

Michigan Law Review

Volume 66 | Issue 8

1968

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Albert A. Ehrenzweig
University of California School of Law, Berkeley

Peter K. Westen
University of California, Berkeley, pkw@umich.edu

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Recommended Citation

Albert A. Ehrenzweig & Peter K. Westen, *Fraudulent Conveyances in the Conflict of Laws: Easy Cases May Make Bad Law*, 66 MICH. L. REV. 1679 (1968).

Available at: <https://repository.law.umich.edu/mlr/vol66/iss8/3>

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FRAUDULENT CONVEYANCES IN THE CONFLICT OF LAWS: EASY CASES MAY MAKE BAD LAW

Albert A. Ehrenzweig* and Peter Kay Westen**

SHORTLY before his death, Brainerd Currie deplored the "Conflict, Crisis and Confusion" in the attempt by New York courts to reform traditional conflicts law.¹ The situation, then serious, has since deteriorated. Chief Judge Fuld has transplanted his grouping-of-contacts theory, nurtured in contract and trust cases² on the pattern of the English "proper law,"³ into the conflicts law of torts. Indeed, his opinion in *Babcock v. Jackson*⁴—with its accumulation of governmental interests, state concerns, and foreign contacts—has been a less-than-respected trademark abroad of the "revolution" in American private international law.⁵

It is increasingly clear that the New York theory consists merely of "catchwords"⁶ which in themselves are either meaningless or circular. To assume that foreign interests, concerns, or contacts are relevant *independent of forum policy* is to presuppose the presence of a superlaw governing the case;⁷ yet such a superlaw could only

* Professor of Law, University of California School of Law, Berkeley; *Honorary professor of Private International Law, University of Vienna*. Dr. Jur. 1928, University of Vienna; J.D. 1941, University of Chicago; LL.M. 1942; J.S.D. 1952, Columbia University.—Ed.

** B.A. Harvard University, 1964; J.D. University of California, Berkeley, 1968.—Ed.

1. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 690 (1963).

2. *In re Bauer's Trust*, 14 N.Y.2d 272, 278, 200 N.E.2d 207, 210, 251 N.Y.S.2d 23, 26 (1964) (dissent); *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961); *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99 (1954). For criticism, see Ehrenzweig, *The "Bastard" in the Conflict of Laws—A National Disgrace*, 29 U. CHI. L. REV. 498 (1962); A. EHRENZWEIG, *TREATISE ON THE CONFLICT OF LAWS* §§ 142, 174 (1962) [hereinafter *TREATISE*].

3. See A. DICEY & J. MORRIS, *THE CONFLICT OF LAWS* 691-903 (8th ed. 1967). See also Ehrenzweig, *The Not So "Proper" Law of Torts: Pandora's Box*, 17 INT. & COMP. L.Q. (1968).

4. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

5. See generally G. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 253-54 (7th ed. 1965); Beitzke, *Les obligations délictuelles en DIP*, 113 RECUEIL DES COURS 67-68, 98 (1965); D'OLIVEIRA, *INTERNATIONALE VERKEERSONGELUKKEN: HET SLAGVELD VAN EEN GRONDSLAGENSTRIJD IN HET IPR* 9-10 (1965); Drion, *The Lex Loci Delicti in Retreat: A Foreigner's Remarks on Babcock v. Jackson*, in *FESTSCHRIFT FÜR OTTO RIESE* 225 (1964); Eck, *Babcock in Sweden*, 54 CALIF. L. REV. 1575 (1966); Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 93, 118-19 (1964); Vitta, *La responsabilità da illecito nei conflitti di leggi negli Stati Uniti: in margine ad alcune recenti sentenze*, 19 DIRITTO INTERNAZIONALE 212 (1965); Webb, *Conflict in Conflicts—Vested Rights Versus Proper Law: An English Don Reads Babcock*, 9 VILL. L. REV. 193 (1964). See also the scathing comment in R. CRAMTON & D. CURRIE, *CONFLICT OF LAWS, CASES—COMMENTS—QUESTIONS* 258-61 (1968).

6. *Babcock v. Jackson*, 12 N.Y.2d at 486, 191 N.E.2d at 286, 240 N.Y.S.2d at 753 (Van Voorhis, J., dissenting).

7. See A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* § 18 (1967); Ehrenzweig, "False

be a constitutional or other federal rule allocating such relevance. On the other hand, to assume that the forum recognizes foreign interests, concerns, or contacts as relevant *independent of a superlaw* is to concede that relevance is the result rather than the premise of the choice-of-law process.

Unhappily, after a short detour,⁸ Chief Judge Fuld and the majority of his court have reaffirmed the *Babcock* rationale with regard to both foreign and forum rules of enterprise liability. In two recent cases, the court has again resorted to interest analysis to deny applicability of a foreign guest statute⁹ and of a foreign limitation on wrongful death damages;¹⁰ in another case, the court found interest analysis necessary even in the interpretation of the owners' liability statute of the forum.¹¹ We can only hope that a 1968 dissenting opinion by Judge Breitel, concurred in by Judge Jasen and supported in its result by Judge Scileppi,¹² augurs a retrenchment or even a "counterrevolution."¹³

Be this as it may, until recently, Chief Judge Fuld applied his unfortunate theory in only one area of tort law: that of enterprise liability, where traditional conflicts formulae had admittedly failed to produce just results. But this failure resulted less from any deficiency in traditional techniques than from the inadequacy of underlying substantive tort rules which remain couched in terms of "fault" and "negligence"—concepts which emphasize punishment rather than distribution of loss.¹⁴ Thus, long before *Babcock*, courts

Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 53 VA. L. REV. 847 (1967).

8. *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

9. *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

10. *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968).

11. *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967). Concerning this singular disregard for statutory construction, see Ehrenzweig, *Comment on Reich v. Purcell* [67 Cal. 2d 551, 432 P.2d 727 (1967)], 15 U.C.L.A.L. REV. 570, 579-83 (1968). See also Ehrenzweig, *Foreign Guest Statutes and Forum Accidents: Against the Desperanto of State "Interests"*, 68 COLUM. L. REV. 49 (1968).

12. *Miller v. Miller*, 22 N.Y.2d 12, 27, 237 N.E.2d 883, 887, 290 N.Y.S.2d 734, 743 (1968), Judge Breitel refutes "governmental-interests" language as "more or less valid," by stressing that "in civil cases courts attempt to do justice between the parties" and that the society cannot be said to have "an 'interest' in seeing that its rule of civil law is applied whenever it has the power to apply it." Instead he sees "the dominant motif [of courts] in the adjudication of multistate transactions [in their] desire to satisfy the reasonable expectations of persons participating in transactions." 22 N.Y.2d at 27, 237 N.E.2d at 886, 290 N.Y.S.2d at 734. Among other relevant factors Judge Breitel mentions the fact that the offending car was "garaged and insured" in the state of the accident. 22 N.Y.2d at 24, 237 N.E.2d at 884, 290 N.Y.S.2d 744. This consideration may open the way to the recognition of the increasing relevance of present and desirable insurance coverage. See TREATISE 580.

13. See Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). See also LaBrum, *The Fruits of Babcock and Seider: Injustice, Uncertainty and Forum Shopping*, 54 A.B.A.J. 747 (1968).

14. See A. EHRENZWEIG, *supra* note 7, § 29 (1967) and sources cited therein.

ignored the traditional formulae and sought a modicum of justice by invoking various conflicts devices to substitute progressive tort rules of the forum for such obsolescent foreign rules as those concerning guest-host liability, nonsurvival of actions, interspousal immunity, and limited damages.¹⁵ When the *Babcock* court forged new tools for this old purpose, it merely reaffirmed a general frustration in the conflicts law of torts—a frustration which will be relieved only by fundamental legislative reform of the substantive law of enterprise liability. Viewed in this context, application of the “interest” theory appears, at least in most cases, to have been harmless and excusable. Yet this has not always been the case. For we may wonder, as Judge Breitel did in a post-*Babcock* case,¹⁶ whether the New York court had properly ignored the interest of the state where the accident occurred, where the defendant resided at the time of the accident, and where the car was garaged and insured. In any event, it would be both harmful and inexcusable to apply the New York theory in other areas of tort law. The New York Court of Appeals has now posed this threat by transplanting the *Babcock* dogma from the area of enterprise liability into that of intentional torts.

It has been said that hard cases often make bad law.¹⁷ The recent decision by the New York Court of Appeals in *James v. Powell*¹⁸ suggests that easy cases, too, may make bad law—especially where a scholarly judge ventures beyond the demands of the case before him.

I. THE EASY CASE

During an appearance on national television early in 1963, Congressman Adam Clayton Powell, Jr., called Mrs. Esther James a “bag woman”¹⁹ for the New York City police department. During the

15. See, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953) (survival); *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963) (immunity); *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (damages); *Riley v. Capital Airlines, Inc.*, 42 Misc. 2d 194, 247 N.Y.S.2d 427 (Sup. Ct. 1963) (wrongful death statute).

16. *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877 (1968).

17. Chief Justice Traynor adds the charming aside that hard cases may also make good law. Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223 (1962).

18. 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967). One is tempted to assume that the Court of Appeals was at least in part motivated by its desire to protect the defendant against punishment for wrongful conduct (contempt) other than that involved in the case. See 19 N.Y.2d at 259-61, 279 N.Y.S.2d at 17-19, 225 N.E.2d at 746-48. The decision has been castigated as “a crude combination of the old and new approaches that left the law in confusion.” Comment, *Choice of Law in Fraudulent Conveyance*, 67 COLUM. L. REV. 1313 (1967). Be this as it may, other distinguished courts have similarly yielded to the lure of scholarship. See, e.g., *Reich v. Purcell*, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P.2d 727 (1967).

19. See statement of facts in *James v. Powell*, 14 N.Y.2d 881, 200 N.E.2d 772, 252 N.Y.S.2d 87, cert. denied, 379 U.S. 966 (1964). Apparently, a “bag woman” is a collector of graft for policemen.

next four years, a "long and ugly record"²⁰ developed; Powell was sentenced to jail for criminal contempt of court,²¹ took sanctuary in the Bahamas,²² and lost his seat in Congress.²³ Mrs. James also recovered a \$46,500 defamation judgment against Powell.²⁴ Shortly thereafter, Powell conveyed his real property in Puerto Rico to relatives, whereupon Mrs. James brought a separate action in New York alleging that Powell had thereby intentionally interfered with the collection of her earlier judgment. The trial court, in the second action, awarded her compensatory and punitive damages for fraudulent conveyance of land.²⁵ On appeal, Powell argued that New York law permits only the holder of a prior lien to recover damages for such a conveyance. The Appellate Division rejected this contention and recognized a tort remedy against anyone who intentionally interferes with the collection of a judgment.²⁶

On further appeal, Powell again challenged the existence of such

20. 26 App. Div. 2d 292, 295, 274 N.Y.S.2d 192, 194 (1966).

21. Mrs. James originally sued Powell for defamation. The damages awarded to her were reduced as excessive. 20 App. Div. 689, 246 N.Y.S.2d 998, *aff'd*, 14 N.Y.2d 881, 200 N.E.2d 772, 252 N.Y.S.2d 87, *cert. denied*, 379 U.S. 966 (1964). To enforce her judgment, Mrs. James subpoenaed Powell for Sept. 20, 1963. He did not appear. When she moved to punish him for contempt, the court ordered Powell to appear on May 1, 1964. Upon his second failure to appear, Mrs. James renewed her motion to punish him for contempt. Powell's defense of constitutional privilege was denied on May 8, 1964 [43 Misc. 2d 314, 250 N.Y.S.2d 635 (N.Y. Sup. Ct. 1964)], as were his attempts to stay the lower court contempt proceedings [26 App. Div. 2d 779, 273 N.Y.S.2d 756, 27 App. Div. 2d 521, 275 N.Y.S.2d 456 (1966)]. Mrs. James prevailed in her motion to punish Powell for civil contempt, on the condition (eventually fulfilled) that the penalty be dismissed upon payment of her underlying defamation judgment. 26 App. Div. 2d 295, 274 N.Y.S.2d 192, *modified*, 18 N.Y.2d 931, 223 N.E.2d 562, 277 N.Y.S.2d 135 (1966), *aff'd*, 19 N.Y.2d 813, 226 N.E.2d 705, 279 N.Y.S.2d 972 (1967).

The trial court then proceeded to prosecute Powell, not for civil contempt of the Sept. 20 subpoena, but for criminal contempt of its May 1 order to appear, sentencing him to 30 days in jail and \$500 in fines. 52 Misc. 2d 1054, 277 N.Y.S.2d 962 (N.Y. Sup. Ct. 1966), *appeal dismissed*, 27 App. Div. 2d 814, 278 N.Y.S.2d 94 (1967), *motion for stay of commitment denied*, *motion for preference granted*, and *hearing set*, 19 N.Y.2d 918, 227 N.E.2d 898, 281 N.Y.S.2d 103 (1967), *dismissal affirmed*, 19 N.Y.2d 984, 228 N.E.2d 696, 281 N.Y.S.2d 528 (1967). In addition, it seems that Powell also faces criminal charges in Puerto Rico for his fraudulent conveyance. N.Y. Times, Aug. 11, 1967, at 29, col. 1.

22. N.Y. Times, Jan. 10, 1967, at 1, col. 8.

23. The Select House Committee which investigated Powell's conduct found that he had brought discredit upon the House by incurring a contempt citation for failing to pay the New York defamation judgment. 113 CONG. REC. 1918 (daily ed. March 1, 1967). The House then voted to exclude Powell from its body. *Id.* at 1956. A suit for reinstatement was dismissed for want of jurisdiction. Powell v. McCormack, 266 F. Supp. 354 (D.D.C. 1967). Although Powell was re-elected, even if seated, he would have forfeited the seniority that had been so valuable to his constituency. See Comment, *The Adam Clayton Powell Case*, 45 TEXAS L. REV. 1205 (1967); Comment, *Exclusion of a Member-Elect by a House of Congress*, 42 N.Y.U.L. REV. 716 (1967).

24. 20 App. Div. 689, 246 N.Y.S.2d 998, *aff'd*, 14 N.Y.2d 881, 200 N.E.2d 772, 252 N.Y.S.2d 87, *cert. denied*, 379 U.S. 966 (1964).

25. See 26 App. Div. 2d 525, 270 N.Y.S.2d 789, 790, *rev'd* 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967) (statement of facts).

26. 25 App. Div. 2d 1, 2, 270 N.Y.S.2d 245, 247 (1966).

a remedy under New York law.²⁷ The Court of Appeals openly expressed dissatisfaction with the case. After successive contacts with the disputants, it may have suspected that the lower courts were using the *James* litigation to censure Powell for his generally contumacious conduct. Whatever its motivation, the court could have reversed the judgment below by adding New York to the majority of jurisdictions²⁸ that denies the existence of the tort of fraudulent conveyance.²⁹ Instead, the court seized upon a multistate element in the case as a way of reversing the lower court. Although it relied upon New York law to deny the plaintiff punitive damages, the court—*on its own motion*—decided that the law of Puerto Rico governed the issue of compensatory damages. In so doing, it resolved an issue that actually required application of the forum rule of decision. For neither party had pleaded the foreign rule. And even if one of them had, the foreign rule should not have displaced a *lex fori* rule which, subject to the *datum* of a valid foreign conveyance, has in effect traditionally governed fraud along with other intentional torts. The court *could* properly have remanded the case to determine the *validity of the conveyance*—and thus the fact of harm—under Puerto Rican law. But in remanding for the additional purpose of ascertaining the *tort law* of Puerto Rico, the court resorted to deviant doctrine and created bad law.

II. THE BAD LAW

The Court of Appeals correctly applied New York law to the award of punitive damages. However, focusing upon the law applicable to punitive as distinct from compensatory damages, the court indicated that the tort of fraudulent conveyance can be committed even by a mere “attempt to frustrate satisfaction of a New York judgment.”³⁰ Powell would apparently have committed the latter tort even if his attempt to frustrate the plaintiff’s New York judgment had failed, which would have been the case had Puerto Rico invalidated his conveyance. To be sure, in the light of previous authority, it is doubtful that the court was justified in assuming the existence of such a tort.³¹ It is equally doubtful—at least on the facts of *James*

27. 19 N.Y.2d 249, 225 N.E.2d 741, 279 N.Y.S.2d 10 (1967).

28. See *James v. Powell*, 25 App. Div. 2d 1, 8-10, 266 N.Y.S.2d 245, 249-50 (1966) (dissent).

29. Indeed, this approach was suggested by the dissenting judge in the Appellate Division. 25 App. Div. 2d at 4, 266 N.Y.S.2d at 249. See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 n.13 (2d Cir. 1967).

30. 19 N.Y.2d at 260, 225 N.E.2d at 747, 279 N.Y.S.2d at 18. But see *James v. Powell*, 25 App. Div. 2d at 12, 266 N.Y.S.2d at 253 (dissent).

31. The court seemed to rely primarily on *Walker v. Sheldon*, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961). That case, however, dealt with a completed fraud.

—that the court should have based its ultimate denial of punitive damages on the absence of “the type of behavior for which punitive damages are available.”³² But there can be no quarrel with the application of New York law to punitive damages in view of the purely admonitory character of the assumed tort. Indeed, the court’s choice of forum law in this context furnishes an important argument for the application of forum law to the claim for compensatory damages, since that claim, in the case of an intentional tort, is also based on the admonitory character of the liability.

However, with respect to both punitive and compensatory damages, the court gave us bad law by resorting to misleading “interest analysis,” elsewhere referred to as the “Desperanto” of conflicts law. More unhappily, the court made an unwarranted *ex officio* choice of law with regard to compensatory damages; and in doing so it made a wrong choice by ignoring the distinction between the datum subject to Puerto Rican law and the rule of decision subject to New York law.

A. “Interest”

In reversing the punitive damages award, the Court of Appeals should have applied New York law as a matter of course, recognizing that most jurisdictions would no more apply a foreign law of punitive damages than a foreign criminal law. It is regrettable, therefore, that the court justified its application of the *lex fori* by reference to the *Babcock* test of the forum with the “strongest interest in the resolution of the particular issue presented.”³³ Interest analysis could be discounted as harmless surplusage if the court had identified New York’s interest as the admonition of debtors engaging in fraud; such an interest would necessitate application of the *lex fori qua fori*. Instead, the court found that New York’s interest was “the protection of its judgment creditors.”³⁴ This conclusion implies that the court might refuse to award punitive damages against a debtor who maliciously engaged in fraud if the injured creditor resided in another state. Thus, not only was interest analysis of the issue of punitive damages unnecessary, but the court also chose to protect the wrong interest. A similar criticism applies to the court’s interest analysis of the issue of compensatory damages which will be discussed below.

Indeed, a cause of action entitling the plaintiff to at least nominal compensatory damages seems to be a general requirement. See W. PROSSER, *TORTS* 13 (3d ed. 1964).

32. 19 N.Y.2d at 260, 225 N.E.2d at 747, 279 N.Y.S.2d at 18.

33. 19 N.Y.2d at 259, 225 N.E.2d at 747, 279 N.Y.S.2d at 18 [quoting *Babcock v. Jackson*, 12 N.Y.2d 473, 484, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 752 (1963)].

34. 19 N.Y.2d at 260, 225 N.E.2d at 747, 279 N.Y.S.2d at 18.

B. *Unpleaded Foreign Law*

According to long-standing practice in cases wherein a foreign rule of decision is not pleaded by either party, most courts, including those of New York, apply the law of the forum unless there is a public interest in applying foreign law.³⁵ However, some courts in this country and abroad continue to adhere to the fiction of a super-law—whether grounded in a theory of vested rights, of a *jus gentium*, or more recently of a general distribution of legislative jurisdictions. Having assumed that—according to such a superlaw—each case is *governed* by a particular law, these courts have been reluctant to permit the parties a different choice. The resulting compulsion to discover the controlling law—regardless of party pleading and preference—has been rejected as an erroneous “imperative conception of the choice-of-law rule.”³⁶

Until the *James* case New York remained free of this error. As early as 1851, the Court of Appeals declared that New York law was “prima facie, the rule of decision; and if either party wishes the benefit of a different rule of law . . . he must aver and prove it.”³⁷ But the court in *James* deviated sharply from this principle. Although both parties submitted their cases under New York law and the lower courts acquiesced in that submission, the Court of Appeals reversed on an unargued motion of its own that the “legal consequences of the defendant’s acts in this case must be determined under the law of Puerto Rico.”³⁸ At the very least, the court should first have ascertained whether any difference existed between the potentially applicable laws of New York and Puerto Rico.³⁹ Even casual research would have disclosed that the law of Puerto Rico, like that of New York, offers a remedy for intentional infliction of loss through interference with the collection of a judgment.⁴⁰ More-

35. See A. Ehrenzweig, *supra* note 7, §§ 98-115.

36. B. CURRIE, *supra* note 1, at 52 (1963).

37. *Monroe v. Douglas*, 5 N.Y. 447, 452 (1851). *Accord* *Jacobi v. Drucker*, 118 N.Y.S.2d 495, 497 (N.Y. Sup. Ct. 1953); and, with some modification, *Arams v. Arams*, 45 N.Y.S.2d 251 (N.Y. Sup. Ct. 1943); *Brandwein v. Provident Mut. Life Ins. Co.*, 150 N.Y.S.2d 429, 431-32 (N.Y. Sup. Ct. 1956); *Albers v. Credit Suisse*, 67 N.Y.S.2d 239 (N.Y. City Court 1946); *Russell v. Société Anonyme des Etablissements Aeroxon*, 268 N.Y. 173, 197 N.E. 185 (1935).

38. 19 N.Y.2d at 256, 225 N.E.2d at 745, 279 N.Y.S.2d at 17.

39. *Cf.* *Goldberg v. Faull*, 275 F. Supp. 96, 97 (E.D. Tenn. 1967). See generally A. EHRENZWEIG, *supra* note 7, § 36 (1967).

40. CÓDIGO CIVIL, art. 1802, on the pattern of all European civil codes (see, e.g., FRENCH CODE CIVIL art. 1382, GERMAN CIVIL CODE § 823, AUSTRIAN CIVIL CODE § 1295) provides for tort damages for any infliction of harm through “culpa o negligencia.” This provision has been, without specific regulation, interpreted as including such intentional torts as malicious prosecution or abuse of process. See generally Amadeo, *Acciones civiles de daños y perjuicios en el derecho puertorriqueño por el uso injustificado de los procedimientos legales*, 14 REV. JUR. U. PUERTO RICO 37 (1944). The requirement of “unlawfulness” common to civil-law tort provisions, is typically satis-

over, the court should not have instructed the lower court to apply the law of Puerto Rico without allowing for the (likely) possibility that a Puerto Rican court in this case would itself have applied the law of New York as the *lex loci delicti* and the law common to the parties.⁴¹ For, whether or not desirable,⁴² *renvoi* is now part of the conflicts law of New York.⁴³

More serious, the court justified its "imperative conception of the choice-of-law rule" by invoking section 4511 of the New York Civil Practice Law and Rules, which merely allows a court to take judicial notice of foreign law already found applicable.⁴⁴ It is disconcerting enough for a court to make an *ex officio* choice of law in a case which the parties have chosen to rest upon forum law.⁴⁵ It is even more disquieting for a court to derive that choice-of-law prerogative from a statute which does nothing but lessen the evidentiary burdens of pleading and proving foreign law.⁴⁶ For a judicial-notice

fied by the criminal character of any act serving the frustration of judgment execution. The Penal Code of Puerto Rico contains such criminal sanctions which, particularly if read against art. 443 of the Spanish Penal Code of March 29, 1963, clearly cover the case at bar. *See also* German Supreme Court, RGZ 143, 267, 272 (1933) with reference to BGB § 823(2) and StGB § 238.

41. On the statist approach of Puerto Rican courts *see* Conde, *La regla Lex rei sitae en la doctrina Puertorriqueña de conflictos de leyes*, 30 REV. JUR. U. PUERTO RICO 57, 63-65 (1961); Hernandez, *Jurisprudencia del tribunal supremo de Puerto Rico en materia de derecho internacional privado*, 6 REV. JUR. U. PUERTO RICO 147 (1936). *See also* Amadeo v. Registrador, 3 P.R.R. 262 (1903) (limiting the *lex situs* to "acts or contracts directly affecting immovables").

42. *See* A. EHRENZWEIG, *supra* note 7, §§ 68-77 (1967).

43. *See, e.g., In re Schneider's Estate*, 96 N.Y.S.2d 652 (Surr. Ct.), *aff'd on reargument*, 100 N.Y.S.2d 371 (Surr. Ct. 1950). *See also* Mason v. Rose, 176 F.2d 486, 489 (2d Cir. 1949).

44. 19 N.Y.2d at 259, 225 N.E.2d at 746, 279 N.Y.S.2d at 17. *See generally* Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 617-37 (1967).

45. For a notorious example, *see* Walton v. Arabian American Oil Co., 233 F.2d 541 (2d Cir. 1956).

46. Section 4511, formerly § 344-a of the Civil Practice Act, was designed to make it easier for parties and for the court—having chosen a foreign law—to establish its contents. While it had once been necessary to invoke costly and exhausting methods for proving the content of foreign law through affidavits, exhibits, and expert testimony, this statute eliminated that burden by allowing the court to take judicial notice of such foreign laws. 9 N.Y. JUD. COUNCIL ANN. REP. 271 (1943). In other words, the statute was designed to overcome the "expense and burden involved in complying with the rules of evidence." Jefferies, *Recognition of Foreign Law by American Courts*, 35 U. CIN. L. REV. 578, 610 n.141 (1966). *See generally* Saxe, *New York Extends Judicial Notice to Matters of Law*, 28 J. AM. JUD. SOC'Y 86 (1944); Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 COLUM. L. REV. 348 (1957). *See also* Arams v. Arams, 182 Misc. 328, 331, 45 N.Y.S.2d 251, 253-54 (Sup. Ct. 1943) ("I think this new enactment was intended merely to dispense with certain formalities respecting the manner in which the law of a state or country . . . may be brought to the attention of the court by the parties, and, in case they omit something pertinent, to give the judge the right to make an accurate determination as to what the law of that state or country really is. In short, the enactment was intended as a safety valve against miscarriages of justice due to mistake, and not as a charter to every judge to apply whatsoever law he likes and can find.").

statute operates as a *rule of evidence* only upon a law which is already before the court through prior and independent choice of law.⁴⁷ The Court of Appeals apparently construed this rule as requiring the judiciary to make an *ex officio* choice of law in every multistate case regardless of the pleadings. Thus, the court abandoned its own earlier practice and disregarded a view held widely in this country and abroad.⁴⁸ However, the New York court may yet return to the prevailing and preferable view. Judge Breitel, writing for a unanimous court in April 1968, noted that “[n]one of the parties [had] questioned that the New York statutes should be applied” Therefore, the court “assumed, as did the parties, that New York law applies”⁴⁹

C. *Rule of Decision or Datum*

Even assuming the existence of an “imperative” rule compelling an *ex officio* choice of law, the Court of Appeals incorrectly chose the law of Puerto Rico as the rule of decision in the *James* case. To be sure, even under a New York rule of decision, Puerto Rican conveyancing law was relevant—as a datum—in establishing the plaintiff’s cause of action. But the court applied foreign law to the “legal consequences of the defendants’ acts” on the ground that “the validity of a conveyance of a property interest is governed by the law of the place where the property is located.”⁵⁰ From the premise that Puerto Rican law governed the *validity of the conveyance*, the court thus concluded that the same law must govern *all other legal consequences of that conveyance*.

The court assumed that all conveyances are governed by the *lex situs*. As a general statement encompassing conveyances of both personal and real property, this assumption is incorrect;⁵¹ the validity of transfers of personal property has rested, variously, with the law of the situs, the law of the defendant’s domicile, or the law of the forum.⁵² Even general application of the *lex situs* to conveyances of real property has been challenged as a regression to the obsolete

47. See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 974 n.32 (1958).

48. TREATISE §§ 99, 101, 102 (1967). See also CAL. EVIDENCE CODE § 311 (West 1967); Comment, *False Conflicts*, 55 CALIF. L. REV. 74, 119-22 (1967). But cf. Advisory Committee’s Notes to Fed. Rule 44.1 (as amended 1966).

49. *Trionics Research Sales Corp. v. Nautech Corp.*, 21 N.Y.2d 574, 237 N.E.2d 68, 69, 289 N.Y.S.2d 745, 747 (1968) (emphasis added).

50. 19 N.Y.2d at 256, 225 N.E.2d at 745, 279 N.Y.S.2d at 15.

51. See *In re Lea Fabrics, Inc.*, 226 F. Supp. 232, 236 (D.N.J. 1964) (validity of transfer) (“Intangibles have no situs.”). See also *Buchman v. American Foam Rubber Corp.*, 250 F. Supp. 60 (S.D.N.Y. 1965).

52. See TREATISE §§ 235, 236.

formulae of vested rights.⁵³ Whatever its possible virtues or shortcomings otherwise, the *lex situs* has no bearing on the issue of whether a conveyance valid under the law of Puerto Rico (*lex situs*) is a tort under the law of New York (*lex fori*). The validity of a conveyance is relevant only as a datum establishing the existence of a tortious injury.

In order to state a claim for relief, Esther James had to demonstrate: that she had a valid New York judgment against Powell; that "Puerto Rico regarded the property when it was owned by [Powell] as . . . being subject to execution or attachment"; that the attempted conveyance was valid under Puerto Rican law or, if invalid, would at least have "blocked or checked [her] efforts to reach the land"; and that "under the law of Puerto Rico, the land . . . [would not have] remained subject [to] execution even after such a transfer."⁵⁴ Plaintiff looked to New York law to establish that she had a valid outstanding judgment, and to Puerto Rican law to establish that Powell's conveyance prevented her from satisfying her judgment. But this reference to the *lex situs* was merely for factual support—to establish the datum of the validity of the conveyance; it had nothing to do with the choice of the applicable substantive law of tort.

None of the reasons advanced by the court support its contrary conclusion. First, the court seems to have based its application of the *lex situs* on a "characterization" of the issue as one concerning land. But, the technique of characterization is circular in purpose and execution.⁵⁵ Whether an issue "concerns land" with respect to a particular legal rule can be answered only in light of the policies underlying that rule;⁵⁶ to ascertain the policies underlying a legal rule, however, is to decide the question of the rule's applicability. In cases involving fraudulent conveyance of land, for instance, the decision to characterize the action as one in tort or as one of immovables can be made only after inquiring into the policies under-

53. Curiously, it was Chief Judge Fuld himself who attacked the "inflexible rule" of the *lex situs*, dissenting in *In re Bauer's Trust*, 14 N.Y.2d 272, 278, 200 N.E.2d 207, 210, 251 N.Y.S.2d 23, 27 (1964), a case involving the invalidating effect of the Rule Against Perpetuities. See also Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1 (1967); Weintraub, *An Inquiry into the Utility of "Situs" as a Concept in Conflicts Analysis*, 52 CORNELL L.Q. 1 (1966).

54. 19 N.Y.2d at 257, 225 N.E.2d at 745, 279 N.Y.S.2d at 15-16. Authorities cited by the court included such doubtful sources as a federal pre-*Erie* case involving forum land [*Marcus v. Kane*, 18 F.2d 722 (2d Cir. 1927)] and RESTATEMENT (SECOND) OF CONFLICTS § 218 (Tent. Draft. No. 5, 1959).

55. See Ehrenzweig, *Characterization in the Conflict of Laws: An Unwelcome Addition to American Doctrine*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 395 (1961).

56. TREATISE §§ 110-14; A. EHRENZWEIG, *supra* note 7, at §§ 52-56.

lying tort liability for fraud. Having made that inquiry, we have made the choice of law without resorting to the circular process of characterization.

It is now generally agreed that a question should be characterized as one concerning land, and thus subjected to the *lex situs*, only in cases involving trespass to land⁵⁷ and the security of title. The conflicts law of contracts rather than that of immovables controls capacity to contract,⁵⁸ the measure of damages for breach,⁵⁹ permissible rates of mortgage interest,⁶⁰ construction of the wording of conveyances,⁶¹ validity of personal covenants not running with the land,⁶² legal incidents of obligations secured by mortgages,⁶³ liability for deficiency upon foreclosure,⁶⁴ and agreements to assume a mortgage.⁶⁵ In the same manner, the conflicts law of torts rather than that of immovables controls liability for misrepresentation in the sale of land⁶⁶ and—we might add—fraudulent conveyances.

As a second rationale for applying the law of Puerto Rico, the *James* court indicated that a court "should, as a general rule, afford the plaintiff no greater or lesser remedy than she is given under the law *creating the right* which the remedy is designed to safeguard."⁶⁷ To hear that "rights" are "created" under foreign law⁶⁸ is surprising to those of us who thought that such vested rights expired with the first Restatement.⁶⁹ To find further that the same law must govern both right and remedy is both a jurisprudential error and an unexplained deviation from New York doctrine, which has long

57. See, e.g., *Widmer v. Wood*, 243 Ark. 457, 420 S.W.2d 828 (1967). This rule is probably a relic of the "land taboo" (see TREATISE § 58, at 209-11, et passim), preserved even in jurisdictions which, like Arkansas, have abandoned the "local action" concept.

58. See, e.g., *Polson v. Stewart*, 167 Mass. 211, 45 N.E. 737 (1897). See generally Herzog, *The Conflict of Laws in Land Transactions: The Borderline Between Contract and Property Matters—A Comparative View*, 8 SYRACUSE L. REV. 191 (1957); TREATISE §§ 231-34; Williams, *Land Contracts in the Conflict of Laws—Lex Situs: Rule or Exception*, 11 HASTINGS L.J. 159 (1957).

59. See, e.g., *Selover, Bates & Co. v. Walsh*, 226 U.S. 112 (1912); *Atwood v. Walker*, 179 Mass. 514, 61 N.E. 58 (1901).

60. See, e.g., *Arnold v. Potter*, 22 Iowa 194 (1867). See generally Comment, *Usury in the Conflict of Laws: The Doctrine of the Lex Debitoris*, 55 CALIF. L. REV. 123 (1967); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203, at 296, 297, 301 (Proposed Official Draft, Part II 1968).

61. See, e.g., *Brown v. National Bank*, 44 Ohio 269, 6 N.E. 648 (1886).

62. See, e.g., *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650 (1876).

63. See, e.g., *Burr v. Beckler*, 264 Ill. 230, 106 N.E. 206 (1914) (validity of note).

64. See, e.g., *Stumpf v. Hallahan*, 101 App. Div. 383, 91 N.Y.S. 1062 (1905) (but *lex situs* applied in effect).

65. See, e.g., *Clement v. Willett*, 105 Minn. 267, 117 N.W. 491 (1908) (forum law).

66. See, e.g., *Dale v. Fulton*, 5 John Ch. 173 (1821); *E. M. Fleischmann Lumber Corp. v. Resources Corp. International*, 105 F. Supp. 681 (D. Del. 1952); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148(2)(e) (Proposed Official Draft, Part II 1968).

67. 19 N.Y.2d at 257, 225 N.E.2d at 745, 279 N.Y.S.2d at 16 (emphasis added).

68. 19 N.Y.2d at 259, 225 N.E.2d at 746, 279 N.Y.S.2d at 17 (emphasis added).

69. See EHRENZWEIG, PRIVATE INTERNATIONAL LAW § 20.

recognized that different laws may govern causes of action and damages.⁷⁰

Furthermore, the court applied Puerto Rican law on what it considered the "sound jurisprudential principle" that courts "should accord [to foreign situs law] the recognition which comity between enlightened governments requires."⁷¹ The court thus indicated that, even if not compelled to do so, it could nonetheless apply the *lex situs* as a friendly gesture to the government of Puerto Rico. Unlike the use of comity in recognition of foreign judgments, however, the "principle" of comity in relation to choice of law is applicable only in those rare cases where a foreign government has a compelling interest in resolving a particular matter under its own law. For example, in *Tramontana v. S. A. Empresa de Viacao Aerea Rio Grandense*,⁷² a Maryland resident brought wrongful death suit against a Brazilian airline for an accident over Brazil. The Court of Appeals for the District of Columbia Circuit applied the Brazilian limitation-of-damages rule on the ground that the Brazilian government had a specific interest in limiting liability in order to foster its burgeoning commercial airline industry.⁷³ In *James*, the court might conceivably have found that Puerto Rico desired comity concerning the *validity of conveyances* of land in Puerto Rico in order to safeguard the security of its land titles; but it could hardly have found such a desire concerning *foreign tort claims* which did not in any way concern the Commonwealth.

Finally, the court indicated that it would be "unrealistic to give the plaintiff a cause of action for fraud against the debtor and others on the basis of their having made a conveyance of property in Puerto Rico if what they did was perfectly valid under the law of that jurisdiction."⁷⁴ But permitting such an action would be eminently realistic, since the validity of the conveyance, as noted earlier, is in most cases an essential datum for the imposition of any liability for fraud. Ironically, the court itself would apparently have granted a remedy without regard to the validity of the conveyance under Puerto Rican law by awarding punitive damages for an attempted but invalid conveyance.⁷⁵

70. *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Gore v. Northeast Airlines, Inc.*, 373 F.2d 717 (2d Cir. 1967). See TREATISE § 33, 119-20 (1962).

71. 19 N.Y.2d at 258, 225 N.E.2d at 746, 279 N.Y.S.2d at 17 (emphasis added). The case relied on is hardly analogous. In *In re Utassi's Will*, 15 N.Y.2d 436, 209 N.E.2d 65, 261 N.Y.S.2d 4 (1965) the New York court, in true international comity, conceded to a Swiss city the right to escheat securities located in New York.

72. 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966).

73. 350 F.2d at 471-72.

74. 19 N.Y.2d at 258, 225 N.E.2d at 746, 279 N.Y.S.2d at 17 (emphasis added).

75. See text accompanying note 30 *supra*. See also *In re Circle Trading Corp.*, 26

D. *Lex Situs or Lex Fori*

Having discounted the question of the validity of the conveyance as a mere datum, the appropriate rule of decision must still be ascertained. Assuming, without conceding, that the court was free to choose *ex officio* between forum or situs law absent both a compelling public interest and an invocation of foreign law by either party, the court should have applied the tort rule of the forum rather than that of Puerto Rico on grounds of reason, authority, and "theory."

Reason ordinarily requires application of forum law in cases involving intentional torts because liability in this area is designed to admonish and deter. If the defendant acted in reliance upon foreign law, fairness may justify application of that law;⁷⁶ but otherwise the forum should apply its own ethical standards. The history of fraudulent conveyances and of the conflicts law of intentional torts suggests this result.

The Statute of Elizabeth,⁷⁷ which in 1571 began the modern development of the law of fraudulent conveyances, imposed criminal and remedial sanctions in favor of the Queen and injured creditors.⁷⁸ Under that statute, the Star Chamber applied English law as a matter of course. Similarly, when equity intervened to allow a creditor to avoid a fraudulent conveyance,⁷⁹ the Chancellor applied his own "conscience" without regard to the situs of the property.

F.2d 193 (2d Cir. 1928), permitting defendant exculpation by proving title under foreign law.

76. See text accompanying notes 88-93 *infra*. Significantly both cases cited in Comment, *supra* note 18, at 1319 n.42, to support the proposition that damages for fraud are governed by the *lex loci delicti*, apply in effect the law of the forum. See *Lowrey v. Dingmann*, 251 Minn. 124, 86 N.W.2d 499 (1957); *Hanson v. Ford Motor Co.*, 278 F.2d 586 (8th Cir. 1960).

77. 13 Eliz., c. 5 (1571) [*repealed* 15 Geo. V, c. 20 § 172, at 695 (1925)]. For Roman antecedents, see Radin, *Fraudulent Conveyances at Roman Law*, 18 VA. L. REV. 109 (1931). See also O. BUMP, *CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS* (4th ed. 1896); 1 G. GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES* §§ 58-62 (2d ed. 1940); C. MOORE, *FRAUDULENT CONVEYANCES* (1908); 6 POWELL, *OUR PROPERTY* 74 (1965); W. ROBERTS, *TREATISE RELATING TO VOLUNTARY AND FRAUDULENT CONVEYANCES* (1800); S. RIESENFELD, *CASES AND MATERIALS ON CREDITORS' REMEDIES AND DEBTORS' PROTECTIONS*, ch. 6 (1967); F. WAIT, *FRAUDULENT CONVEYANCES* (3d ed. 1897); Cohen, *Attachment of Property Fraudulently Transferred in New York*, 49 COLUM. L. REV. 501 (1949); Radin, *Fraudulent Conveyances in California and the Uniform Fraudulent Conveyance Act*, 27 CALIF. L. REV. 1 (1938); Wolson, *Transfers in Fraud of Creditors*, 55 COMMERCIAL L.J. 5 (1950); Comment, *Limitations and Fraudulent Conveyances of Real Property*, 41 TEXAS L. REV. 814 (1963).

78. Statute followed statute to combat continuing abuse, prompting the Star Chamber to agree with an anonymous poet's anguished dystichon:

Why, one may ask, do statutes grow to such numerous volumes?

This is as it must be, fraud is growing apace.

(Queritur, ut crescunt tot magna volumina legis?

In promptu causa est, crescit in orbe dolus).

Twyne's Case, 76 Eng. Rep. 809, 815 (1601). See also 1 G. GLENN, *supra* note 77, §§ 48-62.

79. See *Mannocke's Case*, 73 Eng. Rep. 661 (1571).

His decision to take jurisdiction over an action involving foreign land was itself a decision to apply the law of the forum.⁸⁰ For, as stated in 1682 in an argument apparently approved by the court: "If the laws of Ireland so far differ from the laws here . . . as to allow of a fraud or a cheat, this court had then the greater reason to retain this cause and see justice done."⁸¹ In another early case, much relied upon in this country, the Chancellor ordered reconveyance of land fraudulently obtained on the island of St. Christopher because "this Court will not permit the defendant to avail himself of the law of any country to do what would be gross injustice."⁸² American courts sitting in equity, having in large part shared the English experience,⁸³ have followed the same principle.⁸⁴ Foreign law—usually that of the place where defendant's conduct occurred or that of plaintiff's domicile—has been admitted only to validate transactions⁸⁵ which would have been invalid under one of the forum's increasingly technical and decreasingly moral presumptions of fraud.⁸⁶

In contrast to the experience in equity, there is little conflicts authority at law for fraudulent conveyance of land. Although the

80. *Arglasse v. Muschamp*, 23 Eng. Rep. 322, (1682); *Penn v. Baltimore*, 1 Ves. Sen. 444, 27 Eng. Rep. 1132 (1750); *Massie v. Watts*, 10 U.S. (6 Cranch) 148 (1810) (Marshall, C.J.). For a recent case involving damages, see *Starr v. Berry*, 25 N.J. 573, 138 A.2d 44 (1958). See generally Comment, *Tort Liability for Fraudulent Conveyances*, 19 STAN. L. REV. 636 (1967).

81. *Arglasse v. Muschamp*, 23 Eng. Rep. 322 (1682).

82. *Cranston v. Johnston*, 30 Eng. Rep. 952 (1796), 31 Eng. Rep. 586 (1800). For the possible relevance of the *lex actus* in this and the *Arglasse* case, see notes 83-84 *infra*.

83. For criminal statutes, see, e.g., *Smith v. Blake*, 1 Day 258, 262 (Conn. 1804); *Fogg v. Lawry*, 71 Me. 215, 216 (1880); *Spaulding v. Fisher*, 57 Me. 411, 414 (1869); *Wilder v. Winne*, 6 Cow. 284, 287 (N.Y. 1826); *Wright v. Eldred*, 2 Aik. 401 (Vt. 1827). See also P.R. LAWS ANN. tit. 33, § 1814 (1956). Cf. ME. REV. STAT. ANN. tit. 17, ch. 59, § 1613 (1964) (\$1,000 fine plus less than one year in jail); CAL. PENAL CODE § 531 (West 1955) (misdemeanor).

Connecticut maintained a forfeiture provision for fraud until 1911. CONN. GEN. STAT. § 1092 (1902), reprinted in M. BIGELOW, *FRAUDULENT CONVEYANCES* 28 (Knowlton ed. 1911). See also *Webb v. Long*, 17 Vt. 587 (1845).

The Elizabethan statute, *supra* note 77, survives in federal law. See *United States v. Bess*, 243 F.2d 675 (3d Cir. 1957). The UNIFORM FRAUDULENT CONVEYANCE ACT § 11 adopted in a majority of states, upholds expressly any existing rules concerning the "effect of fraud." 9B U.L.A. 273 (1966).

84. For New York, e.g., see *D'Ivernois v. Leavitt*, 23 Barb. 63, 80 (N.Y.S. Ct. 1856), declaring with regard to transactions relating to real "property in other states, [that] if our law deems them fraudulent, it is within the province of this court to declare them void."

85. On the presumption of validity in general, see A. EHRENZWEIG, *supra* note 69, at 45 (1967).

86. This result has been regularly achieved by declaring inapplicable the forum statute as lacking "extraterritorial" scope. See, e.g., *Merchants' Bank v. Bank of United States*, 2 La. App. 659 (1847); *Williams v. Dry Goods Co.*, 4 Okla. 145 (1896); *Thurston v. Rosenfield*, 42 Mo. 474 (1868); *Greene v. Sprague Mfg. Co.*, 52 Conn. 330, 362 (1884) (*but see* dissent, at 373, 392); *Bentley v. Whittemore*, 19 N.J. Eq. 462 (1868); *Chafee v. Fourth Nat'l Bank of N.Y.*, 71 Me. 514 (1880); *May v. First Nat'l Bank*, 122 Ill. 551, 13 N.E. 806 (1887).

Chancellor was not reluctant to take jurisdiction over parties to disputes concerning foreign land, the law courts generally declined such jurisdiction.⁸⁷ Moreover, even though law courts are slowly losing that reluctance, only a minority of jurisdictions now recognizes a substantive remedy in tort for fraudulent conveyance of land. Thus, we must draw needed inferences from the general conflicts law of intentional torts.

The conflicts treatment of intentional torts is characterized by an interplay between the law of the forum and the law of the place of acting—the *lex actus*. The ancestry of such torts in criminal law and equity seems to call for the application of forum law. On the other hand, the persisting quasi-criminal character of tort law also required courts to make allowance for defendants who could not have anticipated the application of forum law; accordingly, such defendants were permitted to show that their conduct was proper under the *lex actus*. Thus, in the leading Commonwealth⁸⁸ and American⁸⁹ cases the defendants were permitted to justify their behavior under the law of the place of acting. However, such justifications have remained the exception. The adulterer claiming protection under an anti-heart-balm statute of the state of seduction⁹⁰ is no more likely to prevail than the liquor dealer claiming nonexistence of a dram shop act at the place of a drunken accident⁹¹ or, for that matter, than the fraudulent debtor claiming indulgence from the state where he committed his fraud.⁹² On remand, Powell will hardly be heard to allege a Puerto Rican definition of fraud more lenient than that of New York. A “moral” standard of fraud is always a datum under forum law.⁹³

87. It has been said that a court may not take jurisdiction in an action to set aside fraudulent conveyances of foreign land. *West Point Min. & Mfg. Co. v. Allen*, 143 Ala. 547, 39 S. 351 (1905); *Smith v. Schlein*, 144 F.2d 257 (D.C. Cir. 1944). See generally TREATISE § 39, 140. But see *Gardner v. Ogden*, 22 N.Y. 327 (1860); *Pingree v. Coffin*, 78 Mass. (12 Gray) 288, 304-05 (1858).

88. *Phillips v. Eyre*, L.R. 6 Q.B. 1 (1870).

89. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

90. See Ehrenzweig, *Alienation of Affections in the Conflict of Laws*, 45 CORNELL L.Q. 514 (1960).

91. TREATISE § 215(7).

92. TREATISE § 215(3). Concerning conversion, see, e.g., *Keller v. Paine*, 107 N.Y. 83, 13 N.E. 635 (1887); for defamation, *Kemart Corp. v. Printing Arts Research Lab., Inc.*, 269 F.2d 375, 392-94 (9th Cir. 1959) (“closest relationship”).

93. See A. Ehrenzweig, *supra* note 69, § 34; Ehrenzweig, *Local and Moral Data in the Conflict of Laws*, 16 BUFF. L. REV. 55 (1966); *Houston Oilers, Inc. v. Neeley*, 361 F.2d 36, 41 (10th Cir. 1966), cert. denied, 385 U.S. 840, 942 (1966) (purporting to apply a foreign standard without indicating a difference from the standard of the forum); *Myers v. Council Mfg. Corp.*, 276 F. Supp. 541, 547 (W.D. Ark. 1967) (application of *lex loci* rather than *lex fori* “probably of no consequence”). Full documentation is forthcoming in Ehrenzweig, *Specific Principles of Private Transnational Law*, in RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL (1968).

Authority, too, dictates application of forum law. To be sure, the Court of Appeals in *James* construed its own ruling in *Wyatt v. Fulrath*⁹⁴ as applying "the law of the situs [New York] to determine whether the Spanish heirs of a Spanish domiciliary were defrauded by his testamentary transfers of chattels through joint bank accounts maintained in New York . . ."⁹⁵ But that construction is partly incorrect and partly inconclusive. There was no assertion of fraud in *Wyatt*; and the court was there concerned with the parties' "legal capacity"⁹⁶ rather than with their liability in tort. Furthermore, in applying New York law the *Wyatt* court was motivated by considerations far different from regard for the law of the situs *qua* situs. Not only did the court wish to give effect to the parties' stipulation that "New York law [should] apply to the property they place here,"⁹⁷ but it was also concerned with New York's truly governmental (economic and political) interest in applying her *own* law to create a sanctuary for property owners relying upon "the general stability of our Government,"⁹⁸—a far cry from the *James* court's application of a *foreign* law to create a potential haven for acts fraudulent under the law of New York!

Not only does *Wyatt* fail as support for *James*, but there is also good authority *against* the interpretation of the Court of Appeals in the latter case. In *Irving Trust Co. v. Maryland Casualty Co.*,⁹⁹ Judge Learned Hand determined the availability of damages under New York law against grantees fraudulently receiving foreign land. Speaking for the Court of Appeals for the Second Circuit, he conceded that "the law of the situs absolutely determines the validity of conveyances wherever made," and that "title passed . . . to property situated in those . . . states whose laws did not forbid such transfers."¹⁰⁰ However, he also concluded that "the law of New York might still make receipt of the deed a wrong and impose liability upon the grantee even though he got a good title."¹⁰¹ There is little doubt that Judge Hand would have applied the same reasoning to a case involving a fraudulent grantor. In a closely related case an attorney who conducted litigation in Austria for the purpose of frustrating a New York transaction was sued in New York for abuse of process.

94. 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965).

95. 19 N.Y.2d at 256-57, 225 N.E.2d at 745, 279 N.Y.S.2d at 15.

96. *Wyatt v. Fulrath*, 16 N.Y.2d 169, 172, 211 N.E.2d 637, 638, 264 N.Y.S.2d 233, 234 (1965).

97. 16 N.Y.2d at 173, 211 N.E.2d at 639, 264 N.Y.S.2d at 236.

98. 16 N.Y.2d at 173, 211 N.E.2d at 639, 264 N.Y.S.2d at 236. *See also* Judge Keating's interpretation of *Wyatt* in *In re Estate of Crichton*, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967).

99. 83 F.2d 168 (2d Cir. 1936), *cert. denied*, 299 U.S. 571 (1936).

100. 83 F.2d at 171.

101. 83 F.2d at 171.

The Second Circuit discounted Austrian law as a potentially applicable *lex actus* by regarding "the Austrian legal process . . . simply [as] the means employed to effectuate"¹⁰² the defendant's alleged design. Judge Friendly's majority opinion proceeded on the assumption that New York would not "refuse to recognize a claim for abuse of process that it would have recognized if the proceedings had taken place in its own courts . . ."¹⁰³ Clearly, this intentional tort was subject to the moral standards of the forum. Finally, forum law has been applied in many cases to determine the fraudulent character of foreign conveyances on the ground, admittedly less compelling, that the question was one of procedure.¹⁰⁴ Happily, in 1968, the New York Court of Appeals, speaking through Judge Breitel, found no difficulty in interpreting a New York statute which prohibited "illegal transfers" by foreign insolvent corporations as applicable to foreign assets.¹⁰⁵

Since reason and authority fail to support the holding in *James*, only the court's resort to "*theory*" remains to be examined. As previously indicated, the court subjected the claim for compensatory damages to the Puerto Rican tort law since Puerto Rican law governed the validity of the conveyance;¹⁰⁶ the court identified that law as the *lex situs*.¹⁰⁷ The court could have rested its decision to remand the case for the ascertainment of Puerto Rican law on the traditional *lex situs* doctrine—however erroneous. But it chose otherwise, apparently intending to introduce for intentional torts¹⁰⁸ the same "interest" analysis and "contacts" approach which it had previously adopted for enterprise liability, contracts, and trusts.¹⁰⁹ The opinion asserts that the law of Puerto Rico is applicable not merely under the traditional *lex situs* rule but, "to put the matter somewhat differently," because "the availability of a remedy to a judgment creditor who has been prevented from levying execution by a transfer of land located in [Puerto Rico] constitutes a matter of policy which is properly determinable by the law of Puerto Rico . . ."¹¹⁰ The

102. *Weiss v. Hunna*, 312 F.2d 711, 717 (2d Cir. 1963), *cert. denied*, 374 U.S. 853 (1963), citing TREATISE §§ 215, 558, 563. See also *Kluck v. State*, 37 Wis. 2d 378, 155 N.W.2d 26 (1967), similarly treating the foreign proceedings as a mere datum subject to foreign law in a case of false arrest.

103. *Weiss v. Hunna*, 312 F.2d 711, 717 (2d Cir. 1963).

104. See *H. A. Lavanne Co. v. Katz*, 156 F. Supp. 636, 639 (D. Md. 1957), which relied on *Feist v. Druckerman*, 70 F.2d 333 (2d Cir. 1934) (Augustus Hand, J.).

105. *Trionics Research Sales Corp. v. Nautec Corp.*, 21 N.Y.2d 574, 237 N.E.2d 68, 289 N.Y.S.2d 745 (1968).

106. See text accompanying note 50 *supra*.

107. *Id.*

108. See notes 76-105 *supra* and the accompanying text.

109. See note 2 *supra*.

110. 19 N.Y.2d at 257-58, 225 N.E.2d at 745, 279 N.Y.S.2d at 16.

term "policy" in this context is used synonymously with the term "interest";¹¹¹ this is clear from the juxtaposition of the statement just quoted with the preceding concession that New York could "legitimately"¹¹² claim an "interest" in the matter only if Puerto Rico were to discriminate "against New York judgment creditors as compared with local judgment creditors."¹¹³

Are we to understand that such a New York "interest" would have given the plaintiff a remedy—although she had suffered no loss as a result of the defendant's fraud—if her New York citizenship alone would have disqualified her under Puerto Rican law from levying on her New York judgment in Puerto Rico? Conversely, would the absence of such a New York "interest" have deprived a Puerto Rican plaintiff of a remedy—although he had suffered a loss as a result of the defendant's fraud—if under Puerto Rican law his citizenship would have enabled him to levy on the New York judgment? Whatever the answers to these questions, it is less than clear how the court could find an "interest" of Puerto Rico in the application of her law to litigation between two New York citizens concerning damages which could not in any way affect title to Puerto Rican land.

IV. CONCLUSION

On reason, authority, and "theory" the *James* court failed, then, to explain its application of foreign law. The remedy for the intentional tort of fraudulent conveyance, like that of all intentional torts, must remain primarily subject to the law of the forum since—as we have demonstrated—the defendant could not possibly have claimed justifiable reliance on the *lex actus*. By analyzing this case in the "modern" terms of prevailing "interests" and "contacts," as well as in the obsolete terms of "comity" and "foreign-created rights," the New York Court of Appeals has given us bad law. We hope that this distinguished court will now end the "crisis and confusion" in the conflicts law of New York and lead us into what will no longer facetiously be called a "new era of enlightenment."¹¹⁴

111. Even Currie's terminology ultimately results in the interchangeable use of these terms. See A. EHRENZWEIG, *supra* note 69, § 25, at 63-64.

112. 19 N.Y.2d at 258, 225 N.E.2d at 745, 270 N.Y.S.2d at 16. On the circular character of this test which presupposes a superlaw determining legitimacy, see A. EHRENZWEIG, *supra* note 69, § 25 at 63-64.

113. 19 N.Y.2d at 258, 225 N.E.2d at 745, 279 N.Y.S.2d at 16.

114. Rosenberg, *Two Views on Kell v. Henderson: An Opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 460 (1967); cf. the sequel, Ehrenzweig, *Foreign Guest Statutes and Forum Accidents: Against a Desperanto of Conflicts Law*, 68 COLUM. L. REV. 49 (1968).