the lines of the situs theory, leaving it doubtful whether he recommended the *lex fori* or rather the law of the domicile of the debtor.¹⁷ With him, the two doctrinal currents, of situs and procedure, united in a mixed flow of ambiguous reasoning¹⁸ which persisted in some French writings throughout the nineteenth century and has prevailed in the French courts up to the present. Quite clearly, Pothier at one place follows the situs theory;¹⁹ it should not be controversial²⁰ that *this* passage means to apply the law of the creditor's domicile.

In this literature, the principle that the debtor's ordinary forum is at his domicile has been kept in mind.²¹ As in the doctrine of assignment,²² however, the emphasis has shifted to the protection of the debtor; the defense of limitation is granted in his interest, and therefore is to be based on the law of his domicile.²³ Some French courts²⁴ and consist-

¹⁵ Contrarily, MICHEL 40 reads this passage as though it declared expressly the *lex fori* competent and indicated the basic theory of both Voets.

¹⁶ HUBER, De conflictu legum § 7.

¹⁷ MICHEL 56.

¹⁸ "Au XIX^e siècle l'équivoque persiste," MICHEL 91.

¹⁹ POTHIER, Prescriptions, Pt. II art. V § 251, cf. *supra* n. 1.

²⁰ See for the controversy, e.g., SURVILLE 384; VALÉRY 1010; 2 ARMINJON 346; BAUDRY-LACANTINERIE et TISSIER 783 § 977. It is well known to historians that compilers are in danger of following divergent views according to the predecessors they have before their eyes.

²¹ BROCHER, Revue Dr. Int. (Bruxelles) (1873) 142; 2 BROCHER 408.

²² *Supra* pp. 401-402, 408, 430.

²³ For the French authors, see MICHEL 91 ff.; DE NOVA 101, 103 § 19. In Germany, GRAWEIN, Verjährung und Befristung (1880) 56, 201; THÖL, Einleitung

ently the Court of Cassation,²⁵ repeating the same words, have sanctioned this view. When the question arose what time should be taken to ascertain the law, the debtor's domicil at the commencement of the suit, rather than that at the time of contracting, was held decisive.²⁶ No doubt, this doctrine approaches closely the application of the law of the forum. Criticism, therefore, points out the same defects as are charged to the *lex fori* theory: the rule interferes with the natural scope of the law governing the obligation and allows the debtor arbitrarily to choose the applicable law.²⁷ Also, the effect of prescription is to liberate the debtor but not to protect him.²⁸

At present, no theoretical follower of this rule seems to exist. The classification of limitation of action, in the meaning of the French courts themselves, is very probably that it is a substantive institution and a protection of the debtor rather than an application of *lex fori*.²⁹

3. Substantive Theory

For decades the overwhelming authority of the European Continent and Latin America has considered limitation of action as a part of substantive law with extraterritorial

in das deutsche Privatrecht (1850) § 85 n. 9. As an optional defense, 2 BAR 101.

²⁴ NIBOYET § 709 recognized four diverse judicial solutions, including those of the 19th century.

²⁵ Cass. civ. (Jan. 13, 1869) S. 1869.1.49; (July 28, 1884) D. 1885.1.300; (Jan. 9, 1934) D. 1934.1.22, S. 1934.1.201, Revue Crit. 1934, 915, Clunet 1934, 672; (July 1, 1936) Revue Crit. 1937, 175, Clunet 1937, 302; Cour Paris (Jan. 13, 1947) Revue Crit. 1947, 297, and Note, BATIFFOL.

Recently the Court of Cassation held that the defendant may avail himself of the statute of limitation of the *lex contractus* if this is more favorable to him than the *lex domicilii*; Cass. civ. (Jan. 31, 1950) Revue Crit. 1950, 415 and Note, LENOAN. Still more recently the Court applied the *lex contractus* to the question of limitation as a matter of course without even contemplating the *lex domicilii*; see Cass. civ. (March 28, 1960) Revue Crit. 1960, 202 with Note by BATIFFOL, Clunet 1961, 776.

²⁶ Cour Paris (July 6, 1937) Clunet 1938, 78.

²⁷ See lastly, Note, BATIFFOL, to Cour Paris (Jan. 13, 1947) Revue Crit. 1947, 297. The arguments go back to Hertzius, Wächter, and Savigny. See WALKER 325.

²⁸ 2 ARMINJON § 158 (2); see especially DIENA, 1 Dir. Com. Int. 441.

²⁹ See following note.

applicability.³⁰ Agreement is practically complete that the law of the contract governs.

(a) *Antiquated theories.* In the long history of this subject, various suggestions have been advanced in favor

³⁰ Citations have been collected by MICHEL 137-142; LORENZEN, 28 Yale L. J. (1919) 493, 496 n. 21; AILES, *supra* n. 5, 478. See in addition the citations for: Canada, Quebec: Wilson v. Demers (Montreal 1868) 12 L. C. J. 222; see, however, on the provisions of Quebec C. C., "a complex hybrid," JOHNSON (ed. 2) 869 f. n. 24; CASTEL, P. I. L. 89 f.; CASTEL, Cases 312.

Austria: WALKER 325; OGH. (Dec. 29, 1930) SZ. XII No. 315; OGH. (April 1, 1960) 82 J. Bl. (1960) 553 and Note, SCHWIMANN; BOLLA 27 f.

Belgium: Inconsistent, see MICHEL 10, some courts following, with the French courts, the law of the debtor's domicile; GRAULICH 91 f. § 129.

Denmark: BORUM and MEYER, 6 Répert. 225 No. 84, citing a Supreme Court decision (June 19, 1925). See also BORUM (ed. 4) 172 ff. and Østre Landsret (March 26, 1953) Ugeskr. Retsv. 1954, 359, Clunet 1960, 492.

Estonia: App. Tallinn (Nov. 20, 1931) Clunet 1936, 665.

France: Cass. civ. (July 1, 1936) Clunet 1937, 302, Revue Crit. 1937, 175; NIBOYET 824 § 706, Revue Crit. 1934, 915; BATIFFOL § 585 and Traité (ed. 3) 589 § 541; the Notes (by PRUDHOMME?) in Clunet 1937, 302; 1938, 278 and 279; LEREBOURS-PIGEONNIÈRE (ed. 7) 587 f. § 4761.

Germany: Cases from 14 ROHGE. 258 to (July 6, 1934) 145 RGZ. 121, Clunet 1935, 1190; (March 20, 1936) 151 RGZ. 201; 1 RGR. Kom., Vorbem. before § 194; RIEZLER in 1 Staudinger n. 9 before § 194; LEWALD §§ 96-100; RAAPE, IPR. (ed. 5) 498. The most recent cases are BGH. (June 9, 1960) NJW. 1960, 1720 and the unpublished case of BGH. (Jan. 10, 1958) there cited.

Greece: Aeropag (1931) No. 21, 42 Themis 194; (1934) No. 303, 45 Themis 794; 2 STREIT-VALLINDAS 131 n. 11.

Italy: Cass. (Jan. 29, 1936) Foro Ital. 1936 I 1033, Giur. Ital. 1936 I 202, Riv. Dir. Proc. Civ. 1936 II 100; (March 6, 1940) Riv. Dir. Pub. 1940 II 467, cf. Note, BRUNELLI, *id.* 468; Trib. Rome (Oct. 5, 1951) Revue Crit. 1953, 128 and Note, DE NOVA.

The Netherlands: App. den Haag (March 15, 1910) W. 8984, 1 VAN HASSELT 301; Rb. Rotterdam (Nov. 1, 1917) N. J. 1918, 952, 1 VAN HASSELT 302; Rb. Utrecht (April 4, 1928) W. 11895, MULDER 232; App. Amsterdam (Oct. 24, 1946) N. J. 1947, No. 229 (English law of the contracts).

Norway: CHRISTIANSEN, 6 Répert. 580 No. 159; S. Ct. (June 12, 1928) NRT. 1928, 646, 7 Z. ausl. PR. (1933) 946.

Poland: S. Ct. (May 30, 1933) Clunet 1936, 702.

Sweden: S. Ct. (Jan. 29, 1929) Nytt Jur. Ark. 1929, 1; 1930, 692 No. 198; see BAGGE in Festschrift tillägnad Erik Marks von Würtemberg (1931) 19 (cf. 5 Z. ausl. PR. (1931) 740, 7 *id.* (1933) 933 No. 2); NIAL (ed. 2) 49 f.; BECKMAN, "Das internationale Privat- und Prozessrecht in der Schwedischen Rechtsprechung und Literatur," 25 RabelsZ. (1960) 496, 517 f.

Switzerland: BG. (March 5, 1957) 83 BGE. II 41, 47 and cases cited there.

Treaty of Montevideo on Int. Civ. Law (1889 and 1940) art. 51.

Código Bustamante, arts. 229, 295.

Argentina: App. de La Plata (May 14, 1957) Revue Crit. 1958, 94 and Note by WERNER GOLDSCHMIDT.

Brazil: PONTES DE MIRANDA, Recueil 1932 I 625.

of some special laws. The sheer variety of all these theories aroused a false sense of superiority in some advocates of the *lex fori*, but they now belong to the past. As there have been frequent critical reviews of these opinions,³¹ a few words will suffice.

Law of the debtor's domicil. In addition to the above-mentioned French views regarding the significance of the debtor's domicil, it is worth remembering that during a certain period the Scotch courts "looked not to the debtor's domicil at the time of the action but rather to his domicil during the whole currency of the term of limitation."³² Scandinavian courts, of course, include limitation of action in the law of the debtor's domicil³³ because they consider this the law of the contract.³⁴

The *nationality* of the debtor was taken as a test by the special provision of the Peace Treaty of Versailles which puzzled us in the 1920's.³⁵ The treaty excluded from government guaranty in clearing proceedings the debts "barred by the laws of prescription in force in the country of the debtor." Evidently it was felt necessary to establish a conflicts rule otherwise lacking in the international forum. Significance of the debtor state's law for the liability of the same state may have seemed natural.

Lex loci solutionis. The literature has amply dealt with the idea of Troplong that loss of action by limitation is a punishment to the negligent creditor and therefore depends

³¹ Notably, WILHELM MÜLLER, *Die Klageverjährung im internationalen Privatrecht* (Diss. Erlangen 1898); DIENA, 1 *Dir. Com. Int.* 439 ff. (merely repeated by MASSART, *Della prescrizione estintiva in dir. int. priv.*, Pisa 1930); MICHEL and DE NOVA, *supra* Ch. 52 n. 1.

³² Lord Justice Clerk McQueen in *Cheswell v. York Buildings Co.* (1792) Bell Oct. 364, 377, *Mor. Dict.* 4528; GUTHRIE in Savigny tr. at 269.

³³ See, e.g., the Norwegian S. Ct. decision, *supra* n. 30; a Danish decision of 1932, 7 *Z. ausl. PR.* (1933) 923 No. 3.

³⁴ Vol. II (ed. 2) p. 476 n. 178.

³⁵ DÖLLE, *Das materielle Ausgleichsrecht des Versailler Friedensvertrages* (Berlin 1925) 138-140.

on the law governing performance³⁶ and other propositions to the same effect, that limitation rests upon the presumption that the payment has in fact been made at the place where it was due.³⁷

Such a presumption of a payment is at present a visible element only in certain short limitations, the model of which are the provisions of the French Civil Code (articles 2271 ff.) that teachers, innkeepers, physicians, attorneys, shopkeepers, etc. must sue for their fees within six months to two years; the law assumes that in such cases payment is often made without receipt.³⁸ Not even these special provisions suggest a reason why the place of payment should control the termination of the debt. They raise another problem, though. The defense of limitation may be countered by the plaintiff's tendering an oath "on the question whether the thing has been really paid" (article 2275). This procedural act cannot be produced in a court unfamiliar with the ancient deferment of oath,³⁹ while its formalized effect cannot be entirely reached by ordinary means of evidence. Should, therefore, the forum substitute its domestic statute, which usually also prescribes short periods in similar cases?⁴⁰ It would seem that rules of the forum on evidence for the rebuttal of a presumption *de facto* come nearer to the applicable provision than a domestic statute of limitation. Transition from the legal effects of the ancient procedure by party oath to modern rules of evidence is a well-known historical development analogous to the suggested substitution.

Lex loci contractus. Writers believing that the law of the place of contracting governs contracts either by natural

³⁶ TROPLONG, I Prescription § 38. *Contra*: the authors cited by MICHEL 85 f.; DE NOVA 99.

³⁷ LEHR, 13 Revue Dr. Int. (Bruxelles) (1881) 516. *Contra*: DE NOVA 101. The same result was based on the public interest by 8 LAURENT 334 § 234.

³⁸ See PLANIOL et RIPERT, 7 Traité Pratique (ed. 2) 810 § 1394.

³⁹ *Contra*: I FRANKENSTEIN 369 who would have the court use the foreign procedure.

⁴⁰ Thus, NEUNER, Der Sinn 124 f.

law or by the presumable intention of the parties have advocated this device especially for limitation of actions.⁴¹

(b) *Lex contractus*. By overwhelming consent in most civil law countries, the law governing the contract as such controls limitation of action. However, doubts have been raised respecting the role of party autonomy.

Choice of law by the parties. Two questions must be distinguished:

If the parties agree on an applicable law for the contract, does it include limitation of action? This has been wrongly denied by some writers, even supporters of party autonomy in general, because of the allegedly imperative effect of the statutory period of time. Hence, the predestined law, preferably *lex loci contractus*, re-enters the picture.⁴² But imperative municipal law is far from being identical with stringent public policy.⁴³

Illustration. Willy and Roger de Perrot concluded in Neuchâtel a contract with the company, Suchard S. A., giving them the exclusive right to manufacture and sell the Suchard products (chocolate, cocoa, and sweets) in the United States and Canada. The contract provided for the application of the usages and laws of the United States. The Swiss Federal Tribunal, therefore, in a suit for breach of contract, applied American law, identified with the law of Pennsylvania, to the question of limitation of action, although the contract was made in Switzerland, the defendant company was Swiss, and the plaintiff had returned to Switzerland seventeen years before. BG. (March 15, 1949) 75 BGE. II 57, 65.

May the parties stipulate specifically for a special law

⁴¹ See the citations in DE NOVA § 23.

⁴² DIENA, 1 Dir. Com. Int. 444-446; *id.*, 2 Principi 264; MICHEL 159; French decisions cited by 1 FRANKENSTEIN 597 n. 152 seem to join in this view.

⁴³ *Infra* pp. 525 ff. Even the French Supreme Court has recognized the faculty of the parties to eliminate the alleged socially necessary protection of the debtor by his domiciliary law, by stipulating another law in the contract, Cass. req. (March 5, 1928) D. 1928.1.81, S. 1929.1.217, *cf.* the reference to this decision by a French tribunal in Clunet 1938, 281.

to prolong the period of limitation allowed by the law of the contract? This is a practically important question. American courts have raised various objections to any party agreement modifying legal limitations of time for bringing suits and are prone to override a clause backed by foreign law but disapproved by local policy.⁴⁴ However, such clauses have been upheld against the *lex fori*.⁴⁵

We have to concentrate on the main subject.⁴⁶

II. COMPROMISES

(a) *Basic Anglo-American exception.* From 1726, English courts recognized in theory that foreign law could discharge a debt so as to make its enforcement at the forum impossible.⁴⁷ The procedural principle, laid down in the leading cases for limitation, hence, was always accompanied by the exception that a foreign statute "extinguishing" the substantive right, or imposing "a condition upon the right" was to be recognized at the forum.⁴⁸ This might have resulted in broad application of foreign limitations.⁴⁹ But nothing of this sort developed. In fact, the courts seldom find foreign general statutes of limitation answering that description. The writers explain this by observing that English and American statutes scarcely ever expressly declare the right extinguished,⁵⁰ or that the courts are keen

⁴⁴ See for the cases, Note, 48 Col. L. Rev. (1948) at 140 f., speaking of a confused picture.

⁴⁵ See *infra* ns. 89, 131.

⁴⁶ For the same reason, no attention will be given to the "saving" and "tolling" statutes caused by the procedural theory.

⁴⁷ *Burrows v. Jemino* (1726) 2 Strange 733, 93 Eng. Re. 815; see for the subsequent decisions, AILES, *supra* n. 5, 491.

⁴⁸ *Huber v. Steiner* (1835) 2 Bing. N. C. 202, citing STORY who himself spoke of time limitation extinguishing claim and title, which, as well as his case material on the distinction between the title and the right of action, "belongs to property and not to obligation," WESTLAKE § 239.

Scotland: *Don v. Lippmann* (1837) 5 Cl. & F. 1, 7 Eng. Re. 304.

Canada: *Bryson v. Graham* (1848) 3 N. S. R. 271, and decisions *supra* n. 2.

⁴⁹ Optimistically so understood by DE NOVA 116, construing a system of twofold characterization.

⁵⁰ AILES, *supra* n. 5, 493.

on discovering a reason for not making an exception.⁵¹ This tendency, we may add, is greatly aided by the formula of the exception. Genuine statutes of limitation never "extinguish" the right, even though they may use this expression. Thus the statute of Louisiana, identical with the French, has been construed as procedural according to the British model in Louisiana itself,⁵² and in Missouri.⁵³ The French Code was read in the same manner by Tindal, J., in *Huber v. Steiner* in 1835⁵⁴ and by Judge Learned Hand in 1930.⁵⁵ Whether the New Jersey statute restricting to three months the time for recovering the amount of a deficiency after foreclosure of a mortgage on New Jersey land, extinguishes the right, has been a riddle in the courts of New Jersey and New York for a long time.⁵⁶

The general statutes of limitation of Wisconsin⁵⁷ and the Maryland⁵⁸ statute on bills, bonds, and judgments have been recognized as "extinguishing the right," but although the Wisconsin court seems to reject the British doctrine, in the Maryland case it was only stressed that the debt could not be revived by subsequent acknowledgment. Also,

⁵¹ STUMBERG (ed. 2) 149.

⁵² This seems proved by *Erwin v. Lowry* (1847) 2 La. Ann. 314; *Newman v. Goza* (1847) 2 La. Ann. 642, 646; *Metropolitan Life Ins. Co. v. Haack* (D. C. W. D. La. 1943) 50 F. Supp. 55, 64 f. See also PERKINS, "Limitation of Actions in Conflict of Laws," 10 La. L. Rev. (1950) 374.

⁵³ *McMerty v. Morrison* (1876) 62 Mo. 140, 144.

⁵⁴ Tindal, C. J., in *Huber v. Steiner*, *supra* n. 3. MENDELSSOHN-BARTHOLDY, 46 Brit. Year Book Int. Law (1935) 31 n. 2 and AILES, *supra* n. 5, 499 approve Tindal's construction of C. C. art. 1234 as "procedural." Cf. *infra* n. 115.

⁵⁵ *Wood & Selick v. Compagnie Générale Transatlantique* (C. C. A. 2d 1930) 43 F. (2d) 941; *HARPER et al.*, Cases 57.

⁵⁶ *Stumpf v. Hallahan* (1905) 101 App. Div. 383, 91 N. Y. Supp. 1062; *Hutchinson v. Ward* (1908) 192 N. Y. 375, 85 N. E. 390; *Apfelberg v. Lax* (1931) 255 N. Y. 377, 174 N. E. 759; following these precedents, *Paterno v. Eager* (1943) 179 Misc. 966, 40 N. Y. Supp. (2d) 465 (substantive), reversed (1943) 180 Misc. 582, 45 N. Y. Supp. (2d) 225 because of the contrary construction of the statute by the highest local courts.

⁵⁷ *Brown v. Parker* (1871) 28 Wis. 21; *Rathbone v. Coe* (1888) 6 Dak. 91, 50 N. W. 620.

⁵⁸ *Baker v. Stonebraker* (1865) 36 Mo. 338; see other cases in AILES, *supra* n. 5, 493 n. 110.

a Czarist Russian ten-year limitation has been applied as terminating the right.⁵⁹

Special statutory liabilities. American courts feel more secure ground when a special rather than a general foreign statute is in issue. Death statutes have been an example of provisions creating a substantive right not known at common law and simultaneously ending it within a specified period.⁶⁰ Analogous cases have concerned the liability of trustees of a business trust or of stockholders in corporations⁶¹ and the Federal Employers' Liability Act.⁶² This recognition of applicable foreign limitations has been extended to statutes specifically qualifying a right created by another statute.⁶³

A characteristic controversy has developed around the effect of statutes of the forum creating a right similar to the foreign-governed claim in issue but limiting it to a period of duration shorter than the foreign statute. Logic seems to advise that the local prescription is restricted to the domestic-governed right; in this sense, some cases have admitted that nothing prevents the application of the foreign statute even if its period is longer than that of the forum.⁶⁴

⁵⁹ *In re Tonkonogoff's Estate* (1941) 32 N. Y. Supp. (2d) 661.

⁶⁰ The *Harrisburg* (1886) 119 U. S. 199; for other cases, and particulars, see *HANCOCK*, Torts 134; *AILES*, *supra* n. 5, 495 f.; recently, e.g., *Summar v. Besser Manufacturing Co.* (1945) 310 Mich. 347, 352, 17 N. W. (2d) 209.

⁶¹ *Davis v. Mills* (1904) 194 U. S. 451; *Norman v. Baldwin* (1929) 152 Va. 800, 148 S. E. 831, 833.

⁶² *Atlantic Coast Line R. R. v. Burnette* (1915) 239 U. S. 199; *AILES*, *supra* n. 5, n. 129. See also *State ex rel. Winkle Terra Cotta Co. v. U. S. Fidelity & Guaranty Co.* (1931) 328 Mo. 295, 40 S. W. (2d) 1050 (contractors' bonds) and *cf.* Note, 48 Col. L. Rev. (1948) at 139.

⁶³ Mr. Justice Holmes in *Davis v. Mills* (1904) 194 U. S. 451; *Osborne v. Grand Trunk Ry. Co.* (1913) 87 Vt. 104, 88 Atl. 512. Restatement § 605 comment a.

In *Bournias v. Atlantic Maritime Co., Ltd.* (C. C. A. 2d 1955) 220 F. (2d) 152, *CHEATHAM*, Cases (ed. 4) 402, the test of specificity was applied to the reverse effect: an action based upon the Panamanian Labor Code was considered not to be barred, although the limitation period prescribed by the same statute had elapsed; the court was not satisfied that the period in question was "specifically" aimed against the particular right which the plaintiff sought to enforce.

⁶⁴ *Theroux v. Northern Pacific R. Co.* (C. C. A. 8th 1894) 64 Fed. 84;

However, in a contrary view, the statute of the forum expresses public policy barring all suits of the type in question.⁶⁵ This division of opinion demonstrates the futility of both approaches. Evidently, public policy may as well reside in genuine limitation as in preclusion by *lex fori*, and the decisions are visibly veering to the identification of both.⁶⁶

In their embarrassment, the courts take it as a favorable indication when the foreign statute is called substantive in its own state. This self-characterization may occur for various purposes, such as in order to decide whether interruption of the running time by suing or revival through acknowledgment is possible;⁶⁷ whether the statute may act retroactively;⁶⁸ whether special pleading is necessary;⁶⁹ whether a foreign judgment is enforceable despite domestic bar;⁷⁰ or a judgment is dead.⁷¹ The inference for extra-

Negaubauer v. Great Northern R. Co. (1904) 92 Minn. 184, 99 N. W. 620; Keep v. Nat'l Tube Co. (C. C. N. J. 1907) 154 Fed. 121; Cristilly v. Warner (1913) 87 Conn. 461, 88 Atl. 711; Maki v. George R. Cooke Co. (C. C. A. 6th 1942) 124 F. (2d) 663; cf. Wilson v. Massengill (C. C. A. 6th 1942) *id.* 666, 669; see Note, 9 U. of Chi. L. Rev. (1942) 727 n. 31.

⁶⁵ PARMELE in 2 Wharton 1264 § 540b; Hutchings v. Lamson (C. C. A. 7th 1899) 96 Fed. 720; Tieffenbrun v. Flannery (1930) 198 N. C. 397, 151 S. E. 857, seemingly approved by 3 BEALE 1629 § 605.1; Rosenzweig v. Heller (1931) 302 Pa. 279, 153 Atl. 346, noted, 79 U. of Pa. L. Rev. (1931) 1112; Broderick v. Pardue (Tex. Civ. App. 1937) 102 S. W. (2d) 252; White v. Govatos (1939) 40 Del. 349, 10 Atl. (2d) 524.

⁶⁶ In the Maki Case of 1942, *supra* n. 64, the foreign limitation of six years was contained in a Minnesota statute covering all actions commenced "upon a liability created by statute, other than those arising upon a penalty or forfeiture." The domestic (Michigan) restriction of three years to recovery of injuries to person or property is a clear limitation of action. Both provisions thus appear to be genuine limitations of action, rather than "extinguishing" devices.

⁶⁷ Hollingsworth v. Schanland (1924) 155 La. 825, 99 So. 613 ("peremptory").

⁶⁸ McCracken County v. Mercantile Trust Co. (1886) 84 Ky. 344, 1 S. W. 585.

⁶⁹ Cooper v. Lyons (1882) 9 Lea (Tenn.) 596; Wood & Selick v. Compagnie Générale Transatlantique (C. C. A. 2d 1930) 43 F. (2d) 941; HARPER *et al.*, Cases 57; Lewis v. Mo. Pac. Ry. Co. (1929) 324 Mo. 266, 23 S. W. (2d) 100; Carpenter v. United States (C. C. A. 2d 1932) 56 F. (2d) 828.

⁷⁰ Brown v. Parker (1871) 28 Wis. 21.

⁷¹ Angell v. Martin (1880) 24 Kan. 334.

territorial applicability may be more or less convincing.^{71a}

Insecurity, however, is very natural with such nebulous criteria and the fundamental inadequacy of the distinction between "extinguishing the right" and only affecting the "remedy." The courts must be aware that they speak in a concerted language. What is their real impulse? Not only a European writer,⁷² but also Mr. Justice Holmes⁷³ has declared:

"In cases where it has been possible to escape from that qualification (as procedural) by a reasonable distinction courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued."

It may be preferred to assume with Ailes that "statutes are often labelled 'substantive' or 'procedural' depending upon the result sought,"⁷⁴ but this does not give a much different impression. Hancock points to the courts of North Carolina and Pennsylvania refusing to recognize the distinction between special statutory provisions and general statutes of limitations, because they are satisfied with the results of the procedural principle:

"The distinction, though groundless, is probably symptomatic of dissatisfaction with the general principle and of a desire to limit its sphere of operation."⁷⁵

The above-mentioned controversy concerning foreign limitations that are longer than the domestic periods, led a federal circuit court in 1942 to reasoning which sounds like the end of the tortuous development of the procedural construction:

^{71a} Reliance on self-characterization by the *lex causae* is also rejected by EHRENZWEIG, Conflict 431.

⁷² MICHEL 157.

⁷³ Davis v. Mills (1904) 194 U. S. 451, 454.

⁷⁴ AILES, *supra* n. 5, at 493 n. 116 *in fine*.

⁷⁵ HANCOCK, Torts 135.

"Why should not this limitation accompany the new right created by the statute wherever enforcement of the right is sought, if the substantive law of a sister state is by comity to be recognized and enforced?"⁷⁶

(b) *Borrowing statutes.* The application of the *lex fori* indeed has been finally cut down to half size by statutory clauses, now adopted in a great majority of the states.⁷⁷ Their general intention is to protect the defendant against a plaintiff "shopping around" for a forum with a limitation long enough to allow suit. Therefore, they recognize under certain conditions foreign limitation or extinction of a cause of action brought to the forum.

Unfortunately, these statutes are of different types, and all of them are awkwardly drafted.^{77a} Most of them identify the competent foreign statute by pointing to the law of the place where the cause of action "arose" or "occurred," a language adequate only for tort actions. Some recognize the statute of the state where the defendant resided when the action originated, irrespective of where this happened.

In application to contractual and other nondelictual obli-

⁷⁶ Martin, C. J., in *Maki v. George R. Cooke Co.*, *supra* n. 64, at 666.

⁷⁷ Note, 75 A. L. R. (1931) 203; Restatement § 604 is thereby abrogated, YNTEMA, 36 Col. L. Rev. (1936) 183, 213.

^{77a} A Uniform Statute of Limitations on Foreign Claims Act was promulgated in 1957; see 1957 Handbook of the National Conference of Commissioners on Uniform State Laws 264. If it should be enacted in a sufficient number of states, a certain uniformity of borrowing legislation would ensue. For a discussion of the still remaining deficiencies, see PROEY, "A Study of the Uniform Statute and the Present State of the Law Limiting Claims Arising in Foreign States," 4 Wayne L. Rev. (1958) 123; 5 *id.* (1959) 226; VERNON, "Report on the First Tentative Draft of the Uniform Statute of Limitations on Foreign Claims Act," 3 Wayne L. Rev. (1957) 187; VERNON, "The Uniform Statute of Limitations on Foreign Claims Act: A Discussion of Section Two," 4 St. Louis U. L. J. (1957) 442; VERNON, "The Uniform Statute of Limitations on Foreign Claims Act: Tolling Problems," 12 Vand. L. Rev. (1959) 971; VERNON, "Statutes of Limitation in the Conflict of Laws: Borrowing Statutes," 32 Rocky Mt. L. Rev. (1960) 287.

For further studies of present problems in the field of borrowing statutes, see NORDSTROM, "Ohio's Borrowing Statute of Limitations—A Quaking Quagmire in a Dismal Swamp," 16 Ohio S. L. J. (1955) 183; ESTER, "Borrowing Statutes of Limitation and Conflict of Laws," 15 U. of Fla. L. Rev. (1962) 33.

gations, the courts have assumed that the cause of action arises at the place of performance.⁷⁸ What sort of reasoning is required thereby, has been illustrated by a recent controversy necessitating a decision of the Supreme Court of the United States. A federal statute of 1913 obligated the stockholders of an insolvent national bank to make additional payments, without prescribing a time of limitation. The state statutes of limitation of the forum, including its borrowing statutes, had to supply the rules, but what statutes were to be borrowed, i.e., in what state did the cause of action arise? On the direction of the Comptroller in Washington, the receiver in Louisville, Kentucky, where the defunct bank had at all times actually carried on its transactions, issued the summons. The Sixth Federal Circuit Court declared that the cause of action was the failure to pay the amount at the receiver's place and therefore the Kentucky statute applied.⁷⁹ The Third Federal Circuit Court, however, held that the cause of action, created by a federal law and dependent on the act of federal authority did not arise in one particular state more than in another.⁸⁰ It resorted to the law of Pennsylvania as law of the forum. The Supreme Court approved the first opinion, agreeing with the prevailing construction of the place where the cause of action arises.⁸¹ However, it is never correct simply to localize a right flowing from a breach of contract or the violation of a legal obligation at the place where the performance is due, rather than where the obligatory relationship is centered. The supporting reason should have been what was incidentally mentioned, i.e., that the liability in virtue of the federal statute inhered in the membership in

⁷⁸ Cf. STUMBERG (ed. 2) 149 n. 55.

⁷⁹ Miller, C. J., in *Helmerts v. Anderson* (C. C. A. 6th 1946) 156 F. (2d) 47.

⁸⁰ Goodrich, C. J., in *Anderson v. Andrews* (C. C. A. 3d 1946) 156 F. (2d) 972. The criticism in Notes, 60 Harv. L. Rev. (1946) 303 and 32 Cornell L. Q. (1946) 276 fails to censure the technique of the borrowing statutes.

⁸¹ *Cope v. Anderson* (1947) 331 U. S. 461. Approved by HARPER, "The Supreme Court and the Conflict of Laws," 47 Col. L. Rev. (1947) 883, 910-912.

the former banking corporation and could have been better localized, under the circumstances, at the central office than in the charter state.

The borrowing statutes, moreover, refer, in one or another respect, to the (factual) residence of the defendant at the time of the origin of the cause of action; in part require that both parties resided in the same state during the full period; and establish more conditions of residence at the time of action. The complications, doubts, and variety so accomplished are astonishing.⁸²

The New York statute distinguishes, like a few others, between residents and nonresidents of the forum, and in particular excludes from the bar such causes as originally accrue in favor of residents of New York.⁸³ Where however, a nonresident sues a resident on a foreign cause of action, the shorter foreign limitation is observed.⁸⁴ The Wisconsin lawmakers exclude the application of a foreign limitation if a claimant for personal injuries was a resident of the forum at the time of such injury.⁸⁵

As a whole, this broad exception to the procedural principle is a half measure, the statutes, with the exception of that of Kentucky,⁸⁶ leaving intact all domestic bars in addition to those foreign. Such theories have been called irrational, because a more incisive foreign statute is applied and a weaker one is refused effect.⁸⁷ On the other hand, complaint has been raised against them as an unwarranted departure from the procedural principle.⁸⁸

⁸² See the surveys, 75 A. L. R. (1930) 203-232; 149 A. L. R. (1944) 1224-1238; 53 C. J. S. (1948) 977 ff.

⁸³ New York: Civil Practice Act § 13, as amended by law of April 15, 1943.

⁸⁴ Dictum in *Kahn v. Commercial Union of America, Inc.* (1929) 227 App. Div. 82, 237 N. Y. Supp. 94, where a six-month limitation of New York is applied against a thirty-year period of French law, an application in itself understandable. See *infra* ns. 97, 100.

⁸⁵ Wisconsin: Stat. (1957) § 330.19 (5).

⁸⁶ *Smith v. Baltimore & Ohio Ry. Co.* (1914) 157 Ky. 113, 162 S. W. 564.

⁸⁷ BAR, Book Review on Wharton quoted in 2 WHARTON 1245 n. 3.

⁸⁸ AILES, *supra* n. 5, 501 *in fine*.

In fact, the borrowing statutes are intended to protect the debtor against the obvious iniquity that, having once acquired repose, he should be again vulnerable to attack merely because he changed his residence. However, it is still less equitable that a *creditor* should lose his action simply because the debtor changes the place where he can be sued.

(c) *Continental proposals.* Arguments on exactly the same topic have been much discussed in the European orbits. The authors following the procedural principle themselves felt the desire to restrict the hazards just mentioned. On the other hand, writers of the adversary school of thought sometimes conceded overriding considerations of the forum. All these compromises, however, have been more or less openly established on the ground of public policy which will be presently discussed.

(d) *Contractual and corporative limitations.* The Supreme Court of the United States, in a recent majority opinion, enumerates the various modifications imposed on the general principle that *lex fori* governs limitation, and among them mentions contractual stipulations limiting the time for bringing an action, recognized in a long line of cases.⁸⁹ The decision adds that limitation of time for suit by the constitution of a fraternal benefit association is protected by the Full Faith and Credit Clause.⁹⁰ Among other possible implications, it is doubtful whether the argument is equally valid for all suits between a corporation and its members.

(e) *Federal characterization.* Nothing is more indicative of the awareness, in the United States, of the true char-

⁸⁹ Order of United Commercial Travelers of America v. Wolfe (1947) 331 U. S. 586, 607, 608 n. 20.

⁹⁰ *Id.* 624. The dissenting opinion by Mr. Justice Black, by a kind of *argumentum ad absurdum*, extends the scope of the majority decision very far. His criticism is shared by HARPER, "The Supreme Court and the Conflict of Laws," 47 Col. L. Rev. (1947) 883, 895-900.

On the special subject of the insurance companies, cf. *supra* pp. 332-334.

acter of limitation of action than its recognition first in a hint,⁹¹ then a straight decision,⁹² by the Supreme Court of the United States. For the purpose of application of state statutes to lawsuits before federal courts in diverse citizenship cases, the statutes of limitation are expressly termed substantive law, and this has even been extended to equity cases where an exception may have been expected.⁹³ It should not be objected that characterization for this purpose may soundly be distinguished from conflicts characterization.^{93a} The manner in which the opinion of the Supreme Court is motivated,⁹⁴ refutes any such distinction; indeed, there is no reason why the contrast of substance and procedure should not be exactly the same in both cases.⁹⁵

III. THE ROLE OF PUBLIC POLICY

The Anglo-American conception of limitation survives in this country in a vastly reduced and amorphous shape. Its only real support is not procedural characterization but the

⁹¹ *Ruhlin v. N. Y. Life Ins. Co.* (1938) 304 U. S. 202.

⁹² *Guaranty Trust Co. v. York* (1945) 326 U. S. 99.

⁹³ TUNKS, "Categorization and Federalism, etc.," 34 Ill. L. Rev. (1939) 271.

^{93a} *Accord*, SEDLER, "The Erie Outcome Test As a Guide to Substance and Procedure in the Conflict of Laws," 37 N.Y.U.L. Rev. (1962) 813, 846 ff. Cf. also the interesting dissenting opinion by Mr. Justice Jackson in *Wells v. Simonds Abrasive Co.* (1953) 345 U. S. 514, suggesting that in pursuing the Erie doctrine the federal courts, in cases of wrongful death statutes, should apply the statute of limitation of the *lex causae* rather than that of the state in which they are sitting.

⁹⁴ Mr. Justice Frankfurter, 326 U. S. 109: "And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?"

Cf. ESTEP, Note, 44 Mich. L. Rev. (1945) 477.

⁹⁵ In the United States, constitutional control for the protection of foreign limitation statutes has only been exercised in a few special cases, on which see Note, 48 Col. L. Rev. (1948) 136 at 142-146. See also *Wells v. Simonds Abrasive Co.*, *supra* n. 93a, CHEATHAM, Cases (ed. 4) 558; JOHN A. CARNAHAN, "The Full Faith and Credit Clause—Its Effect on Statutes of Limitations," 4 Duke B. J. (1954) 71; STEWART & MUSGROVE, "The Full Faith and

British territorialism of former centuries which at present must take the appearance of public policy of the forum. This is probably the general opinion, although theoretical considerations are scarce and usually mix the points of view regarding remedy and policy. The former Continental literature, on its way from the same basic conception, took more opportunity for emphasizing, by arguments pro and contra, the role of local *ordre public*.

Around the turn of the century, a considerable group of authors believed they had discovered a sound compromise between the law of the forum and that of the contract in reserving for the court its domestic statute when the period prescribed by it was shorter than that of the *lex causae*.⁹⁶ Some proposals restricted this concession to the longest period known to the forum, usually thirty years. Others have distinguished all "long" and all "short" periods. Finally, Rolin, reporter to the Institute of International Law, allocated to the law of the forum also certain limitations such as the French period of five years for rents (C. C., article 2277), in contrast to the very short limitations which in French law rests on a presumption of payment made.⁹⁷ Bar, to protect the defendant, allowed him an option between the local statute and the law of the contract, if sued at his domicile.⁹⁸

Wherever in these suggestions the *lex fori* was maintained, its clear ground was the reaction of public policy against claims regarded at the forum as superannuated.

This idea was directly formulated so as to form the only

Credit Clause As Related to the Diversity Clause in Statute of Limitations Cases," 11 Wash. & Lee L. Rev. (1954) 47; VERNON, "Some Constitutional Problems in the Conflict of Laws and Statutes of Limitations," 7 J. Pub. L. (1958) 120.

⁹⁶ 1 AUBRY et RAU 165 and n. 69; DESPAGNET 925 § 317, citing cases; WEISS, 4 Traité 407; ROLIN, 1 Principes §§ 338 f.; VALÉRY 1014 § 703; BOSCO, Rivista 1931, 413. Also PHILONENKO, Clunet 1936, 259, 513; JITTA, Méthode 355.

⁹⁷ ROLIN, 31 Annuaire (1924) at 161.

⁹⁸ 2 BAR 99, 101.

exception to the law of the contract, in the resolutions of the Institute of International Law:

Liberatory prescription may also be deemed acquired by the courts seized of litigations by virtue of their own law of the forum, if the invoked limitation, according to this law, constitutes an institution of absolute public policy, preventing the application of any foreign statute, even that normally competent to govern it as, for instance, in the interest of third persons, on consideration of humanity, etc.⁹⁹

This proposal was an attempt to include the common law courts in a universal rule. However, in Europe itself all such far-reaching exceptions to the law properly governing the obligation are entirely and deservedly discarded.¹⁰⁰ A public policy, not strong enough to be enforced by the court except when pleaded by the defendant should not be a reason to shield one who changes his abode arbitrarily to the forum, nor should it be a ground to remove limitation from many other important incidents of the governing law. True, statutes of limitation are usually "imperative" in municipal law so that the parties are not allowed to agree in advance to waive the statute or prolong its period of time. But, as the Italian Supreme Court has put it, terminating a long-continued controversy in that country:

Although it cannot be denied that limitation of action is founded also on considerations of public order (which are, however, joined by other, not less important, reasons), this does not mean that it belongs to the international public order. Therefore, limitation is not considered by the court without party request; it can be waived after the time has lapsed; and the time is suspended if impossibility to sue is proved.¹⁰¹

⁹⁹ 31 *Annuaire* (1924) 182 art. III.

¹⁰⁰ DE NOVA § 130; 2 SCHNITZER (ed. 4) 667 f.

¹⁰¹ Italy: Cass. (Nov. 13, 1931) *Foro Ital.* 1932 I 2332, and (March 3, 1933) *Riv. Dir. Priv.* 1934 II 67, *Clunet* 1936, 697. *Accord*, Cass. (Jan. 29, 1936) *Foro Ital.* 1936 I 1033, 1040, applying an American statute.

The Italian Court still left open (in 1933) the question whether a foreign period of time longer than the domestic period may offend the public policy of the forum.¹⁰² The better-elaborated German doctrine of courts and writers sharply rejects such inconsistency. Whether a period of limitation is longer¹⁰³ or shorter¹⁰⁴ than the local statute admits makes merely a technical, but not a moral, and certainly not a fundamental, difference.¹⁰⁵ In France, the same view seems to prevail after the long controversy.¹⁰⁶

The domain of stringent public policy, thus, shrinks to the extent of extreme cases: The Reichsgericht once held the Swiss rule that a deficiency certificate against an insolvent debtor is not subject to limitation¹⁰⁷ "contrary to the purpose of German legislation," because the statutes of limitation serve also the public welfare, viz., peace and security.¹⁰⁸ But embarrassment followed as to the rule

¹⁰² Cass. (March 3, 1933) *supra* n. 101. Such offense was contended by CERETI in Fedozzi 736, and repeatedly; DE NOVA 196; App. Milano (March 28, 1916) Riv. Dir. Com. 1916 II 896; App. Firenze (June 8, 1927) Rivista 1928, 245.

¹⁰³ RG. (July 8, 1882) 9 RGZ. 225; (Nov. 22, 1912) Leipz. Z. 1913, 550 (Dutch thirty years instead of German two years); OLG. Hamburg (July 1, 1912) 25 ROLG. 218, 23 Z.int.R. (1913) 342 (English six years instead of German three years to six months).

Switzerland: App. Bern (Nov. 3, 1927) Bl. IPR. 1928, 286.

¹⁰⁴ LEWALD 29 § 33.

¹⁰⁵ MICHEL 227, 239; I FRANKENSTEIN 209, 597; WUNDERLICH, *supra* Ch. 52 n. 3, 486.

Accord in Switzerland: 2 SCHNITZER (ed. 4) 666 f.

Brazil: ESPINOLA, Lei Introd. 628, citing MACHADO VILLELA, O Direito internacional privado no Código Civil brasileiro (1921) 334.

Austria: The Supreme Court has invoked Austrian public policy against a Czechoslovakian statute substituting a three-year period of limitation for a thirty-year period; OGH. (Feb. 26, 1958) 3 Z. f. RV. (1962) 117 and MAGERSTEIN, "Die Verjährungsfristen ausländischen Rechts und der ordre public," 77 J. Bl. (1955) 470.

¹⁰⁶ MICHEL, 10 Répert. 305 Nos. 79-83, 307 No. 87; BATIFFOL 459 §§ 585 f.; with more reservations, NIBOYET § 708.

¹⁰⁷ Switzerland: Law on Enforcement and Bankruptcy, art. 149.

¹⁰⁸ RG. (Dec. 19, 1922) 106 RGZ. 82, Revue 1926, 278. In an analogous case, the French App. Colmar (Mar. 31, 1933) Revue Crit. 1934, 468, 2 Giur. Comp. DIP. (1937) 127 No. 85, held the Swiss provision not offensive to French public order, but stressed the fact that the French thirty-year limitation had not yet run out.

positively to apply, and it was not true that every debt must be prescriptible.¹⁰⁹ Occasionally, it has been contended that a foreign period should not apply when it is unreasonably short,¹¹⁰ or, under reference to National Socialist intransigence, that a Hungarian thirty-two-year period was unacceptable in face of a German two-year period.¹¹¹

Is it worth while to introduce an element of uncertainty for the sake of such rare discrepancies? Curiously enough, we may point to an American decision which did not hesitate to apply the Ohio borrowing statute in favor of the Pennsylvania statute ending in two years the right to sue for an injury committed in the later state. Under Ohio law, the plaintiff, only 3½ years old at the time of the injury, would have enjoyed suspension and could have sued after eighteen years.¹¹² Consideration of domestic protection of citizens could have been expected to work in this case, if anywhere. But the court acted wisely in maintaining the rule. Do American courts, as it had been contended, really feel it unbearable that Continental general limitation periods usually are of thirty years?¹¹³ If so, this would be the only understandable concession to public policy.

IV. THE INTERNATIONAL PROBLEM

The earliest attitude of Story and approval by most modern Anglo-American scholars have not prevented their acknowledgment of the existing principle, short of legislative reforms. On the Continent, conformingly, courts and authors have taken this procedural theory at its face value as the law of the Anglo-American countries, ignoring such important exceptions as the American and Canadian borrow-

¹⁰⁹ WUNDERLICH, *supra* Ch. 52 n. 3, 481, 506.

¹¹⁰ RAAPE, *IPR.* (ed. 5) 498 f.

¹¹¹ OLG. München (Feb. 2, 1938) H. R. R. 1938, 1402.

¹¹² Hilliard v. Pa. R. Co. (C. C. A. 6th 1935) 73 F. (2d) 473, cert. denied, 294 U. S. 721.

¹¹³ Suggested by Note, 9 U. of Chi. L. Rev. (1942) 724 at n. 11.

ing statutes. The two groups, almost neatly divided on the lines of common law and civil law, thus face the problem how to treat the opposite conception of the statutes of limitation. Here, the three theories of characterization—applying the conception of the forum; of the foreign law; and of analytical jurisprudence—demonstrate their most significant consequences.¹¹⁴

I. Characterization According to *Lex Fori*

We have seen that the English courts remain fixed on the axiom that any foreign statute of limitation is inapplicable, excepting conceivable but rarely recognized statutes "extinguishing the right." This distinction was applied to the French *prescription*, and it was found that it also did *not* "extinguish the right"¹¹⁵ and hence did not affect a French note. One hundred years later, an outstanding American judge repeated this investigation and reached the same result.¹¹⁶ He ascertained in a perfectly correct statement that the French institution is of exactly the same nature as the American general statutes of limitation. But when, for this reason, he again classified French limitation as procedural and therefore inapplicable, he demonstrated the inherent vice of characterization according to the *lex fori*. Not only has a wrong municipal theory transgressed into conflicts law, so that the similarly constructed statutes of the sister states have become inapplicable, but this theory is extended to foreign limitations considered in their own countries as substantive.

¹¹⁴ See 5 Zausl.P.R. (1931) 241, 278; Vol. I (ed. 2) pp. 69 ff. On the occasion of a German decision of 1932, the three theories were advanced simultaneously in 1 Giur. Comp. DIP. (1932) 160 ff. No. 40, the first being advocated by the decision and the Note by SIEBERT, and the second with ill-placed vehemence by AGO, the third, my own, being explained by LUDWIG RAISER.

¹¹⁵ Tindal, C. J., in *Huber v. Steiner* (1835) 2 Bing. N. C. 202.

¹¹⁶ Judge Learned Hand in *Wood & Selick v. Compagnie Générale Transatlantique* (C. C. A. 2d 1930) 43 F. (2d) 941, HARPER *et al.*, Cases 57.

The same approach, however, has marked the entire German doctrine.¹¹⁷ It seemed to provide escape from other egregious blunders.¹¹⁸ Exactly as the English and American judges mentioned above examined the French Code, the courts investigated English law with the identical clear result that limitation of actions was subject essentially to the same rules as German *Anspruchsverjährung*.¹¹⁹ The German courts and writers now unanimously state that what imports is only that in the German view limitation is substantive and for this reason the New York statute does operate in a German court. Also, in other countries this form of characterization has found favor.¹²⁰

On the European side, it is true, the effect is reasonable. But the underlying theory is less admirable, as has been shown just above, on the common law side. So long as the English and American courts believe in construing a Swedish statute by the method which they learned for the interpretation of the Statute of James I, we shall have no harmonious conflicts solution. And the reader should take a moment to consider the law of a world where an admittedly identical phenomenon is termed, classified, and treated in opposite manners by the two chief legal groups of western civilization!

¹¹⁷ ROHG. (June 15, 1875) 15 ROHGE. 186; RG. (May 8, 1880) 2 RGZ. 13; OLG. Hamburg (July 1, 1912) 23 Z.int.R. (1913) 342; RG. (July 6, 1934) 145 RGZ. 121, IPRspr. 1934 No. 29, Revue Crit. 1935, 447; 6 Giur. Comp. DIP. No. 130.

KAHN, 1 Abhandl. 103 ff., 119; 2 BAR 95 f.; LEWALD 73 § 98; SCHOCH, Klagbarkeit etc., *supra* Ch. 52 n. 3, 110 and n. 2.

¹¹⁸ *Infra* n. 122.

¹¹⁹ OLG. Hamburg (Jan. 13, 1932) IPRspr. 1932 No. 28 at 59; RG. (July 6, 1934) *supra* n. 117; cf. ECKSTEIN, 6 Giur. Comp. DIP. 152.

¹²⁰ Denmark: S. Ct. (July 19, 1925) 6 Répert. 215 No. 10.

France: 2 ARMINJON 346.

Italy: FEDOZZI-CERETI 736.

Sweden: Decision of the Swedish Supreme Court, and BAGGE, *supra* n. 30.

Switzerland: (Semble) App. Tessino (Sept. 23, 1929) and Bezirksgericht Zürich (Dec. 19, 1928) 5 Z.ausl.PR. (1931) 725; (probably) 2 SCHNITZER (ed. 4) 667 f., and definitely BG. (March 15, 1949) 75 BGE. II 57, 66.

2. Characterization According to *Lex Causae* (Secondary Characterization)

Reputable authors advise a compromise to the effect that the forum should apply its domestic statute of limitation in principle to all cases decided at the forum, but recognize a foreign-governing law with the content given it in the foreign country. Characterization by *lex causae* and secondary characterization agree on this point.¹²¹ The Swedish statute is applicable since it is considered substantive in Sweden, and the Ontario statute is not applied because it is construed as procedural in Ontario. Thus, while theory (1) provides the German courts with satisfactory decisions and leaves the American courts in the dark, theory (2) rescues the latter courts from their predicament. However, it immediately puts the Continental courts back in an insoluble puzzle. We are again where the Reichsgericht was in 1880.¹²²

At that time, the German Supreme Court hearing an action on a note issued in Tennessee, speculated that it could neither apply the Tennessee statute because it was procedural nor the German statute because it was intended only for a German-governed contract. Hence, a Tennessee note could never be prescribed as far as the German courts were concerned—an outcome amazing even to the hardboiled specialists of conflicts law. Corrections have been attempted. Thus, it was assumed that American law refers the question of limitation to the domestic law of the forum exercising jurisdiction of the claim and this renvoi ought to be accepted.¹²³ Also the Anglo-German Mixed Arbitral Tribunal,

¹²¹ AILES, *supra* n. 5, 482; CHESHIRE (ed. 3) 74-75, 834; ROBERTSON, Characterization 64, 248 ff.; PONTES DE MIRANDA, Recueil 1932 I 625 § 7. The so-called "foreign court's interpretation test" advocated by R. M. Z., "Statutes of Limitation: Lex Loci or Lex Fori," 47 Va. L. Rev. (1961) 299, 307 f. is in fact identical with the characterization according to the *lex causae*.

¹²² RG. (Jan. 4, 1882) 7 RGZ. 21, 24; (May 18, 1889) 24 RGZ. 383, 393.

¹²³ OLG. Darmstadt (Nov. 2, 1906) cited by LEWALD 73 No. 98; 1 FRANKEN-

in a most involved reasoning, so argued.¹²⁴ Another escape was discovered by scrapping the entire conflicts rule and reverting to the domestic statute on the ground of public policy.¹²⁵ Also this solution, curiously to say, was followed in a decision of the Anglo-German Mixed Arbitral Tribunal on the basis of the German conflicts rule referring to Scotch law.¹²⁶

But how awkward is a treatment that requires such precarious counteractions! Are we compelled to use in the two groups different approaches for reconciling divergent rules? The situation is not really similar to the conflict between domiciliary and nationality principles that calls for two methods of employing *renvoi*. The German doctrine has abandoned the entire approach,—a fact that should have given thought to the recent advocates of this artifice.

3. Characterization According to Comparative Analysis

Although we have to recognize the existence of the territorial Anglo-American rule, so far as it reaches and so long as it survives, we need not recognize any mistaken characterization. We apply a foreign "law" in its entirety without regard to its own categorizations.¹²⁷ Once a court,

STEIN 596; WUNDERLICH, *supra* Ch. 52 n. 3, 503, 506. PACCHIONI 331 rejects the *renvoi* but asserts that the *lex fori* enters into a gap of the foreign law.

Contra: The Swedish Supreme Court, see BAGGE, *supra* n. 30.

¹²⁴ Weiser & Co. v. The Heirs of Ludwig Dürr, 6 Recueil trib. arb. mixtes 632, 634: German conflicts law declared applicable refers to English law of contracts which excludes limitation of actions as procedural. Hence, nothing is left but to apply the German provisions on limitation. SCHOCH, Klagbarkeit etc., *supra* Ch. 52 n. 3, 116 n. 3, criticizes this decision because it looks at once to a conflicts law instead of asking the preliminary question what is procedural and what substantive law. But how can this be done by a court not having a *lex fori*, if no characterization can be evaluated as right or wrong, but only as inherent in a determinate system, as the same author contends (at 112 n. 3)? The tribunal followed its course: (July 22 and Oct. 6, 1927) C. G. Baron et Salaman v. Hugo Schnetzer, 7 Recueil trib. arb. mixtes 427; (June 12, 1929) C. A. Rebus v. Theodora Hennig, 9 *id.* 19.

¹²⁵ RG. (Dec. 19, 1922) 106 RGZ. 82, Revue 1926, 278.

¹²⁶ Cook v. Kutscher (May 31, 1926) Case No. 2263, 6 Recueil trib. arb. mixtes 540.

¹²⁷ Vol. I (ed. 2) pp. 71 f.

whether American or European, knows that limitation is always a part of the substantive law, although it may not be applied in all courts in the same way as other parts are applied, there is no obstacle to the desired application. An American court has to apply Dutch or German statutes of limitation because they belong to the governing law, not only in the eyes of Dutch and German courts but also in correct American theory.^{127a} Swiss or Argentine courts ought to apply the New York statute for the same reason.

Of course, the force of this view is restricted by the positive Anglo-American law. That it should be reformed, is unquestionable.^{127b}

4. Conclusion

In theory it should be frankly acknowledged by any court in this country and abroad that the effect of lapse of time on an obligation is an incident of the law governing it. Foreign statutes of limitation are therefore applicable to a foreign contractual or legal obligation.

This theory is for the time being restricted in British jurisdictions, and to an essentially lesser extent in the United States, through the age-old thesis that a court ought to apply its domestic statute of limitation. The resolutions of the Institute for International Law have recognized this phenomenon as an exception based on public policy,¹²⁸ but go so far as to perpetuate the excuse of common law courts for not applying statutes of civil law countries. At most, common law courts may reciprocate with other common law jurisdictions when the other statutes prescribe a longer period than the forum does. Even this is anachronistic.

It would seem easy to enlarge the borrowing statutes in

^{127a} This view is shared by McDONNOLD, "Limitation of Actions—Conflict of Laws—*Lex Fori* or *Lex Loci*?" 35 Tex. L. Rev. (1956) 95.

^{127b} *Accord*, JOHN A. CARNAHAN, "The Full Faith and Credit Clause—Its Effect on Statutes of Limitations," 4 Duke B. J. (1954) 71.

¹²⁸ 31 *Annuaire* (1924) 182 art. III, quoted *supra* p. 527.

the field of obligations by replacing them through a very brief uniform rule. The uniform statute has simply to provide that an obligation governed by the law of a foreign state or country is exclusively subject to the effects of lapse of time, as imposed by that law on the rights of the creditor. This would end an overcomplicated and unjust legal situation.

V. SCOPE OF THE RULE

Whether and when a cause of action arises is naturally determined by the law governing the obligation, even in common law courts.¹²⁹ The conditions of effective lapse of time depend, conforming to the respectively adopted principles, in this country on the *lex fori* or the borrowed statute,¹³⁰ and in Continental courts, except the French, on the law governing the obligation. This law determines also whether the parties are permitted to agree on a longer or shorter period of time.¹³¹

Illustration. A German buyer sued an Austrian seller for rescission on the ground of implied warranty and for damages on the ground of express warranty. According to the splitting method, the Appeal Court of Hamburg applied German law to the rescission and Austrian law to the damages. In consequence, the question whether the time of limitation was interrupted by a formal expert inspection of the goods, was answered affirmatively as respects rescission, under the German BGB., § 477 par. 2, and negatively, with respect to the damages,¹³² under the Austrian Allg. BGB., § 1977, and an Austrian Supreme Court decision. With a better choice of law, only Austrian law would have been applicable; under the common law approach, only German law.

¹²⁹ Glenn v. Liggett (1890) 135 U. S. 533.

¹³⁰ With all preliminary questions, see 75 A. L. R. (1890) 203.

¹³¹ Inst. of Int. Law, 31 Annuaire (1924) 182 art. II; DE NOVA 170 n. 2; BATIFFOL 455 § 578. But see for the American decisions, *supra* ns. 44, 89.

¹³² OLG. Hamburg (April 28, 1920) Hans. GZ. 1920, Hbl. 182 No. 91.

The Railway Convention of Bern,¹³³ however, took the usual easy way out, by limiting action for total loss of goods to one year but referring the causes of interruption and suspension to the law of the country in which the action is brought.¹³⁴ This example has been followed by other conventions of unification.¹³⁵

German courts have repeatedly dealt with the case where a claim was sued upon in a foreign court; did this act interrupt the period of limitation established by the law of the debt? The answer has been affirmative on the condition that a judgment following the action would be recognized in the forum.¹³⁶ This questionable solution, however, has been restricted to the case where German law governs the obligation,¹³⁷ and is criticized in the literature where it has been recently suggested that the effects of foreign lawsuits on limitation of action should be subordinated to the rule, *locus regit actum*.¹³⁸

¹³³ Of Oct. 23, 1924, art. 45 § 4, HUDSON, 2 Int. Legislation 1448, revised Nov. 23, 1933, HUDSON, 6 *id.* 556, in force since Oct. 1, 1938. The pertinent provision is now to be found in art. 46 § 5 of the Bern Convention, as revised on Oct. 25, 1952, in force since March 1, 1956. A further revision of Feb. 25, 1961, has not yet come into effect.

¹³⁴ For an application of the then art. 45, see Trib. com. Seine (Nov. 25, 1905) Clunet 1906, 837.

¹³⁵ E.g., Warsaw Convention on international air transportation, of 1929, art. 29 (2) (HUDSON, 5 Int. Legislation 114); Brussels Convention on collisions on the high seas, of 1910, art. 7, par. 3 (BENEDICT, 6 Admiralty (ed. 7) 37); Geneva Convention on collisions in inland navigation, of Dec. 9, 1930, art. 8 (3), not in force (HUDSON, 5 Int. Legislation 818). The Uniform Laws on bills of exchange and on checks chose another more complicated method, see Annex II art. 17 and Annex II art. 26, respectively (HUDSON, 5 Int. Legislation 547 and 913).

¹³⁶ OLG. Hamburg (March 13, 1906) Hans. GZ. 1906, Hbl. No. 50; OLG. Celle (Dec. 11, 1907) 1 ROLG. 158; RG. (Sept. 18, 1925) 129 RGZ. 385, 389, Clunet 1926, 737.

¹³⁷ OLG. Breslau (Dec. 19, 1938) JW. 1939, 344, H. R. R. 1939, No. 375, approved by 2 SCHNITZER (ed. 4) 668.

¹³⁸ KATINSZKY, 9 Z.ausl.R. (1935) 855, criticizes confusion of substantive requirements for conflicts law and procedural requirements for recognition; an unjust and inconsistent result. On this basis, KALLMANN, "L'effet sur la prescription libératoire des actes judiciaires intervenus en pays étranger," Revue Crit. 1948, 1 ff., esp. 31, undertakes to formulate a theory.

TABLES

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