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## AN INTERIM ACCOUNT ON COMPARATIVE CONFLICTS LAW

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AN INTERIM ACCOUNT ON COMPARATIVE  
CONFLICTS LAW

*Ernst Rabel\**

UNDER the sponsorship of the American Law Institute and subsequently of the University of Michigan, with the efficient assistance of the Faculty, notably of Hessel E. Yntema as editor, I published the first volume of a work on conflicts law in 1945. A second volume has just followed, after a long delay caused by the vicissitudes of postwar printing. The greater part of a third volume has been readied in the meantime, but its date of publication is not yet fixed.<sup>1</sup>

The task consists in surveying the existing and proposed conflicts rules of the world and in ascertaining their background, purposes, and social effects as exactly as the available sources permit. We should be able by such research to devote the manifold advantages of comparative studies to the urgent needs of a branch of law which at present bears the name of private international law as if by irony, like *lucus a non lucendo*.

The critics of the first volume have shown generous understanding and benevolence. I am particularly appreciative of the general con-

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<sup>1</sup> THE CONFLICT OF LAWS: A COMPARATIVE STUDY. Michigan Legal Studies. Ann Arbor: University of Michigan Press. Chicago: Callaghan & Co. Vol. 1, Introduction and Family Law; vol. 2, Corporations, Torts, Contracts in general; vol. 3, Special Contracts.

In the well-meaning opinion of Professor Farage, 46 COL. L. REV. 337 (1946), this title does not convey the importance of the subject. In view of his remarks, I should like to say that in my view there are three kinds of comparative studies connected with conflicts law; (1) Comparative private law in fragmentary portions has often figured in cases with foreign elements. Courts want to know the results of the application of the several laws in question. Scholars have shown the same interest on a higher level and should do their best to verify the interplay of conflicts rules. (2) The instant work compares with each other the conflicts rules of the various jurisdictions. This task is different only in scope and intensity from the consideration given in American courts to conflicts rules of other American states and of England. But it is exacting enough to form the main subject of the work and therefore is exclusively indicated by the title. Finally (3) the exact relation between the private laws of all systems and the conflicts rules (existing or desirable) should be examined in order both to adjust the conflicts rules to the reality of the legal world and to assure their necessary independent function. This is one of my principal postulates but requires special inquiries for which the present research furnishes only contributions.

firmation that the citations are precise, which is due to the careful checking and rechecking of the materials by the research staff at the University of Michigan Law School.<sup>2</sup>

From the point now reached in the pursuit of the study, a resumé of certain characteristic phenomena may be of some value. Not that the time for final conclusions has come, when the "general doctrines" of conflicts law may be discussed with real knowledge of the entire matter. But the abundant facts accumulating shed so much light on the nature and technique of this branch of law as to suggest a few observations with respect thereto. At the same time the prevailing negative statements of the second volume, respecting the use of conflicts rules for contracts in general, may here be accompanied by a few illustrations of desirable rules which the study of special contracts in the third volume will reveal.

Our first attention is due to the very *raison d'être* of conflicts law. There are thoughtful people who seem to prefer to see it crippled!

### *The International Function of Conflicts Law*

Conflicts law is a sore spot in every country of the world, excepting those where courts overlook the conflicts problem altogether, an idyllic method still quite popular with many Latin-American courts. The apparently simple question of what law governs a certain case has led to many theories and to great confusion. All the theories have been exceedingly learned and full of useful ideas but often, especially in the United States from Story to Minor to Beale, built on treacherous ground. "Confusion" is an ominously often-recurring word in the discussion of this field. Some observers, indeed, speak of a legal labyrinth

<sup>2</sup> An objection has been raised by my eminent and highly esteemed English colleague, H. C. Gutteridge, 63 L. Q. Rev. 112 (1946) against Volume I, p. 375, n. 181 where I referred to a rule expressed by Vaughan Williams, L. J. in the case of *In re Martin, Loustalan v. Loustalan*, [1900] P. 211 at 240. Did I really take an obiter dictum as authoritative, as Gutteridge suggests? What Vaughan Williams expressed in the specific language of conflicts law and is therefore reproduced separately in the headnote, is the same rule that Lindley, M. R. at p. 228 states among "the principles which . . . ought to be applied to the case" and terms as "the real question on which this case turns." The same is necessarily implied in the opinion of Rigby, L. J., at p. 235. Falconbridge, 15 CAN. B. REV. 227 (1937), and CHESHIRE, PRIV. INT. LAW 523 (1935) share in this view. Gutteridge notes correctly that occasionally I have cited, e.g., Swiss sources, in connection with English law. I should have mentioned generally that I think it valuable to collect trustworthy but unorthodox utterances showing, for instance, how the international working of English law impresses a Swiss lawyer or how it is described by expert opinion in the report of a Swiss lawsuit. Common discussion needs such information. Thus far, I have not been able to do much in this direction.

and of a bankrupt branch of law. A profusion of legal thinking has been affected by some vicious ailment. What is it that disturbs the same branch of legal science and technique in the same manner in all countries, although with a variety of intensity and effects?

The diagnosis of the evil is very easy and so will be its cure, if consideration be directed to the whole body of international life instead of the part one nation, or one state, takes in the intercourse of persons and goods. How would a railway train operate from Chicago to San Francisco, if the gauge of the tracks changed from state to state, after the model of Russia where the gauge is different from all other European networks? Or how would an orchestra sound if every instrument were tuned to a different key? Exactly this has happened in the last sixty years to private "international" law. When it was discovered that it had no anchorage in universal custom or the law of nations, but was a part of municipal law, it was promptly adjusted, mentally and bodily, to the domestic climate of each particular country. In a formerly widely held opinion which enlists the renewed enthusiasm of a few recent writers,<sup>3</sup> conflicts law serves principally the interests and predilections of the particular state. In a less articulate manner and without the ruthless nationalism of Niboyet and the Civil Code of Perú, the law for marriage and divorce, successions and contracts is selected everywhere according to some arbitrary policy, or simply the law of the forum is applied. An Italian emigrating to Argentina is treated in Argentina under that country's law of marriage, legitimation, adoption, and inheritance, although he and his issue will be treated in the same matters by the Italian standard in his native land. A North Carolina couple will be divorced in Nevada against the law of their matrimonial domicil, and the divorce must even be recognized in all states if the plaintiff spouse establishes a "real" domicil in Reno, even though it should last for only six weeks. The identical marriage may be considered valid in one state, invalid in another, validly celebrated but dissolved in a third. What becomes of the children and their issue, and of the matrimonial property and inheritance of the spouses, are nice subjects for statutes, cases, and annotators. A corporation created in Delaware with headquarters in Belgium for exploiting mines in Bolivia is a possible creature, but the kinds of surprises it may experience are too much for imagination. On many topics the conflicts rules seem objectively drafted, although they are different

<sup>3</sup> Vol. 1, pp. 75 ff.; vol. 2, pp. 556-558; Book Review on NIBOYET, *TRAITÉ DE DROIT INTERNATIONAL PRIVÉ FRANÇAIS*, Tome III, 59 HARV. L. REV. 1327-1334 (1946).

and thereby objectionable, but there are innumerable technical devices to make them apply in favor of *lex fori*.

The evil is unprincipled expansion of the domestic laws, and the remedy is a conscious orientation towards harmony.

Let us carefully preserve the few almost universal conflicts rules inherited from past awareness of the legal community, such as the *lex situs* for property, the personal law of corporations,<sup>4</sup> the law of the place of wrong for tort liability,<sup>5</sup> and let us modify slightly the American practice concerning the form of contracts,<sup>6</sup> so as to adopt the principle of *locus regit actum*. The British deviation from the universal tort principle is justly known as an expression of insularism.<sup>7</sup>

Even before the British Legitimacy Act of 1926, English courts recognized foreign legitimation by subsequent marriage of the parents. Yet according to Dicey, Beale, and the *Restatement of the Law of Conflicts of Law* (section 120), a status unknown to the forum is non-existent in the forum.<sup>8</sup> Such extreme territorialism is prevailingly rejected. Nevertheless, there is a tendency to cut down foreign-created legal acts to the inferior measure of some domestic institution considered analogous. Thus, there is a division in the American decisions concerning the effect of a foreign adoption on succession by, from, and through an adopted child, when the statutes of distribution differ. The *Restatement* (section 143) would give it the same effect as a domestic adoption. The only consistent solution is found in a statute of Quebec: the adopted person shall have the same rights of succession as he would have had in the country in which he was adopted.<sup>9</sup> Foreign death statutes were initially applied only if substantially similar to the law of the forum.<sup>10</sup> Foreign corporations are said, in very numerous American constitutions and statutes, as well as by foreign writers and laws, to have no more powers than domestic corporations of a similar kind.<sup>11</sup> Fortunately, American courts have instinctively refrained from a harmful use of this inconsiderate idea and have reduced it practically to the just enforcement of basic commercial policy.<sup>12</sup> Yet in Latin America, it is not a rare occurrence that foreign corporations are re-

<sup>4</sup> Vol. 2, Part Six.

<sup>5</sup> Vol. 2, Part Seven.

<sup>6</sup> Vol. 2, pp. 485 ff., 515.

<sup>7</sup> Vol. 2, pp. 239-244, 347, note 57.

<sup>8</sup> Vol. 1, pp. 175-178, 558, 592, 646, 650.

<sup>9</sup> Vol. 1, pp. 648, 651 ff.

<sup>10</sup> Vol. 2, pp. 237 f.

<sup>11</sup> Vol. 2, pp. 149 ff.

<sup>12</sup> Vol. 2, pp. 154-157.

quired to live up to the same provisions on subscription stock and paid-in stock, or on allocations to the reserve fund, as domestic corporations.<sup>13</sup> Subjection to the domestic standard, where the local branch or agency is not concerned, is a very frequent abuse in Latin-American and other countries.<sup>14</sup> Curiously, the proclaimed equal right of foreign with domestic organizations, in addition to suffering acute exceptions, is perverted to create unjust requirements; it has become quite as much of an impediment to international business life as discriminatory measures can be. Equality, once more, should mean measuring of *equal* things by equal standards.

There is no such arbitrariness in the judicially buttressed American system of unlimited recognition and conditional admission to the doing of business, a sound middle course between English liberalism and arbitrary discretion in many other countries.<sup>15</sup> Also the numerous abuses in supervising the activity of foreigners within the states and in punishing failure to comply with licensing or registration statutes, sometimes even depriving a foreign corporation not doing any business in the forum from bringing an action, are alien to this country, with some minor exceptions which, in fact, should be repealed for the sake of a good example.<sup>16</sup>

Another type of trespass into the neighbor's sphere may end this list. In determining the personal law of individuals, governing family relations and in most countries also capacity and other incidents of "status," the systems have been fundamentally divided into followers of the law of domicile—common law countries and others—and those considering nationality as the decisive connection with a state. But in an increasing number of Latin-American codes both tests are used cumulatively to extend the control of the state, including both foreigners living in the forum and nationals living anywhere.<sup>17</sup> While the coexistence of the two principles in the world causes grievous hardships, their ambitious combination within one state removes any possibility of international harmony. Similar double-acting provisions in Italy, Argentina, Japan, and other countries subject corporations to full domestic control not only when they are domiciled but also when they have their main activity in the country.<sup>18</sup>

<sup>13</sup> Vol. 2, pp. 184, 199.

<sup>14</sup> Vol. 2, pp. 197 ff.

<sup>15</sup> Vol. 2, pp. 173, 181, 183.

<sup>16</sup> Vol. 2, pp. 213-215, 222.

<sup>17</sup> Vol. 1, pp. 117-119.

<sup>18</sup> Vol. 2, pp. 46-49.

It may be added that Soviet Russia from its beginning has been hostile to foreign law.

### *Choice of Law*

Our familiar conflicts rules are essentially restricted to the life situations characteristic of private law, as opposed not only to procedure but also to administrative law, jurisdiction of courts, and penal law.

Private law is a concept worthy of attention. As a basic principle, we must admit that private laws of civilized states are interchangeable, while public laws are not. This has its significance in the vexed problem of "public policy."<sup>19</sup>

Better known is the analogous contrast between substantive law, subject to choice of law, and civil procedure, which is traditionally regulated by local legislation and rules of court. This sharp distinction cannot be fully maintained under the intricate modern conditions,<sup>20</sup> but it exists and raises special difficulties when the line of separation is traced at different points. The exaggerated scope of the concept of procedure in the English tradition, however, is shrinking. In the United States, definitely, the Statute of Frauds has become subject to the conflicts rule concerning formalities.<sup>21</sup> Limitation of action is more and more considered an incident of the cause of action, hence a substantive institution, as it has always been in the civil law countries. Where this is the case under the law governing an obligation, all courts ought to apply the provision.<sup>22</sup> Presumptions of fault and legal burdens of proof contain objective elements sufficient for application in foreign courts.<sup>23</sup>

Judicial jurisdiction is consistently separated from choice of law in the civil law doctrines. Their close connection in the American doctrine, visible in the *Conflicts Restatement*, is strikingly illustrated in the treatment of divorce as a subject exclusively of jurisdiction.<sup>24</sup> A court taking cognizance of a divorce suit as a matter of course applies the statute of its own state. This happens also in Soviet Russia and allegedly in a few Scandinavian countries. It is otherwise in Europe and Latin America, where jurisdiction is assumed according to rules

<sup>19</sup> Vol. 2, pp. 558 ff.

<sup>20</sup> E.g., for court consent to adoption, vol. 1, p. 640; form of damages, vol. 2, p. 279.

<sup>21</sup> Vol. 1, pp. 50 ff., vol. 2, pp. 498 ff.

<sup>22</sup> Vol. 1, p. 64.

<sup>23</sup> Vol. 2, pp. 283 ff., 545.

<sup>24</sup> Vol. 1, pp. 390 ff., 422-424.

of judicial organization, and if it is granted, the applicable divorce law must be ascertained according to the rules of choice of law. The law applied is that of the matrimonial domicil under the Treaties of Montevideo and Habana; that of the nationality of the husband in England, Germany, and Italy; and that of the last common nationality of the spouses under the Hague Convention, in Poland, and Greece, with many variants and complications.<sup>25</sup> This contrast raises, among other problems, the two following questions pertinent to much regretted disadvantages of the American system:

First, is it sound to accept divorce suits brought by foreign domiciliaries, as extensively as it has been done despite very different rules of jurisdiction? In the United States the need is acutely felt for restrictive measures to avoid the ensuing complications. Many curiously varied and cumulated requirements have been adopted in the statutes in order to make access to the courts more selective. But the divorce mills flourish nevertheless, either because the law is only in the books or because the statutes have made their main barrier—the requirement of a period of domicil—illusory by reducing it to a nominal period such as six weeks.<sup>26</sup> A more effective prohibition against assuming jurisdiction, but one unavailable in the United States, appears in Germany and Switzerland, in case the jurisdiction over divorce or the divorce decree would not be recognized in the national country of the husband.<sup>27</sup> The right remedy has been proposed by the American reform drafts which make the so-called residence requirement—domicil plus residence during one year—compulsory.<sup>28</sup>

Second, jurisdiction once assumed, is it natural that the *lex fori* should determine whether and for what causes divorce is permissible? We should say not. Especially the American system, where divorce jurisdiction is predicated upon the ground of only one party's domicil and at the same time the court administers exclusively its own divorce law, seems explicable solely in terms of historical residues. But the continental refinements are no more attractive, since they require con-

<sup>25</sup> Vol. 1, pp. 426 ff.

<sup>26</sup> Vol. 1, pp. 407-410.

<sup>27</sup> Vol. 1, pp. 411-413.

<sup>28</sup> The requirement of a "minimum residence time," advocated by the author in 28 IOWA L. REV. 190 at 223 (1943), and in the present work, vol. 1, p. 460, means "domicil and, in most jurisdictions, actual presence in the state as well, although a temporary absence is innocuous," *id.* at 207, vol. 1, p. 409, citing I BEALE, CONFLICT OF LAWS, § 10.8 (1935). This fact must have escaped Cheshire, "The International Validity of Divorces," 61 L. Q. REV. 352 at 371 (1945). I have therefore not been satisfied with mere residence, as he assumes, see vol. 1, p. 515.



sideration of both the national law of the parties and the law of the forum. If the parties are or originally were of different nationality, various ideas prevail. Laden with complication, the principle has been rejected by leading courts in critical instances.<sup>29</sup>

However, no reason exists why in the case of divided domicils of the parties one should be preferred to the other. The law of the last common domicil recommends itself.

Also, when a divorce court awards custody of children, the rules should not be taken from the law of the forum but from that governing filiation matters. That the applicant has succeeded in obtaining the forum for divorce is no ground for changing the rules of custody.<sup>30</sup>

### *Mechanical and Rational Rules*

One would expect conflicts rules no less than other legal rules to serve reasonable purposes. But without any functional approach, the primitive conflicts doctrines of the former centuries, including the nineteenth, were satisfied with a few crude rules conceived *a priori* out of some scholastic imaginations. Contract law, the main vehicle of modern business, has been an outstanding victim of these quaint methods to this very day. New Brazilian and Italian laws, both of 1942, profess, like the French courts, the general rule that all contracts are governed by the law of the place where they are made. The German courts and the treaties of Montevideo declare instead in the same cases for the law of the place of performance. The American *Restatement* of 1934 and the Swiss federal tribunal, intermediate between these systems, obscurely determine all contracts as respects validity ("or effects," adds the *Restatement*, section 332) under the *lex loci contractus* and the remaining questions under the *lex loci solutionis*. A few American statutes have adopted one or the other of such devices.<sup>31</sup> That all these are bloodless and unworkable formulas, seems not yet common knowledge. We may still encounter in courts tired of *lex loci contractus* Story's strangely illogical predication

<sup>29</sup> Vol. 1, pp. 429-450, 583 ff., 618-622.

<sup>30</sup> Vol. 1, pp. 533 f.

<sup>31</sup> Law of the place of contracting: Georgia: Code Ann. (1937) § 102-108 (8); cf. Oregon: Code (1930) § 2-215.

Law of the place of performance, certain states adopting this rule from the Field Code: California: Civ. Code (Deering, 1941) § 1646; Montana: Rev. Code (1935) c. 108, § 7537; North Dakota: Rev. Code (1943) § 9-0711; Oklahoma: Stat. (1941) tit. 15, § 162; South Dakota: Code (1939) § 10.0106.

Law of the place of performance for "effects": Louisiana: Civ. Code (Dart, 1945) Art. 10, ¶ 2.

that a contract is governed by the law of the place of contracting, except when performance is to be made in another state, in which case the latter's law is applicable. If contracting and performance are to be in the same state, the former is the criterion; if they are separated, the latter decides! Another trick is that of calling any desired contact the place of contracting.<sup>32</sup>

Rules of this kind seemed to make sense to the statist scholars four to six hundred years ago. Application of the *lex loci contractus* was supported by naive speculation that a contract is "created" by the territorial power of a lord and therefore "born" with the local law attached to it, similar to the status with which an individual is born subject to the sovereign.<sup>33</sup>

American legal language and technique has preserved far more of these feudal remainders than any other country's literature. Beale and the *Conflicts Restatement* use the full equipment of territorial theories. They let a contract be "created" by the law of the place of contracting,<sup>34</sup> as they sanction Huber's axiom that law can operate only in the state where it is made,<sup>35</sup> and Judge Taney's word that a corporation exists only in the state where it is incorporated.<sup>36</sup>

The effect of such ritualism may be seen in decisions such as that in *Milliken v. Pratt*,<sup>37</sup> often cited without criticism. A married woman at her marital domicil in Massachusetts delivered a note to her husband, guaranteeing his debt. The husband sent it by mail to his creditor in Maine. Although under the law of Massachusetts, the forum, she could not bind herself, the court 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." She contracted as if personally present in Maine. This reasoning was supported by an English precedent on the theory that a principal is deemed to be present at the place where his agent contracts—that is the questionable old identity fiction, confusingly used in conflicts law. At the same time, the decision takes it for granted that the place of making the contract determines the law, which in this simple form has no justification. It is usually assumed, further-

<sup>32</sup> Vol. 2, pp. 461-463.

<sup>33</sup> Vol. 2, pp. 443-445, 448-449.

<sup>34</sup> CONFLICTS RESTATEMENT, Scope Note before § 311 (1934).

<sup>35</sup> Vol. 1, p. 61.

<sup>36</sup> Vol. 2, pp. 124 ff.

<sup>37</sup> 125 Mass. 374 (1878). Cf. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 22 ff. (1942).

more, that for the purpose of the "law of the place where a contract is made" the contract is considered made at the place where the last act completing it is made, a most tenacious idea, presupposing finally that this *place* is to be found by applying the municipal rule deciding at what *time* a contract is perfected. This is another puzzle, because the private laws differ greatly on this question. But from the same premises the contrary result was reached in the case of *Freeman's Appeal*<sup>38</sup> where the married woman likewise delivered her note at their domicile in Connecticut to her husband who then mailed it to his partner in Illinois, who in turn handed it there to the creditor. The Connecticut court distinguished the precedents, arguing that the woman had only constituted an agency within the state and that it was invalid for want of capacity. The distinction would astonish a layman. Stripped from all the legalistic finesses, the question should not have been where the agency or the guarantee was made, but whether the restriction of the wife's capacity by the law of her matrimonial domicile governed only her notes made to domestic creditors, or embraced her obligations entered into with any creditor, wherever residing. This question has never been faced squarely, but the majority of decisions, taking the position of *Milliken v. Pratt*, have reduced substantially the extraterritorial effect of the restrictions on capacity. They may be regarded as an important, though concealed, step in the historic process of women's emancipation, rather than as authority for the mysterious force of *lex loci contractus* in determining capacity or in constituting an agent.

The general conflicts rules concerning contracts produce uncertainty, inconsistency, and arbitrariness. Their defects defy remedies, such as the proposal to give preference to the law validating a contract or a contract clause. This may be just a palliative in certain situations.<sup>39</sup> The real cure includes two propositions: choice of law by the parties should be favored, and in its absence the court should look to the center of the contractual relationship.

The practice of English, French, German, Swedish, and Swiss courts demonstrates the wholesome operation of unfettered party autonomy. Contrary to the teaching of innumerable French and other authors who have become influential on the American literature, the parties to a contract are authorized to select their law, without excepting the "imperative" rules of some predestined law. Study of the

<sup>38</sup> 68 Conn. 533, 37 A. 420 (1897). On contrary decisions of Connecticut, see 2 BEALE, CONFLICT OF LAWS 1126, note 3 (1935).

<sup>39</sup> Vol. 2, pp. 474 ff.

American cases reveals that in their overwhelming majority, though with notable exceptions, they are far from sharing either in Beale's absolute elimination of the parties' choice of law, or in any variant of the dominant theories prohibiting the choice of a law not "substantially" connected with the contract, or excluding important incidents such as the formation of the contract from the stipulated law. Yet, the judicial declaration of this freedom of contracting might be more articulate and wholehearted. The parties and their counsel ought to be sure in making interstate and international transactions that their stipulation of an applicable law will be respected, and they should not fail to insert appropriate clauses, which thus far are frequent but not common and for good reasons should even accompany arbitration clauses.

The agreement may be express or implied by conduct. Where an intention of the parties is merely "presumed," the judge rather than the parties chooses the law. But English and most other courts use a method that under the guise of discovering the will of the parties "accumulates contact points,"<sup>40</sup> a method directly opposite to the total formulas. Every single contract must be searched for every single local connection, and all circumstances must be pondered for a final adjudication of the contact point of greatest weight. I agree that this method is right when an individual contract is unusual. But for the enormous bulk of standardized transactions of traders, producers, manufacturers, and commercial organizations, the center has to be ascertained typically rather than individually, according to the conceptions of business itself.

Can this be done effectively? There is a reassuring answer. Even with all the multiple handicaps of present conflicts law, judicial wisdom has more often than not broken through the artificial theoretical barriers.<sup>41</sup>

One topic, international sale of goods, has enjoyed the privilege of a thorough elaboration by eminent committees.<sup>42</sup> They have firmly settled the rule that where the parties are domiciled in different systems of law, the law of the seller's domicile should in principle govern all the contractual obligations. Only the definition of exceptional cases in which the buyer's law should obtain was doubtful and

<sup>40</sup> This theory was recently recognized under this name in Indiana, see 22 IND. L. J. 78 (1947).

<sup>41</sup> The following short assertions are anticipated results of discussions contained in the third volume. They refer merely to the most usual situations in a preliminary abridgment of the conclusions.

<sup>42</sup> Vol. 2, p. 483, note 214.

finally was based on the place where the offer is received. This is questionable. A better criterion is suggested by a series of American decisions dealing with interstate F. O. B. sales contracts. When the goods are deliverable at the seller's factory, or at a station, a pier, a warehouse in his state, this state's law applies. When the shipping point is in the buyer's state, this decides. By an excellent confirmation of this view, when the goods are shipped F. O. B. to a third state, the choice of law falls back to other considerations. The courts have hereby demonstrated an admirable feeling for the outstanding importance which the place of shipment has in F. O. B. and C. I. F. contracts; regularly also the risk of loss passes with this last positive act to be done by the seller. We may well take the hint that the buyer's law in overseas sales may apply only when the seller has to bring the goods, on his own risk, to the buyer at some place across the ocean.

Agency was mistreated in conflicts law until modern legal science clarified the presence of three separate relationships: (1) the internal relation between principal and agent, grounded on employment, partnership, marital power or whatever else may obligate the agent to act in the interests of the principal; (2) the power of attorney or authority, flowing from private authorization or judicial decree or law, and making the act of the agent binding on the principal, either directly and primarily, or indirectly by reflex inference, according to the common law doctrine of undisclosed principal; and (3) the transaction made by the agent on the ground of his authority with, or in relation to, a third party. The *Restatement* has evidently attempted to observe this necessary trichotomy but has not succeeded in harmonizing its fatal theory of *lex loci contractus* with a manifest doctrine of the courts, which, not accidentally, conforms to the attitude of all the best courts in the world. The existence and extent of a principal's authorization is ordinarily determined, not by the law of the principal's domicil, nor of the place where the authority is allegedly given,<sup>43</sup> but by that of the place where the agent acts.<sup>44</sup> The American courts in trying to reconcile this excellent result with the usual formulas, emphasize the place where the contract with the third party is made and risk a confusion with the law governing this main contract. But such details can be clarified. We may, furthermore, follow a universal judicial tendency to the effect that employment of a servant is normally governed by the law of that business place of the master to which the service of the employee is attached; in the United States there

<sup>43</sup> CONFLICTS RESTATEMENT, § 343 (1934).

<sup>44</sup> *Id.*, § 345.

is at least a promising trend toward this view. An analogous rule is clearly about to gain supremacy in localizing the primarily applicable statute for workmen's compensation. In the case of an independent employee such as a professional man or a broker, the contract in the soundest opinion is centered at the place where he is established.

A most surprising agreement of the courts can be stated with respect to the various contracts of transportation. Seven or eight different local connections were advanced in the old and extensive literature regarding maritime carriage of goods. Scholars increasingly praised the law of the flag until the recent Italian Code of Navigation (1942) adopted this law for every "utilization of ships." A great error! The majority of the courts of *all* countries concerned have continuously determined the law governing regular contracts of carriage of goods by sea according to the port where the bill of lading is issued. In states which have adopted the Hague Rules, without extending them to incoming vessels as the United States does, the clear principle is that the Rules apply to carriage on ships departing from their ports, provided that bills of lading are issued there.<sup>45</sup> The Italian law destroys this uniformity.

It follows immediately that the same rule is not suitable to charter parties, a fact entirely disregarded by all courts but involuntarily observed in most decisions.

Scarcely necessary to observe, the courts disguise the F. O. B. place as "the" place of performance, the port of dispatch as the place of contracting, and the place of an agent's act as that of making the third party contract. In the above-mentioned topics, little is needed to bring the results into shape.

It seems to me that so pronounced, almost involuntary, trends throughout the most competent judiciaries are a reliable sign for the business conceptions involved. It is interesting to consider why the nationality of a ship is treated as immaterial and the loading of the goods against a bill of lading is decisive. We have to guess the reasons, since the courts are inarticulate, but we may be sure that they are realistic. At any rate, we have been provided with a considerable number of uniform points of view, conforming to the universal trend of commercial law.

### *Reform*

If the description of present conditions has prompted critical observations, they were offered in recognition of the fact that it is not only in the interest of the private parties to avoid clashes between the

<sup>45</sup> See, for instance, British Carriage of Goods by Sea Act, 1924, s. 1, cf. art. I (b).

rules claiming to govern their lives. A condition of state government is involved. If forty-eight states maintain forty-eight legislatures, each assiduously elaborating its particular socially satisfactory set of substantive requirements for marriage, the unqualified application of the law of the place where a marriage is celebrated, accidentally or by evasion, unnecessarily frustrates the intentions of the domiciliary states.<sup>46</sup> Coexistence of states in our federation as well as in our civilization requires continuous consideration, without which neither the Constitution nor the desired international law can guarantee peace in private relations beyond a state boundary.

For the needed improvements, I have not made many new proposals. Most of what has been suggested in my books has been made in the spirit of the American or international drafts born too early. New international efforts to reform the existing laws ought to establish, for instance, a model code for the treatment of foreign corporations so as to attribute fairly *summ cuique*, to each his own, to the home state and the guest state.<sup>47</sup>

A conspicuous contribution will be made by the courts when they throw away their anachronistic modes of formulating rules. The judges should simply say what local connection is the most important in their opinion.

But if I believe that judicial wisdom outranks academic speculation, I feel with equal strength that legal science has the duty to guide the courts so as to reach the limited generalizations upon which legal rules must be formed. The American literature of the last decades has afforded admirable contributions. That additional ample information and suggestive thought are available in the united domains of common and civil law has, I hope, been demonstrated. Whether my individual method of analyzing and evaluating them is the best, will be decided in the future. But it will scarcely be doubted that the modern legal problems demand the widest range of vision, including the fullest comparative research, and especially that sound conflicts rules can neither be devised nor applied in isolation. Further proof will come forth from investigation of the treatment of property and succession problems throughout the world.

<sup>46</sup> Vol. 1, pp. 289 ff.

<sup>47</sup> Vol. 2, p. 225.