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THE PLACE OF ACTING IN INTENTIONAL MULTISTATE TORTS: LAW AND REASON VERSUS THE RESTATEMENT

ALBERT A. EHRENZWEIG*

"No liability without fault" was the principle on which judges and writers of the last century based what they thought to be a highly moralized law of torts. Though this principle is still with us, it has long since been deprived of its "moral" meaning. Whether you have been hit by an automobile, whether you have crushed your finger in the door of a railroad car or contracted indigestion from the consumption of spoiled food, you are likely to assert that somebody was at fault, and to claim damages for the "negligent" causation of your injury. In my study on "Negligence without Fault" I have attempted to show that many of the theoretical and practical difficulties of our present tort law can perhaps be solved by the conscious segregation of those "negligence" liabilities serving primarily compensation for harm inflicted by unavoidable incidents of modern mechanical enterprise rather than the censure and admonition of a wrongdoer. To follow some of the implications of this thesis for the conflicts rules governing the law of torts is the object of this paper.

So manifold are the situations and problems here involved that comparison and understanding of their analysis will perhaps be assisted by the introduction of a set of symbols: (A) In "single contact" cases where both the causal conduct and the harm caused have occurred at one "place of wrong," the choice is limited to one

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between the law of that place (lex loci, X) and the law of the forum (lex fori, F). The symbols designate application of the lex fori resulting in liability (FL) or nonliability (FN), or application of the lex loci resulting in liability (XL) or nonliability (XN). (B) In multiple contact cases (multistate torts) the defendant’s conduct (C) and the plaintiff’s harm (H) have occurred in different states. Since one of these is quite regularly the state of the forum, the analysis will be limited to the choice between the law of the forum as that of the place of harm (FH) or conduct (FC) and the law of a foreign place of harm (XH) or conduct (XC). The symbols designate application of the lex fori as the law of the place of conduct resulting in liability (FCL) or nonliability (FCN), or as the law of the place of harm resulting in liability (FHL) or nonliability (FHN); and application of the lex loci as the law of the place of conduct resulting in liability (XCL) or nonliability (XCN), or as the law of the place of harm resulting in liability (XHL) or nonliability (XHN).

At a time when tort law was mainly concerned with moral wrongs, courts in conflicts cases quite naturally stressed the place of the defendant’s wrongful conduct as that whose law he could most properly be expected to obey. Once and where, however, the proper allocation of losses came to cause more concern than the righting of wrongs; once and where, in other words, the tort rule applied was primarily compensatory rather than admonitory, the place of loss seemed more significant than that of the defendant’s conduct. It was this consideration which apparently induced the Restaters of the law of conflicts to adopt a general rule based on what is now usually referred to as the “place of harm.” I will try to show that this generalization, with its underlying failure to distinguish between the new compensatory “quasi-strict” liabilities and what has remained of the admonitory fault liability of the pre-industrial era, accounts for much of that confusion of theory and language (now prevailing) in the conflicts law of torts, which only recently has caused an eminent writer to postulate the “give-it-up” theory of a “proper law of torts.”

The question whether the place of harm rule of the Restatement will ultimately prove to be the best rule for liabilities without fault or will have to be replaced by different rules for different torts or fact situations is outside the scope of this paper. What I am attempting to prove is that the Restatement rule, contrary to the conviction of its authors, is not one of general, logically required, application. This will appear from the fact that the Restatement rule has not been, and should not be, adopted by the courts with regard to what has remained of liability for "moral" fault. Since the policies predominant in this field are most clearly apparent in intentional torts, these torts have been chosen as the principal object of this paper.

The case of Gordon v. Parker\(^3\) offers an appropriate starting point. A domiciliary of Pennsylvania sued in the federal court in Massachusetts for the alienation of his wife's affections by acts committed in the state of the forum. Defendant moved for a summary judgment under a Pennsylvania statute barring actions of this type and alleged to be applicable as the law of the place where the defendant's act had "its chief and indeed its final consequences."\(^4\) The defendant's position seemed fully supported by the Restatement of Conflict of Laws according to which recovery depends on whether "a cause of action in tort is created at the place of wrong" (Section 384), i.e. "where the last event necessary to make an actor liable for an alleged tort takes place" (Section 382).\(^5\) Since a "tort is

\[^3\text{Gordon v. Parker, 83 F. Supp. 40 (Mass. 1949), aff'd on other grounds, 178 F. 2d 888 (1st Cir. 1949). For comments see 1 Stan. L. Rev. 759 (1949) ; 62 Harv. L. Rev. 1065 (1949).}\]

\[^4\text{Gordon v. Parker, supra note 3, at 42.}\]

\[^5\text{This rule is circuitous in several respects. Neither the existence of a "wrong" nor the "last event" can be ascertained without reference to a specific law the applicability of which is the very issue to be determined under §§ 382 and 384. Cf. Cook, The Logical and Legal Bases of the Conflict of Laws 328 (1942) ; Stimson, Conflict of Criminal Laws 46 (1936) ; 2 Rabel, Conflict of Laws 232, 235 (1947) (with references to foreign laws) ; Freund, Book Review, 61 Harv. L. Rev. 1264, 1265 (1948) ; Lorenzen, Selected Articles on the Conflict of Laws (1947) ; Kuratowski, Torts in Private International Law, 1 Int. L. Q. 172 (1947) ; Lewald, Règles Générales des Conflits de Lois, 69 Recueil Des Cours 5, 82 (Académie de Droit International, 1939). For a case involving this problem see Mountain v. Price, 20 Wash. 2d 129, 146 P. 2d 327 (1944). Cf. [1944] Ann. Sur' Am. L. 60. As a counsel of despair some writers have expressly advocated application of the lex fori at this point. Raape, Internationales Privatrecht 364 (3d ed. 1950) ; Robertson, Characterization in the Conflict of Laws 78 (1940) ; Overton, Analysis in Conflict of Laws: The Problem of Classification, 21 Tenn. L. Rev. 600, 607 (1951). Presumably conscious of the insoluble difficulty, Professor Beale limited himself in the Restatement to an informal Note purporting to summarize the rules which "represent the general common law as to what constitutes the place of wrong in different types of torts." Restatement, Conflict of Laws 455 (1934). Whether or not we can concede the existence of such a "general
complete only when the harm takes place," the Restarters would apply the law of "the place where the person or thing harmed is situated at the time of the wrong." If the Massachusetts court had followed this rule, it would probably have felt compelled to apply the law of plaintiff's individual or matrimonial domicile as that of the place of the harm to his interest in the affections or in the services of his wife. Judge Wyzanski, however, in a brilliant opinion, denied the defendant's motion, holding applicable the law of Massachusetts as the law of the state in which the defendant's reprehensible conduct had concededly occurred.

Much of the court's reasoning in support of this conclusion is unconvincing. We find the argument that Pennsylvania herself had not intended to extend her policy beyond her borders, and that, even if she had, this was "not a situation in which the interests of Pennsylvania plainly outweigh those of Massachusetts." Here as so often in the law of conflicts legislative "intention" and state "interests" are used to restate the desired results. However, the common law, courts following the theory of the Restatement will resort to Professor Beale's treatise, recognized and relied on as the authoritative commentary on the Restatement. See infra note 7.


8. That this place would have been considered as that of the harm seems likely in view of the Massachusetts rule which requires either adultery or separation for the tort of alienation of affections. McGrath v. Sullivan, 303 Mass. 327, 21 N. E. 2d 533 (1933), referred to by the court in Gordon v. Parker, supra note 3, at 41. See also A. v. B., BGE 43 II, 309 (Swiss Supreme Federal Court, 6.15.1917), also referred to by the Massachusetts court (infra note 130), at 315. For a recent reexamination of the concept of "consortium" see Hitaffer v. Argonne Co., 183 F. 2d 811 (D.C. Cir. 1950).

9. Restatement, Torts § 683, Comment (1938). See also Prosser, Torts 916 (1941) with authorities.


court itself does not seem satisfied with these arguments and proceeds to examine purpose and function of the tort rule invoked.

In the tort of alienation of affections, the court finds, "the principal reason why the state stamps conduct as wrongful is that so many people regard it as sinful, so many regard it as offensive to public morals." Here, the "compensatory element," always present in tort law, "is of secondary consequence" and tort law fully reflects its relationship to "its younger brother, criminal law." Clearly and unambiguously Judge Wyzanski thus draws a line between two types of torts, those being primarily "compensatory" in character and perhaps properly subject to the now traditional place of harm rule and those, which, like the tort of alienation of affections, being primarily admonitory, require the application of the law of that state in which the "sinful," wrongful conduct has occurred.

It will be shown that most, if not all, court decisions involving intentional torts can be rationalized under a rule referring to the place of the defendant's wrongful conduct. While this finding defeats the general applicability of the Restatement rule (FHL, FHN, XHL, XHN), it does not prove the desirability of a general "conduct rule" for fault liability (FCL, FCN, XCL, XCN). Notwithstanding high authority to this effect, it may be doubtful whether liability for an intentional tort, though recognized under the law of the place of harm, should always be denied merely because the defendant had acted under a law not imposing such liability (FCN, XCN). In such a situation it may be a better solution to allow the plaintiff to recover if liability is imposed under the law of either the place of conduct or of the place of harm. But this much is certain: American courts have always given, and ought to give, preference to the law of the place of conduct over that of the place of harm, if the former (though not the latter) renders the defendant liable for an intentional tort. This is true whether or not the forum itself is the place of conduct (FCL, XCL). But since in the case of a foreign place of conduct, the forum's public policy will often modify this result particularly where the forum is also the place of harm (FHN v. XCL), the thesis of the present paper is limited to the proposition, exemplified by Gordon v. Parker, that when in an intentional tort the defendant's conduct has occurred

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14. See infra text at note 48.
within the state of the forum, and under this law there is liability, the defendant will be held liable even though the harm was sustained in a state which would not impose liability under its local law (FCL). This result alone should be sufficient to reveal the erroneousness of the Restaters' place of harm rule as a general "logical" principle, and open the way for the needed functional analysis of the conflicts rules as to each of those numerous types of civil liability which, largely by historical accident, have come to be lumped together under the heading of tort law.

In view of the seemingly prevailing opinion to the contrary, the testing of this thesis on principle and authority must be preceded by a critical examination of the historical and functional foundations of the entire conflicts law of torts. To prove the original, "moral" meaning of the "place of wrong" rule, it will be shown (1) how torts, having originally, like crimes, been exclusively governed by the lex fori; (2) came to follow the law of the "place of wrong" (lex loci) as to the recognition of both (a) defenses and (b) causes of action. (3) To explain the shift, effected within this rule and rationalized under various dogmatic formulas, from the place of acting to that of the harm both as to (a) defenses and (b) causes of action, the impact will be examined on the law of conflicts of the growing need for compensation for industrial accidents innocently inflicted and thus unaffected by "moral" policies peculiar to the law of the place of defendant's conduct. It will appear that (4) the courts' refusal to extend this shift to torts continuing to be based on the reprehensibility of defendant's conduct, has made imperative, with certain exceptions and modifications, the recognition of at least two distinct conflicts rules in the field of multistate torts. That courts have in fact recognized this need will be shown in the final chapter of this paper which (5) contains an analysis of the authorities bearing on the conflicts law in intentional multistate torts.

1. The Lex Fori (FL and FN)

For several centuries English courts had chosen generally to avoid foreign contacts by refusing to take jurisdiction as to any case involving a "fait en une estraunge terre." Even when it be-
came clear from Lord Mansfield's decision in the case of Mostyn v. Fabrigas\textsuperscript{16} that such jurisdiction would lie, the courts were able to dispense with conflicts rules by applying the law of England to the foreign tort. In a modified form, restated in the celebrated case of Phillips v. Eyre\textsuperscript{17} which permitted the defendant to "justify" himself under the law of the place of his conduct, this practice has remained unchanged both in England and in Canada up to the present time.\textsuperscript{18} In Continental Europe, too, the lex fori, having displaced the law of nationality, has had much weight.\textsuperscript{19} Thus, the French practice prohibiting la reserche de la paternit\`e even as to children conceived in countries recognizing a tort of illegitimate intercourse, induced Savigny to postulate general application by the forum of its own tort law.\textsuperscript{20} Other German, French, and Swiss writers have expressed similar views.\textsuperscript{21} And the Soviet Supreme Court ruled in 1941 that "the law of the place of trial (lex fori) shall be applied" to tort claims.\textsuperscript{22} The same rule was the law of Greece until the

\textsuperscript{16} Mostyn v. Fabrigas, 1 Cowp. 161, 98 Eng. Rep. 1021 (1774), frequently relied upon in early American decisions. See \textit{e.g.}, Whitford v. Panama R. R., 23 N. Y. 465, 475 (1861).


\textsuperscript{20} Savigny, \textit{A Treatise on the Conflict of Laws} 205 (transl. Guthrie, Edinburgh, 1869). The resulting danger of "forum shopping" he considered as "the inevitable result of the particular nature of this class of laws." \textit{Id.} at 207. For further references see Lewald, \textit{Deutsches Internationales Privatrecht} 260 (1931); Simons, \textit{La Conception du Droit International Privé d’après la Doctrine et la Pratique en Allemagne}, 15 Recueil Des Cours 437 (Académie de Droit International, 1926).

\textsuperscript{21} See Waechter, \textit{Archiv Fuer Die Civilistische Praxis} 25, 389; Wyss, \textit{Zeitschrift Fuer Schweizerisches Recht} IV, 95; Mazeaud, \textit{Traité Théorique et Pratique De La Responsabilité Civile} §§ 2075-5 \& seq. (1950) ; 1 Arminjon, \textit{Précis De Droit International Privé} No. 120 (1947); see also the decision of the Appellate Court of Berne of May 5, 1892, Z. 3, 194. Frankenstein's rather isolated plea for the law of nationality could not be considered for interstate delicts in this country. See 2 Frankenstein, \textit{Internationales Privatrecht} 362 (1929). See also \textit{infra} note 47.

\textsuperscript{22} 2 Gsovski, Soviet Civil Law 14 (1949).
recodification of 1946 and has found recognition in German legislation.  

Although resort to the lex fori in tort cases has occasionally been advocated in this country, too, American courts, but for isolated traces of declined jurisdiction and "justification," have never in terms adhered to the English approach, except perhaps when dealing with torts committed abroad or on the high seas. Yet, there is reason to assume that these courts, too, have considered the lex fori as the law primarily applicable in torts cases. Story, rejecting attempts of foreign jurists to construct a complete and consistent system of conflicts law, failed to include torts among those fields (personal status, contracts, property and succession) in which international tradition had come to recognize foreign "sovereignty and jurisdiction." Tort claims, considered as essentially penal, were subjected to the lex fori under the heading of either criminal  

23. Article 6 of the Civil Code of 1856, said to be the only "legislative text ever to adopt the theory of the law of the forum advocated by Savigny," Nicoletopoulos, Private International Law in the New Greek Civil Code, 23 Tulane L. Rev. 452, 470 (1949). This provision has now been replaced by Article 26 of the New Code referring to the place of the wrong (interpreted to be identical with the place of acting. Nicoletopoulos, supra at 470). See in general Streit, La Conception du Droit International Privé en Grèce, 20 Recueil Des Cours 347, 385 (Académie de Droit International, 1927).  


26. Cf. Molony v. Dows, 8 Abb. Pr. 316 (N.Y. 1859). The New York court, rejecting two cases to the contrary as badly reasoned [Walls v. Thomas, 2 Bibb. 458 (Ky. 1802); Smith v. Bull, 17 Wend. 323 (N.Y. 1837)], refused to take jurisdiction in an action for assault committed in California in 1856 by the "San Francisco Vigilance Committee": "No case will be found in the whole course of English jurisprudence in which an action for an injury to the person, inflicted by one foreigner upon another in a foreign country, was ever held to be maintainable in an English court" (at 329). See also Great Western R. R. of Canada v. Miller, 19 Mich. 305 (1869) maintaining that American courts will not take jurisdiction in law suits between aliens on a foreign tort.  

27. See Shaver v. White and Dougherty, 6 Munf. (20 Va.) 110, 112 (1818).  

28. See, e.g., Stewart's Admin'x v. Bacon, 253 Ky. 748, 70 S. W. 2d 522 (1934) (wrongful death in Ontario) with further references at 70 S. W. 2d 523; Robinson, Admiralty 836 (1939): infra note 46.  


30. Id. at 19. The first edition (1834) omits torts entirely and even the fourth edition (1852) limits itself to the discussion of torts committed on the high seas, always a special field of investigation within the law of admiralty, and to the incidental discussion of the enforcement of penal claims. Id. at 1016.
law or remedies. Indeed, as long as tort law was primarily common law and thus presumed to be identical in all states of the Union, there was little need for developing a law of conflicts in this field.31 Quite possibly this need was brought home to American courts by the codification of the law of Louisiana32 and it may not be a coincidence that the first American text on conflicts was written in 1820 by an attorney practicing in that state.33 But soon increasing legislative action and growing interstate commerce compelled attention, too, to the increasing differences between the laws of other states.

In a period in which statutes were considered as encroachments upon the common law, it seemed unfair to impose statutory liability for wrongs committed outside the territory of the legislating state. In this country, as in England, this problem appeared first in jurisdictional contests as to the actionability or "transitory" nature of foreign torts.34 Once this question was settled in the affirmative, American conflicts theory apparently refusing to follow English authority and lacking American precedent,35 turned to foreign learning to justify the substitution of the law of the "place of wrong" for the lex fori, both as to foreign defenses and foreign claims.

2. Place of Wrong (Lex Loci)

(a) Nonliability under the lex loci (XN). In one of the earlier cases the New York court, holding a wrongful death statute in-

31. The same reason may account for the rule of § 34 of the Judiciary Act of 1789 which fails to mention the common law in its rule on the applicability of state law in the federal courts. Only when judicial activity had increased diversity between the common laws of the several states, did a problem arise which as late as 1938 was solved in Erie R. R. v. Tompkins by what amounts to judicial legislation equalizing the treatment of statute and common law.

32. See Dennick v. R. R., 103 U. S. 11, 18 (1880).
33. Livermore, Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations (New Orleans, 1820).
34. As early as 1818, it was settled in Virginia that actions upon "personal injuries committed anywhere" could be brought in that state. Shaver v. White and Dougherty, supra note 27, at 112. But see Minor, Conflict of Laws 476, 478 n. 3, 4 (1901). The problem is still very much alive in the law governing the delimitation of admiralty jurisdiction. See Robinson, Admiralty 76 et seq. (1939).
35. It is perhaps significant for the dearth of authority that three of the five cases relied on by the Supreme Court in the Dennick case (supra note 32) [Pickering v. Fisk, 6 Vt. 102 (1834); Ex parte Van Riper, 20 Wend. 614 (N.Y. 1839); Great Western R. R. of Canada v. Miller, 19 Mich. 305 (1869); Lowry v. Inman, 46 N. Y. 119 (1871); N. & C. R. R. v. Sprayberry, 67 Tenn. (8 Baxter) 341 (1874)] fail to support the holding. In the Lowry and Pickering cases the holding was for defendant under the lex fori and in the Miller case the Court established a forum non conveniens doctrine for suits on foreign torts between foreigners.
applicable to a tort committed outside the state, relied on a quotation from Story's treatise according to which the laws of a country "can have no intrinsic force, proprio vigore, except within the territorial limits and jurisdiction of that country," an often repeated statement adopted almost literally from Boullenois and traced back, by Story himself, to the rule of the Digest according to which one may with impunity disregard the law pronounced by a magistrate beyond his territory. The same New York case further justifies its refusal to apply its own statute to foreign facts by referring to the partly penal character of that statute. This equally legalistic reasoning is at least as old as Bartolus' fourteenth century conflicts theory of the "law of delicts," then still part of the law of crimes, under which a foreigner committing a tort in the state of the forum should in fairness be held only if his wrongful act was "commonly prohibited by all cities" and not excusable by ignorance of the law. A fortiori, he would have been free of liability had his act been committed abroad under a law not holding him accountable. It was in this form of a requirement of "concurrent actionability" that the place of wrong rule was recently modified in Scotland.

Both the "extraterritoriality" and the "penalty" exceptions from the lex fori, while underlying one of the earliest conflicts rules


39. Dig. 2, 1, 1, 20.

40. Beach v. The Bay State Steamboat Co., supra note 36 at 440.

41. On the law prior to Bartolus, see 2 Neumeyer, Die Gemeinrechtliche Entwicklung Des Internationalen Privat—Und Strafrechts Bis Bartolus 66, 138 (Muenchen, Schweitzer, 1916); also 3 Niboyet, Droit International Privé Français 44 (1944); Meijers, L'Histoire des Principes Fondamentaux du Droit International Privé à Partir du Moyen Age, 49 Recueil Des Cours 547 (Academie de Droit International, 1934).


as well as the modern Scots rule, still imply recognition of the law of the forum as that primarily applicable in tort cases. And, indeed, as late as 1875, the Supreme Court of Wisconsin, though relying on doubtful authority,44 could call the principle that a personal injury action is governed by the lex fori, “almost too familiar... for discussion or authority.”45 But what may have started as an exemption from liability statutes of defendants excused by the common law of the place of acting, soon became a general principle of conflicts law, compelling the “application” of foreign nonliability rules without regard to whether the forum rule invoked by the plaintiff was one of common or statute law.46 This principle, widely recognized,47 has thus been phrased and rationalized as required by fairness to the tortfeasor in Mr. Justice Holmes’ classic statement in the American Banana case: “...the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. ...For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts... would be unjust.”48

46. See Story, Conflict of Laws 703 (4th ed. 1852). But two exceptions were recognized by Mr. Justice Holmes in the American Banana case, infra note 48 at 355, deeming the lex fori applicable where the place of wrong is situated (1) “in regions subject to no sovereign,” e.g., on the high seas, or (2) in regions subject “to no law that civilized countries would recognize as adequate.” As to similar foreign rules see 2 Schnitzer, Handbuch Des Internationalen Privatrechts 546 (1950); 2 Rabel, Conflict of Laws 244 (1947).
Recent political events have given increased importance to the second rule, though the line of demarcation remains subject to change. Cf. e.g., Salimoff v. Standard Oil Co. of N. Y., 262 N. Y. 220, 186 N. E. 679 (1933) (denying to the original owner recovery against the purchaser of oil land confiscated by the Soviet government); Carr v. Fracis Times & Co. [1902] A. C. 176 (lawful seizure of British goods by Sultan of Muscat).
47. See Meili, International Civil and Commercial Law 258 et seq. (transl. Kuhn, 1905). The theory supported by Savigny and Waechter (supra notes 20, 21) that the lex fori should govern because of “the strongly ethical and coercive nature” of tort claims further stresses the admonitory, quasi-criminal rationale underlying the classical conflicts approach in the law of torts. Id. at 239. See also Bar, Das Internationale Privat-Und Strafrecht 317 (1862); 2 Rabel, Conflict of Laws 236 (1947); Velasquez, Directivas Fundamentales Del Derecho Internacional Privado Puertorriqueno 62 (1945).
(b) **Liability under the lex loci (XL).** Like the recognition of foreign defenses, the "enforcement of foreign tort claims" was probably first litigated in American courts with regard to those discrepancies between the laws of the several states which had been created by statutes such as those governing wrongful death or corporate liability. But since the place of wrong rule was primarily designed to protect the defendant, recognition of foreign defenses seemed for a long while "more pressing than the recognition of foreign claims;" and courts, though quite willing to substitute foreign nonliability for their own liability rule, were often reluctant to recognize tort claims based on foreign law. Many were the ways in which this reluctance with its preference for the lex fori expressed itself.

True, rejection of foreign statutes as penal or lacking extraterritorial effect was soon abandoned as "indefensible." Similarly, occasional references to the remedial nature of statutory tort claims found early opposition. But the same preference for the lex fori, as expressed in these obsolete theories, may be found in the later, and still persisting, requirement that a foreign statute to be applicable must be similar to, or at least not substantially dissimilar from, the lex fori. While modern courts are reluctant to admit


50. See O'Reilly v. New York & N. E. R. R., 16 R. I. 328, 17 Atl. 906 (1889). The cases cited by Hancock, op. cit. supra note 49 at 26, n. 2, do not seem in point. Richardson v. N. Y. Central R. R., 98 Mass. 89 (1867) stresses the "remedy" approach (infra note 53); and McCarthy v. Chicago Rock Island & Pac. R. R., 18 Kan. 46 (1877) the extraterritoriality argument as to a forum statute. For a modern case see Linn v. Phillips Oil Co., 87 F. Supp. 444 (W.D. Okla. 1949), where the Oklahoma federal court refused to take jurisdiction in a suit for exemplary damages under a Texas statute. While the reason stated was that the plaintiff had chosen the forum "as a matter of convenience and not of necessity" (at 447), the penal character of the foreign statute may have prompted the unusual decision.

51. See Woodard v. Michigan Southern and Northern Indiana R. R., 10 Ohio St. 122 (1859).

52. Minor, Conflict of Laws 492 (1901).


this preference they adhere to it by stressing their power to refuse application of the place of wrong rule on grounds of public policy or forum interest in questions of "remedy." Nevertheless, foreign claims, like foreign defenses, have found increasing recognition. Indeed, regarding new enterprise liabilities, even if fairness to defendants acting under foreign laws seemed to argue against the "extraterritorial" application of such liabilities created by the forum, no such argument has existed against the application by the forum of similar foreign liabilities which, far from violating the forum's public policy, have often been found to meet a domestic trend.

But, if growing concern for the plaintiff may thus to some extent account for the recognition of "foreign-created" claims, similar concern may have contributed to the further modification and refinement of the place of wrong rule which expressed itself in the shift within that rule from the place of acting to that of the harm, and in the consequent elimination of foreign defenses obstructing the plaintiff's recovery. The development of this tendency in multistate tort cases will now be discussed.

3. The Place of the "Last Event"
   (a) Liability under the law of the place of harm (FHL and XHL). Assume a law of the forum state F rendering liable air carriers for any injury negligently inflicted on their passengers and a law of state X limiting such liability to certain amounts. Assume further that plaintiff A, after having boarded a plane in X is injured in a crash in F, caused by the pilot's negligence allegedly committed over X. Should A, in accordance with the classic rationale of the place of wrong rule, be precluded from full recovery in F merely because some (usually constructive) negligence is alleged to have occurred in a state with a more lenient law, although the defendant cannot claim with any justification that he would have conducted himself differently had he expected application of the stricter liability rule of the forum, and although the defendant's


56. See, e.g., Mertz v. Mertz, 271 N. Y. 466, 3 N. E. 2d 597 (1936), where Judge Lehman chose the unhappy formula [which if taken literally, would deny all conflicts law] that the foreign "transitory cause of action" would not be enforced if "contrary to the law of this state." See also Black Diamond S. S. Co. v. Robert Stewart & Sons, 336 U. S. 386 (1949).

enterprise may extend over several jurisdictions making it virtually impossible to trace the causal harmful conduct to a particular phase of its activities? "The ice began to form on the wings over Pennsylvania; the wrong handle was pulled in the air over Maryland so the de-icer broke down over West Virginia and the plane fell in Virginia."

And where a resident of the forum state seeks to hold a defendant entrepreneur under the law of the forum for harm inevitably caused by the defendant's hazardous profitable activity, why, indeed, should the forum ever ignore its own interest in protecting the injured and itself against the former's impoverishment? Why should it permit a foreign defendant to invoke a more lenient law which, while prevailing at the place of his activities, had not determined his conduct, and even if it had, had not precluded him from calculating and insuring against hazards created in the state of the harm? In this sense the "place of harm" as that of the plaintiff's residence or business seems to require consideration. And in this sense a place of harm rule could have been rationalized as to those liabilities for "negligence without fault" the growth of which may have decisively contributed to the adoption of such a rule in the Restatement. Unfortunately, however, here again the Restaters followed what they apparently considered a logical approach based on historical precedent.

Dogmatic developments seemed to furnish the basis for the new rule. The lex loci delicti had early become a conflicts rule comparable and compared to, and often identified with, the ancient rule of the lex contractus. And contract law was flatly applied where tort law


59. Cf. Salonga, Conflict of Laws: A Critical Survey of Doctrines and Practices and the Case for a Policy-Oriented Approach, 25 Phil. L. J. 527, 528 (1950). As to defamation see Note, 60 Harv. L. Rev. 941, 947 (1947); Mattox v. News Syndicate Co., 176 F. 2d 897 (2d Cir. 1949), infra note 151. See also Hollingquest v. Kansas City Southern R. R., 88 F. Supp. 905 (W.D. La. 1950), where a railroad's liability to a Louisiana passenger was adjudicated under Louisiana law though the accident had occurred in Missouri. (Merely discussing the jurisdictional problem, the court seems to follow the lex contractus.) See also infra note 87.

60. See 2 Neumeyer, Die Gemeinrechtliche Entwicklung Des Internationalen Privat-Und Strafrechts Bis Bartolus 138 et seq. (1916), tracing the doctrine into the Canon law of the 13th century. Early American cases reflect this history of the lex loci delicti. See, e.g., Molony v. Dows, 8 Abb. Pr. 316, 328 (N.Y. 1859), where the New York court, while refusing to take jurisdiction in an action for false imprisonment by a California refugee against an officer of the San Francisco Vigilance Committee, conceded that the reason for recognizing the ubiquity of contract claims applied equally to claims for injuries to personal property (debitum et contractus sunt nullius loci).
did not seem to produce the desired result. Thus, in Dyke v. Erie RR.\textsuperscript{61} the New York court refused to apply the statute limiting recovery which prevailed in Pennsylvania, the place of wrong, relying on the execution in New York of the contract of transportation. In the law of Workmen’s Compensation similar techniques have resulted in the substitution for the original “tort doctrine,” of conflicts theories based on contract or residence or both.\textsuperscript{62} In addition to the contract approach, revived reliance on analogies with the criminal law\textsuperscript{63} seemed to permit the choice of the place of harm at least in personal injury cases. Ultimately going back to a decision by Mr. Justice Story in United States v. Davis\textsuperscript{64} and further to the English case of Rex v. Combes,\textsuperscript{65} one of the leading American cases relied on “that well established doctrine of the criminal law that where the unlawful act is committed in one jurisdiction or state and takes effect—produces the result which it is the purpose of the law to prevent, or, if having ensued, punish for—in another jurisdiction or state, the crime is deemed to have been committed and is punished in that jurisdiction or state in which the result is manifested, and not where the act was committed.”\textsuperscript{66}


\textsuperscript{63} The chapter in the Conflicts Restatement on “Wrongs” (§ 377 et seq.) is applicable to both torts and crimes (§ 425 et seq.).

\textsuperscript{64} United States v. Davis, Fed. Cas. No. 14,932 (C.C. Mass. 1837).

\textsuperscript{65} Rex. v. Combes, 1 Leach 388, 168 Eng. Rep. 296 (1785) (admiralty jurisdiction determined by place of death without regard to place from which shot fired). But see still King v. Alsop, 1 Show 339 (1691) (conviction reversed, the indictment failing to state where defendant stood when shooting); and again Queen v. Keyn, L. R. 2 Exch. Div. 63, 13 Cox C. C. 403 (1876) (“it is only for acts done when the person doing them is within the area over which the authority of British law extends, that the subject of a foreign state owes obedience,” at 236, 541). See in general Stimson, Conflict of Criminal Laws 46 et seq. (1936) ; Cook, Act, Intention and Motive in the Criminal Law, 26 Yale L. J. 645 (1917) ; Cibychowski, La Compétence des Tribunaux à Raison d’infractions Commises hors du Territoire, 12 Recueil Des Cours 251 (Académie de Droit International, 1926) ; Foster, La Théorie Inflaise du Droit International Privé, 38 Recueil Des Cours 399, 535 (Académie de Droit International 1938).

\textsuperscript{66} Alabama G. S. R. R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892). See also Simpson v. State, 92 Ga. 41, 17 S. E. 984 (1893) (defendant indictable in Georgia if his bullet shot from South Carolina struck in Georgia). But see People v. Botkin, 132 Cal. 231, 64 Pac. 286 (1901) (jurisdiction of California where poisoned candy mailed to Delaware victim); People v. Licenzia, 199 App. Div. 106, 191 N. Y. Supp. 619 (1921) (jurisdiction of New York, place of preparation of poisonous beverage); Beattie v. State, 73 Ark. 428, 84 S. W. 477 (1904) (Arkansas statute prohibiting the turning loose of cattle inapplicable to such conduct committed in Missouri though
Not until the rationalization under Beale's "vested rights" doctrine, however, did the place of harm rule find its present dogmatic generalization referring to the place "where the last event necessary to make an actor liable for an alleged tort takes place." While Story had considered the ubiquity of both delictual and contractual claims as a matter of mere comity to be determined by the forum in its discretion, such ubiquity now became a matter of logical conclusion, based on the omnipresence of rights "vested" outside the state of the forum. It should not be necessary again to disprove the validity of this theory which was so mercilessly and, we may hope, definitively, defeated by W. W. Cook in his classic book on the Logical and Legal Bases of the Conflict of Laws. And Professor Rheinstein has, I believe, admirably succeeded in establishing that Professor Beale, when formulating his last event rule, far from correctly summarizing the weight of precedent, mainly relied on cases following the discredited territoriality doctrine or precedents unrelated to choice of law problems. Nevertheless, how-

cattle straying in Arkansas, because act was "lawful" in state of acting); Commonwealth v. Lanoue, 95 N. E. 2d 925 (Mass. 1950) (no jurisdiction of Massachusetts court over offense of "begetting" committed in Rhode Island, though child born in Massachusetts to Massachusetts resident).

67. *Supra* text at notes 4 et seq.


69. See *supra* note 5. See also Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 Harv. L. Rev. 361 (1945); Heilman, *Judicial Method and Economic Objectives in Conflict of Laws*, 43 Yale L. J. 1082 (1934); Battifol, *Les Tendances Doctrinales Actuelles en Droit International Privé*, 72 Recueil Des Cours 5, 56 (Académie de Droit International, 1948). The downfall of the vested rights theory, the propagation of which by Professor Beale is now generally considered as a regrettable error of a great scholar, can be demonstrated significantly by following Judge Goodrich, another fervent adherent of that theory, through the three editions of his text, in his "theoretical explanation" of the general recognition of P's right under the law of Massachusetts to recover for harm inflicted upon him by D in that state.

In the first edition we learned that "Massachusetts law is the only law which can properly determine the legal consequences of D's act," and "must determine whether the harm done to P was to an interest entitled to protection." In the second edition Massachusetts law no longer "must," but "in all fairness" should" determine this question. In the third edition Massachusetts law has ceased to be the "only law" which can do so, and the theoretical explanation has become a "pragmatic" one based on nothing but the parties' expectations. Unfortunately, however, the theory of vested rights with its pseudo-logical approach, has, as will be seen, left all-too-many traces in the formulation of conflicts rules in Judge Goodrich's leading text (*supra* note 6) as well as in the language, if not the holdings, of many courts.

70. Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 Tulane L. Rev. 4, 165, 168, n. 49 (1944), with an analysis of these authorities.
ever questionable we may find the Restatement rule both as to theory and authority, it has fully established itself in the law of enterprise liability, with regard to the recognition of place of harm liability under the laws of either (1) the forum or (2) a foreign jurisdiction.

(1) (Where the forum is the place of harm, FHL.) The oldest case generally cited in support of the place of harm rule, in which a court held liable under its own law a defendant entrepreneur acting under another law, is that of *Cameron v. Vandergriff.* Damages were allowed in that case under Tennessee law for harm caused by a blasting operation in Indian territory because the injury was "done in this state." But this holding was based on a jury finding of ordinary negligence which presumably would have supported the same ruling under the law prevailing in the Indian territory. And the place of acting was expressly referred to in *Connecticut Valley Lumber Co. v. Maine Cent. R.R.* prominently relied on by Beale and others as authority for the last event rule. In that case, a New Hampshire court, while for other reasons deciding for defendant railroad, which had been sued under a strict liability statute of New Hampshire for fire damage caused in that state by a spark emitted by defendant engine in Canada, stated that "the locality of the act is deemed at common law to be the same as that of the damage." On the other hand, we find cases, even prior to the Restatement, which, though not cited by Professor Beale, seem to support his thesis better than those on which he relied. Thus, in *El Paso & N. W. R. R. v. McComas* plaintiff, who had been injured in Texas by a piece of lumber falling from a railroad car improperly loaded in New Mexico by defendant's employee, was permitted to recover fellow servant rule, because "the injury occurred in Texas, and, if it was caused by the negligence alleged, the laws of this state, and by a Texas court under Texas law, notwithstanding a New Mexico not of New Mexico, would determine the liability...." And

71. *Cameron v. Vandergriff,* 53 Ark. 381, 13 S. W. 1092 (1890). For cases relying on this decision, see Rheinstein, *supra* note 70, at 172, n. 58, particularly Dallas v. Whitney, 118 W. Va. 106, 188 S. E. 766 (1936), involving the converse situation (Ohio law applicable to suit for damage to Ohio storeroom from blasting in West Virginia).


74. *Id.* at 171, 81 S. W. at 761, quoting from the decision on prior appeal. For the court's uncertainty the following dictum from Atlanta and Charlotte Air Line R. R. v. Tanner, 68 Ga. 384, 390 (1882) (not taking a definite position in view of the similarity of the laws in question) seems
whether or not Professor Beale was right, subsequent decisions prove a tendency, at least since the adoption of the Restatement, to prefer, in cases of enterprise liability, the forum's liability rule as that of the place of injury over the nonliability rule of the place of conduct. Indeed, as explained above, where the forum, in contrast to the place of conduct, recognizes liability without fault, application by the forum (as the place of harm) of that rule seems eminently desirable.

(2) (Where the place of harm is outside the forum, XHL.) Nor is there any objection to an extension of the place of harm rule resulting in the converse application of a foreign liability without fault in preference to a more lenient liability rule under the forum law of place of conduct. True, little support for this proposition can be gained from Otey v. Midland Valley RR., the case relied upon by Professor Beale, where the Kansas court holding defendant railroad liable for harm caused to plaintiff's barn in Oklahoma by the emission of a spark in Kansas, refrained from deciding the conflicts question, no difference between the laws of Kansas and Oklahoma having been proved. However, since this case, and particularly since the publication of the Conflicts Restatement, many cases have applied the principle incorrectly deduced from the Otey case. One of the most articulate recent decisions on this point is that of the Second Circuit in Hunter v. Derby Foods where defendant food distributing company was held liable for the death of an Ohio resident caused by the consumption of canned meat prepared or distributed by defendant. The trial court was upheld, having insignificant: "... does the law of the place of the actual injury to the person suing prevail, or the law of the place of the contract and of the prior negligence, which was the real, or at least the prominent reason of the injury? We leave it undecided..." (Italics added). See in general 2 Wharton, Conflict of Laws 1130 (3d ed. 1905).

75. Not all courts may be willing to follow this rule as one required by logical necessity. See, e.g., Haw v. Liberty Mutual Ins. Co., 180 F. 2d 18 (D.C. Cir. 1950), where the court accepted the parties' consent as to the applicability of Virginia law to a Virginia accident because "the contacts for choice of law purposes were overwhelmingly in Virginia" (Id. at 22), rather than simply by virtue of the place of accident.


77. One of the cases most widely cited for this proposition is Kristansen v. Steinfeldt, 165 Misc. 575, 300 N. Y. S. 543 (Sup. Ct. 1937), rev'd 256 App. Div. 824, 9 N. Y. S. 2d 790 (1939) (no jurisdiction of state court where conduct occurred in New York and "force impinged" in explosion on high seas), relying on Kelly v. Steinfeldt, 98 N. Y. L. J. 1435 (Oct. 30, 1937) (not officially reported) and two admiralty cases, The Haxby, 95 Fed. 170 (E.D. Pa. 1899) and Smith v. Lampe, 64 F. 2d 201 (6th Cir. 1933),
structed the jury that the violation of the Ohio criminal statute against the distribution of spoiled food was negligence as a matter of law. Ohio law was held applicable in accordance with Section 377 of the Restatement because the last event necessary to make the actor liable (consumption, sickness, and death) had occurred in Ohio; and because "the fact that the defendant's conduct occurred in New York does not oust the law of Ohio." While the court relied on cases hardly relevant to the present issue, its decision clearly stands for the proposition that the plaintiff in a tort suit against a manufacturer may invoke the law of the place of harm.

From the standpoint of public policy there can be little quarrel with this proposition. Why should a manufacturer or distributor of mass products be permitted to invoke the law of the place of production or distribution to defeat a stricter rule imposed, to protect its citizens, by a state in which the defendant engaged in its hazardous business, when presence or absence of such stricter liability could in no way have influenced the defendant's conduct and although the latter was in a position to foresee and calculate the existence of such a liability when engaging in business in the state imposing it?

To concede in cases of enterprise liability the interpretation of the place of wrong rule as recognizing causes of action under the law of a place other than that of acting, does not mean, however, that the Restatement rule, either as a "last event" or "place of

78. Hunter v. Derby Foods, 110 F. 2d 970, 972 (2d Cir. 1940). See also infra note 81. For another much discussed case see Fischl v. Chubb, 40 D. & C. Rep. (Pa. 1937), applying a New Jersey dog owners' liability statute without regard to the forum law under which the dog had been kept; infra note 104. Cf. Restatement, Conflict of Laws § 379, illus. 4 (1934).


81. Similar thoughts appear in certain cases dealing with the law applicable to the liability of the liability insurer. Courts seem to be inclined to apply the law of the accident in preference to that of the contract which was "broad enough to contemplate the risk" incurred in other states, Bradford v. Utica Mutual Insurance Co., 179 Misc. 919, 39 N. Y. S. 2d 810 (Sup. Ct. 1943). See in general Faude, Conflict of Laws Applied to Automobile Insurance, [1950] Ins. L.J., 818.
The "harm" rule is generally acceptable. It has been argued that the choice of the last event rather than that of the first, or for that matter of any other significant event in the chain of causation, is arbitrary. This and the even more persuasive argument that the last event rule is circuitous in presupposing the choice of law it is designed to ascertain may have caused courts and writers to refer to, and apply, the last event rule as referring to the "place of harm," or, less frequently and less happily, as "the place where the operative facts occurred." Even if so rephrased, the Restatement rule can be objected to on the ground that the exceptions recognized by the Restatement such as those regarding wrongful death and poisoning would warrant the re-examination of the principal rule. And further studies of particular fact situations, such as those arising from automobile or airplane accidents, may result in the adoption of other tests. But whatever be the ultimate fate of foreign causes of


83. Supra notes 5, 6, 7. Judge Goodrich's deduction of this rule from the consideration that "the plaintiff does not sue the defendant for the latter's negligence, but because the negligence has caused the plaintiff harm," has been retained even in the current edition of his textbook (op. cit. supra note 6, at 263) notwithstanding Professor Cook's compelling refutation. Cook, op. cit. supra note 5, at 317. The explanation of the place of harm rule as "due to motives of convenience," advanced in the Restatement, Conflict of Laws 97 (Proposed Final Draft No. 1, 1930), though less legalistic, is even less helpful. See Cook, loc. cit., at 321.

84. This phrase seems to be preferred by Judge Goodrich's Third Circuit. See Black & Yates v. Mahogany Ass'n, 129 F. 2d 227 (3d Cir. 1941); Young v. Wilky Carrier Corp., 159 F. 2d 764, 765 (3d Cir. 1945); Mannsz v. Macwhyte Co., 155 F. 2d 445, 449 (3d Cir. 1946); Moran v. Pittsburgh-De Moines Steel Co., 166 F. 2d 908, 910 (3d Cir. 1948), followed in Diesbourg v. Hazel-Atlas Glass Co., 176 F. 2d 410 (3d Cir. 1949) (bottle shipped to Florida from New Jersey); Trowbridge v. Abrasive Co. of Phila., 190 F. 2d 825 (3d Cir. 1951) (wheel shipped to Oregon from Pennsylvania). This phrase, too, is circuitous since it presupposes a law under which the facts are "operative." Harm, on the other hand, can be objectively ascertained. See also DeVito v. United Airlines, 95 F. Supp. 88, 97 (E.D. N.Y. 1951) ("significant facts").

85. Restatement, Conflict of Laws § 391 (1934) (place of injury, rather than death); Id. at § 377, Illustr. 2 (place of illness rather than poisoning). See, e.g., Melton's Adm'r v. Southern R. R., 236 Ky. 629, 33 S. W. 2d 690 (1930) (injury in Virginia, death in Kentucky); Stumberg, op. cit. supra note 82, at 192.

86. See Page, supra note 55, 99; Spence, Conflict of Laws in Automobile Negligence Cases, 27 Can. B. Rev. 661 (1949); Knauth, supra note 58.

87. Regarding a possible domicile test see supra note 59. Reluctance to apply the place of wrong rule appears in many cases involving tort actions by residents of community property states for causes of actions arising in separate property states. Cf., e.g., Williams v. Pope Manufacturing Co., 52 La. App. 1417, 27 So. 851 (1900); and in general Stumberg, op. cit. supra note 82 at 208; Notes, 18 Tulane L. Rev. 319 (1943); 40 Col. L. Rev. 527 (1940); Page, supra note 55, at 164, with additional authorities; Morris, The Proper Law of Torts, 64 Harv. L. Rev. 881 (1951).
action in the field of enterprise liability, it seems that the policies determining the recognition of causes of action arising at places other than that of acting, fail to justify the application of the same tests to the recognition of foreign defenses in this field [infra (3) (b), (4)] or even more conspicuously, the conflicts law governing other torts so lucidly analyzed by Judge Wyzanski in the Gordon case [infra (5)]. As will be shown presently, dogmatic generalizations have in these respects created iniquities similar to those due to similar generalizations regarding the place of wrong rule.

(b) Nonliability under the law of the place of harm (FHN and XHN). As to the place of wrong rule, we have seen that American courts, having acknowledged the unfairness of subjecting to liability rules of the forum defendants claiming defenses under the law of the place of conduct, have come to “recognize” such foreign defenses (XN); and that these courts, having dogmatically rationalized this practice, have extended this “place of wrong” rule to include, without support in its original rationale (fairness to the defendant), the modern “tort” liabilities of mechanical enterprise for “negligence without fault.”

A very similar development in multistate tort cases can be observed in the judicial development of the place of harm rule. We may assume that the adoption of this rule was promoted by the courts' reluctance to deny, under a foreign lex actus, recovery under liability rules of the forum primarily serving the distribution of enterprise risk rather than the defendant's admonition (FHL and XHL). But again dogmatic rationalization has resulted in an overextension of the rule which is now invoked not only to defeat foreign defenses unjustifiable under the policy of the forum as the place of harm (FHL), but also to allow such defenses, however opposed to forum policy, merely because the harm occurred outside the forum's jurisdiction (XHN).

We have seen that in the El Paso case, the plaintiff, injured in the state of the forum, was permitted under the place of harm rule to recover against a railroad, though the causal negligence had been committed in a state protecting the defendant under the fellow servant rule (FHL). But does it follow that, on the same ground, a plaintiff injured in a state so protecting the defendant, should be

89. This interpretation seems to be approved by Professors Yntema and Rabel. See 2 Rabel, Conflict of Laws 302, n. 6 (1947). See also Cook, op. cit. supra note 5, at 321.
denied recovery although the causal negligence had been committed in the state of the forum in which that rule had been abolished by statute? Many courts have so held91 (XHN). While occasionally such holdings can perhaps be explained on more realistic grounds,92 or within a rule of the place of conduct,93 the source of this practice must be sought in the dogmatic approach of earlier courts94 and later theorists.

Or to mention another frequent situation: It has been seen that a good argument can be made for the application of the forum law of unlimited liability to an injury sustained in an airplane crash in the state of the forum even though the accident had been caused by negligence committed in another state limiting the carrier's liability to certain amounts (FHL).95 But does it follow that a New York court must apply a Connecticut limitation statute to the damage claim of a New York passenger for harm caused by negligence committed in New York merely because the subsequent crash occurred in Connecticut (XHN)?96 Only a fatally dogmatic approach can justify this result.

Promoting this approach even in cases of strict liability, the Restatement suggests that water escaping from a reservoir maintained in the state of the forum whose law imposes strict liability,
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into state X which limits this liability to negligence, will not render the owner liable for harm caused in X (XHN).\(^7\) If the *Rylands v. Fletcher* doctrine here involved is designed to distribute risk created by a hazardous enterprise, and if this liability can be fairly imposed because the entrepreneur, rather than the party injured, must be expected to calculate and insure against such risk,\(^8\) this conflicts rule can hardly be said to follow the rationale of the liability rule.

And what may that guest of a Pennsylvania tourist have thought of the place of harm rule, who, having been injured by a blowout in Ohio, was told by the Pennsylvania court, in a suit against his host presumably directed against his host's insurer, that since "to constitute a tort, there must be injury," and since that injury occurred in Ohio, and since Ohio had a guest statute requiring proof of gross negligence, and since no such proof was offered, he could not recover, although the defendant's negligent act had occurred in the state of the forum whose law would have permitted recovery (XHN) ?\(^9\)

Thus, even in enterprise liability cases, where fairness to the defendant carries little weight, adoption of the place of harm rule, though properly eliminating domestic or foreign place of conduct defenses in the plaintiff's interest (FHL, XHL), may prove inadequate if held to support defenses unknown to the forum (XHN), or, for that matter, at the foreign place of conduct (FHN). It is submitted that both courts and writers have shown their uneasiness regarding this problem by renewed attention to the law of the place of acting.

4. A General Place of Conduct Rule? (FCL, XCL, FCN, XCN)

Foreign courts and writers, when permitting reference to the law of the place of harm, have frequently insisted on the plaintiff's

\(^7\) Restatement, Conflict of Laws § 379, comment on Clause (c) (1934). Cf. the similar case of *Le Forest v. Tolman*, 117 Mass. 109 (1875).


\(^9\) Mike v. Lian, 322 Pa. 353, 356, 185 Atl. 775, 777 (1936). See also Pringle v. Gibson, 135 Me. 297, 301, 195 Atl. 695, 697 (1937). Page, *Conflict of Law Problems in Automobile Accidents*, [1943] Wis. L. Rev. 145, 154 criticizes courts for following "the basic theory of the horse and buggy days," "without giving much thought to the matter," and suggests the possible relevance of "the law of the place in which the automobile was made and was equipped with accessories." Cf. Burkett v. Globe Indemnity Co., 182 Miss. 423, 181 So. 316 (1938) (Louisiana law applied to Alabama accident, the causal negligence, namely defective repair of steering apparatus, having occurred in Louisiana), overruled in McArthur v. Maryland Casualty Co., 184 Miss. 663, 186 So. 305 (1939).
right to choose between that law and that of the place of acting.\textsuperscript{100} Professor Lorenzen, referring to the German practice to that effect, apparently advocates this choice for adoption by our courts.\textsuperscript{101} And Professor Cook has made similar suggestions.\textsuperscript{102} But domestic authority for this proposition is apparently limited to a dictum in one of the oldest cases in this field, widely relied on in later decisions, where the Mississippi court, while applying a Tennessee wrongful death statute to a death caused in Tennessee, assumed that “physical force proceeding from this state and inflicting injury in another state might give rise to an action in either state, and vice versa.”\textsuperscript{103}

On the other hand, even in the field of enterprise liability, outside those liabilities, specifically to be discussed [infra (5)] concerning which courts have consistently refused to follow the place of harm rule, the place of conduct has not entirely lost its original significance. Thus, in one of the very cases relied on by Professor Beale for the last event, \textit{Le Forest v. Tolman},\textsuperscript{104} the Massachusetts court rationalized denial of recovery under a strict liability statute of the forum, to a person injured in New Hampshire by defendant's

\textsuperscript{100} See generally 2 Rabel, Conflict of Laws 304, 333 (1947); Raape, \textit{op. cit. supra} note 5, at 366; Schnitzer, \textit{op. cit. supra} note 19, at 597. For a decision of the German Supreme Court to this effect, in addition to those mentioned by Lorenzen, Selected Articles on the Conflict of Laws 370 (1947) see South-African Steamship Co. v. Oldenburg-Portugiesische Dampfschiffs-Reederei, 138 R. G. 244, 246 (1932) (injury resulting on high seas on German ship from collision caused by act performed on British ship—plaintiff's choice between English and German law). For a Swiss decision see Bammert v. St. Gallen, BGE 40 I, 1, 18 (Feb. 27, 1914) (venue in criminal fraud case), and a Spanish doctrine, 1 Orbaneja, Commentarios a la Ley de Enjuiciamiento Criminal 381 (1947) cited 2 W. Goldschmidt, Sistema y Filosofia del Derecho Internacional Privado 77 (1949). A unique rule is that of the Polish Supreme Court [9.7.1936, No. C. III, 1165/35, Off. Coll. 1937, No. 318, Journal Clunet, 627] choosing the law most favorable to the defendant.\textsuperscript{101} Lorenzen, Selected Articles on the Conflict of Laws 370 (1947).


\textsuperscript{103} Chicago, St. Louis and New Orleans R. R. v. Doyle, 60 Miss. 977, 984 (1883); note 54 \textit{supra}.

\textsuperscript{104} \textit{Le Forest v. Tolman}, 117 Mass. 109 (1875). \textit{But cf. Fischl v. Chubb}, 30 D. & C. Pa. 40 (1937), where application of a New Jersey strict liability statute to the bite in that state by a Pennsylvania dog was justified by simple reference to the place of harm rule of the Restatement compelling the enforcement of rights acquired in New Jersey. A more realistic interpretation of these two cases would rely on the progressing understanding for the liability of the dog owner as entrepreneur, primarily serving risk distribution rather than admonition.
dog owned and kept in Massachusetts, inter alia on the ground that the defendant had “done no wrongful act in this Commonwealth,” it being “the act of the dog” committed in New Hampshire for which the defendant would have been responsible. And we find another significant statement in Centofanti v. Pennsylvania R. R. where the Pennsylvania court explained application of its own wrongful death statute to a New Jersey death caused by a Pennsylvania accident, inter alia on the ground that “it is the tortious act or negligence of the wrongdoer and not the consequences, that is the basis or ground of action.” While reference to the place of acting in these cases are dicta significant merely as revealing a persistent admonitory approach, the place of conduct rule has been more widely preserved in broad fields of the conflicts law of contracts and restitution. And the exclusive reference in the Federal Tort Claims Act to the “law of the place where the act or omission occurred,” even if an unintentional deviation from “the American rule,” as Judge Goodrich suggests, at least reveals subconscious resistance against the artificial “logic” of the Restaters. Finally, as will be seen presently, the Conflicts Restatement itself, after apodictically establishing the last event rule as the only logical one, has reintroduced the place of conduct through the back doors of the “privilege” and “standard of care” rules.

106. Id. at 262, 90 Atl. at 561. Although this language is often quoted as exemplifying a place of conduct approach, the holding is in complete accord with the prevailing rule since both act and injury occurred in Pennsylvania. See Stumberg, op. cit. supra note 82, at 185.
107. “The law of the place of performance determines whether a breach has occurred.” Restatement, Conflict of Laws § 370 (1934). See, e.g., Louis-Dreyfus v. Paterson Steamships, Ltd., 43 F. 2d 824 (2d Cir. 1930). But the law of the place “where the repudiation occurs” seems to govern anticipatory breaches. Auglaize Box Board Co. v. Kansas City Fibre Box Co., 35 F. 2d 823 (6th Cir. 1929). Cf. Wester v. Casein Co. of America, 206 N. Y. 506, 100 N. E. 488 (1912); caveat attached to Restatement, Conflict of Laws § 370 (1934). Claims for restitution should be governed by the law of the place of enrichment. G. L. Williams, 7 Mod. L. Rev. 66, 69 (1944); Guttridge and Lipstein, Conflicts of Law in Matters of Unjustifiable Enrichment, 7 Camb. L. J. 80 (1930); Pontes de Miranda, La Conception du Droit International Privé d’après la Doctrine et la Pratique au Brésil, 39 Recueil Des Cours, 553, 662 (Académie de Droit International, 1932). No American cases on this subject have been found. Cf. Restatement, Conflict of Laws § 452 (1934).

In Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932) plaintiff, owner of an upper estate in Arkansas, sued defendant, owner of a lower estate in Louisiana, in a court of that state for the removal of a dam obstructing natural drainage. The court held for plaintiff under the law of Louisiana because the act had been done in that state, and no greater hardship was thus being imposed on the defendant “than if both estates were situated in Louisiana.”

Besides and beyond these instances, dissatisfaction with the improper extension of the place of last event rule has caused renewed advocacy for the place of conduct rule. Thus, Professor Rheinstein, having proved the Restatement rule to the unsupported by the authorities, suggests in effect general applicability of the place of conduct rule, with a right of the forum as the place of harm to apply its own law if the alleged harm was reasonably foreseeable by the actor.109 And Dean Stimson in his “Bill Proposed for Enactment by the Congress” prefers “the law to which the person alleged to be under a duty was subject at the time of his conduct” to “the law to which the person claiming the right was subject.”110 Some support for these and similar suggestions by American scholars may be derived from laws prevailing or proposed in other countries. Only recently, no less a court than the English Court of Appeals stated broadly that “the question is not where was the damage suffered,” but “where was the wrongful act, from which the damage flows, in fact done?”111 Several Romance countries have codified this rule112 and a Draft to a European Code of Conflicts Law would expressly exclude consideration of the law of the place of harm,113 in conformity with the recent legislative experiments of the Italian, Polish and Greek Codes.114

It is submitted, however, that all these suggestions and proposals are subject to the same fatal error which has rendered the Restatement unworkable: they prove too much. They fail to recognize the need for two different tort conflicts rules applicable according to whether the policy of admonition or compensation prevailingly characterizes the particular tort. Whatever the desirable solution for many borderline fields, that much seems clear: A distinction must be drawn between those tort liabilities for hazardous enterprise activities which, "wrongs" merely in name, tend toward the recognition in their conflicts rule of an element more appropriate to the growing policy of risk distribution than an (often uncertain) conduct; and those liabilities which, remaining prevailingly admonitory, should retain their relation to the law of the place of the wrongful act. The impact of this distinction on the choice of the proper conflicts rule can perhaps best be demonstrated in the field of vicarious liability where the two policies continue to compete.

The doctrine of respondeat superior has been one of the most important tools of the growing liability of modern hazardous enterprise. If and where serving as such a tool, this doctrine requires, therefore, a conflicts rule looking to a place other than that of the defendant's conduct. In this sense Section 387 of the Restatement is justified in referring to the "last event" in determining the principal's liability (FHL and XHL). However, to call "incorrect" a decision which stresses the place of the principal's liability (FHL and XHL).
pal’s conduct over that of the harm, means to ignore the rearguard action now fought by the policy of admonition in the law of vicarious liability.

In *Levy v. Daniels’ U-Drive Auto Renting Co.*, a Connecticut automobile renting company was held liable under a Connecticut strict liability statute although the accident had occurred in Massachusetts, a state requiring proof of negligence. This decision, while hardly supportable by the court’s more than strained argument that the statute was applicable as a part of the contract, can be fully explained as interpreting the forum statute as one designed to promote careful selection by the renting company of its customers. On this assumption, Connecticut will, of course, apply her own law as that of the place of the defendant’s wrongful conduct (FCL). A similar admonitory theory apparently underlies *Strogoff v. Motor Sales Co.*, where the Massachusetts court refused to apply Section 377 of the Restatement and the forum doctrine of nuisance to harm caused in the state of the forum by an automobile driven in that state, without the defendant’s consent, with license plates unlawful in its home state Connecticut, because the “defendant did nothing in Connecticut to create a liability there.”

Equally indicative of a place of conduct approach is *Scheer v. Rockne Motors Corp.* where Judge Learned Hand held an Ontario owners’ liability statute inapplicable to an automobile accident caused in that Province by an agent of defendant, a New York corporation. In leaving open the question whether the statute would have been applicable had defendant authorized the agent to operate the car in Ontario, the court indicated its inclination to base the principal’s liability on his act of authorization. Whether the

118. Goodrich, *op. cit. supra* note 6, at 280, with regard to *Levy v. Daniels’ U-Drive Auto Renting Co.*, *infra* note 119. But cf. the excellent analysis of that case by Stumberg, op. cit. *supra* note 82, at 205; and, as to the principal’s criminal liability under “the law of the state in which the principal was at the time of the conduct,” Stimson, *op. cit. supra* note 65, at 78.


121. *Scheer v. Rockne Motors Corp.*, 68 F. 2d 942 (2d Cir. 1934). For a significant reliance on this case in this sense, see Gratz v. Claughton, 187 F. 2d 46 (2d Cir. 1951), *cert. denied*, 71 Sup. Ct. 741 (1951) where Chief Judge Learned Hand found § 16 (b) of the Securities Exchange Act violated at the place of the wrongful transactions rather than at the seat of the corporation, the obvious place of harm. Cf. Morris, *The Proper Law of Torts*, 64 Harv. L. Rev. 881 (1951).
more recent case of *Molina v. Sovereign Camp, W.O.W.*\(^2\) can be rationalized on a similar ground, is not clear. In that case, a Nebraska fraternal benefit society was sued by Mexican citizens for a fraud allegedly committed by defendant's agent in Mexico. The Nebraska court, though referring to the Restatement rule, based its decision for defendant on the *lex fori*, Mexican law not having been pleaded.\(^3\)

Some support for the proposition that the principal's liability may be subject to the law of the place of his conduct may perhaps be derivable from the case of *Steffens v. Continental Freight Forwarders Co.*\(^4\) In that case an Ohio court reversed a judgment upon directed verdict, which, applying Pennsylvania law, had denied the liability of an Ohio interstate motor carrier, for an injury caused in Pennsylvania by a truck owned and operated by defendant's independent contractor. While approving "generally speaking" the Restatement rule, which seemed to support the applicability of Pennsylvania law, the appellate court felt justified in finding against the defendant whose liability was "affected" by the Federal Motor Carrier Act requiring liability insurance for the benefit of the public.\(^5\) This decision is not only highly significant as basing tort liability on a provision requiring insurance—a topic further explored by the writer elsewhere—\(^6\) but by its apparent preference for the law of the place of defendant's conduct over that of the harm.\(^7\)

Another somewhat unique case which, however, demonstrates well the conflict of policies, is *Gordon v. Bates-Crumley Chevrolet Co.*\(^8\) where the law of the forum Louisiana was applied to the liability of a Louisiana dealer for an accident in Mississippi caused

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\(^2\) Id. at 401.  
\(^4\) 49 Stat. 557 (1935), 49 U. S. C. § 315 (1946) provides in part: "No certificate or permit shall be issued to a motor carrier . . . unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of . . . policies of insurance . . . conditioned to pay . . . any final judgment recovered against such motor carrier for bodily injuries . . . resulting from the negligent operation . . . of motor vehicles under such certificate or permit . . . ."  
\(^6\) Although the court purported to apply federal rather than either Pennsylvania or Ohio law, it fully explored the law of Ohio which it found to be identical with the federal rule. See also Hodges v. Johnson, 52 F. Supp. 488 (Va. 1943), subjecting an interstate carrier's liability to state law.  
by a defect in a car manufactured in Michigan and sold by him in Louisiana. Since the Louisiana law limited the dealers' liability to harm caused by defects known to them, the decision which is contrary to the last event rule can be rationalized as stressing the admonitory policy of the law involved.

Notwithstanding these and similar isolated cases revealing a persisting admonitory approach even in fact situations increasingly subjected to compensatory considerations, such considerations have apparently decisively contributed to the general adoption of the place of harm rule in the law of enterprise liability for negligence without fault. On the other hand, the inadequacy of this rule in cases involving primarily admonitory tort liabilities accounts, I believe, for the frequent recognition in this field of defenses and liabilities under the law of the place of conduct (FCN, XCN, FCL and XCL). While further study will be required to examine the scope of this development as to each tort, it will be shown presently that intentional torts at least have never been subject to the place of harm rule of the Restatement; and that, therefore, Judge Wyzanski in Gordon v. Parker129 was not compelled to resort to secondary authority in support of the rule of the place of conduct (FCL) as applied to the tort of alienation of affections.130

5. Place of Conduct versus Place of Last Event in the Conflicts Law of Intentional Torts

The first Restatement "Illustration" to its place of harm rule concerns a defendant who, standing in state X, fires a gun and lodges a bullet in the body of B who is standing in state Y.131 Y law

129. See note 2 supra.

130. In addition to the authorities discussed supra notes 10-13 and to statements by various writers, Judge Wyzanski relies on two decision of foreign courts: Lister v. McAmully (1944) 3 D. L. R. 673 (Can. Sup. Ct. 1944) (applying the foreign domicile rule rather than the domestic place of wrong rule to the scope of plaintiff's claim for loss of his injured wife's consortium and services); and A. v. B., BGE 43 II, 309 (Swiss Supreme Federal Court, 6.15.1917) (applying Swiss law to a suit by a Danish resident for adultery committed in Switzerland, because Swiss law was the lex loci as well as the lex fori and the law of citizenship of both plaintiff and defendant, at 317). More valid support could have been derived by the court from Professor Beale's statement in his Commentaries on Conflict of Laws, Restatement No. 2 (Feb. 27, 1926) 46: "... whether the husband has a right of action against one who entices his wife from him ... depends upon the law of the state where the wife ... is at the time."

131. Restatement, Conflict of Laws § 377, Illustr. (1) (1934). See also, e.g., 11 Am. Jur., Conflict of Laws, § 182, n. 13 (1950 Supp.). The only faintly similar tort case I have been able to find, is that of a German frontier guard shooting and killing a French hunter beyond the border. Frankenstein, op. cit. supra note 21, at 366. The Restaters, however, seem to have drawn on Pauli Voetii, De Statutis Eorumque Concursu, Lect. I, cap. I, 8, one of Story's principal sources.
is said to apply because only Y as the place of the last event "has legislative jurisdiction to determine the legal effect of . . . events caused within its territory."\textsuperscript{132} This dogma, as applied to intentional torts, would not only, contrary to Mr. Justice Holmes' postulate of justice in the 

\textit{Banana} case, subject the defendant in a court of state Y to that court's notions "rather than those of the place where he did the acts"\textsuperscript{133} (FHL), but also deprive a plaintiff in a court of state X of any cause of action accrued to him under its own law (XHN), and, moreover, defeat the admonitory policy of the forum. Both as to defenses and causes of action this rule requires re-examination.

Discussions of the treatment to be accorded defenses under the lex actus are still limited to the analysis of the fanciful Restatement case of the shot across the border. While a similar tort case has never arisen in an American court, this "illustration" has gained some standing in dicta involving different facts. Thus, the case of a sale in Ohio by a New York manufacturer of poisonous food was said to be "like that of shooting a firearm across the state line."\textsuperscript{134} If it was this analogy that led the court to permit recovery under Ohio law as that of the "last event" without regard to New York law as the law of the place of acting (XHL), are we then to assume that a ranger standing in the forum state F, shooting at a well-known poacher practicing his profession in state X, will be precluded under the same rule from claiming nonliability under the law of his home state F—just because, in Restatement language, the force of his gun "impinged" on the plaintiff's body in X?\textsuperscript{135} It was perhaps in order to avoid this result that the Restatement, allegedly over the protest of Professor Beale,\textsuperscript{136} has re-introduced the place of conduct rule through the back door, or rather through the two back doors, of the "privilege" and "standard of care" exceptions.

Under Section 382(2) of the Restatement "a person who acts pursuant to a \textit{privilege} conferred by the law of the \textit{place of acting} will not be held liable for the results of his acts in another state."\textsuperscript{137} Although completely unsupported by case law, either prior or subsequent to the Restatement,\textsuperscript{138} the rule is harmless enough

\begin{itemize}
\item \textsuperscript{132} Restatement, Conflict of Laws 454 (1934).
\item \textsuperscript{133} American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909).
\item \textsuperscript{134} Hunter v. Derby Foods, 110 F. 2d 970, 972 (2d Cir. 1940).
\item \textsuperscript{135} Restatement, Conflict of Laws 456 (1934).
\item \textsuperscript{136} See Rheinstein, \textit{supra} note 70, at 10; 2 Rabel, Conflict of Laws 306 (1947).
\item \textsuperscript{137} Italics added.
\item \textsuperscript{138} The "Restatement in the Courts" (1945, Supp. 1948) cites the following three cases in support: Gray v. Gray, 87 N. H. 82, 83, 174 Atl.
\end{itemize}
provided no future court decides to interpret the term "privilege" in conformity with the Hohfeldian terminology (elsewhere adopted by the Restatement)\textsuperscript{139} as entailing nonliability, and thus entirely to reverse the last event rule even as to compensatory liabilities. If properly limited to admonitory liabilities, however, and if based on a privilege concept narrower than Hohfeld's,\textsuperscript{140} the privilege exception, though hardly useful,\textsuperscript{141} is significant as illustrating the need, stressed in the present paper, for the preservation of the conduct rule wherever, to quote Mr. Justice Holmes again, it would be unfair for a court to treat a tortfeasor "according to its notions rather than those of the place where he did the acts."\textsuperscript{142}

A similar thought seems to underlie Section 380(2) of the Restatement, according to which the forum will follow the judicial and statutory determination by the law of the place of conduct of the required standard of care, without regard to the law of the place of harm. Concededly unsupported by cases either prior or subsequent to its formulation,\textsuperscript{143} this rule is illustrated in the Re-

\textsuperscript{139} See Restatement, Properly §§ 1-4 (1936).

\textsuperscript{140} Cf. Goodrich, op. cit. supra note 6, at 266; Restatement, Torts § 10 (1934); Stumberg, Conflict of Laws 203, n. 77 (2d ed. 1951).

\textsuperscript{141} Since the distinction between "general" and other conduct (supra note 140) is one resulting from the accidental phrasing of the liability rule involved, the most helpful meaning that may be given to the privilege exception is probably one which, requiring some vague disapproval by the law of the place of acting, would approach the "justification" rule of English law. See note 17 supra. See also the excellent analysis by Stumberg, op. cit. supra note 82, at 203.

\textsuperscript{142} American Banana Co. v. United Fruit Co., 213 U. S. 347 (1909).

\textsuperscript{143} "Authorities on this point seem not to exist." Commentaries on Conflict of Laws Restatement No. 2, 55 (Feb. 28, 1926). But "it seems clear in such a case that the law to be applied is that of the state where the alleged wrongdoer acted: that law alone can properly qualify the action." Id. at 50. The Restatement in the Courts (1945, Supp. 1948) merely cites cases involving the forum's choice between its own law and that of the "place of wrong." Tobin v. Penna. R. R., 69 App. D. C. 262, 263, 100 F. 2d 435, 436 (D.C. 1938), cert. denied, 306 U. S. 640 (1939) (forum rather than place of wrong law determines sufficiency of jury case); Strogoff v. Motor Sales Co., 302 Mass. 45, 18 N. E. 2d 1016 (1939); Peterson v. Boston & Maine R. R., 310 Mass. 45, 18 N. E. 2d 701, 702 (1941) (forum law as to sufficiency of evidence); Pilgrim v. MacGibbon, 313 Mass. 290, 47 N. E. 2d 299, 300 (1943) (place of wrong law as to finding of gross negligence in guest case). See also similar cases cited by Beale, Conflict of Laws § 380.1 (1935).
statement by the case of a railroad which, failing to use a spark arrester required by the law of the state of the forum, will not be held liable for a fire caused in that state (the place of harm) by the emission, in consequence of such failure, of a spark in state X, whose law does not establish such a requirement. Recognition of railroad liability as one for negligence without fault will cast some doubt on the desirability of this result which is keyed to the admonition of railroads rather than to the distribution of risks created by their hazardous activities. Why should a railroad running its tracks in the vicinity of the state line and thus able to calculate, and insure against, any harm it may cause by the emission of sparks in the adjoining state, not in fairness be held liable under the law of that state? Both this and the “privilege” exception from the last event rule, though inappropriate in cases involving enterprise liability, show the Restaters’ realization of the need for limiting that rule, and could support the upholding, as to intentional torts, of defenses raised under the place of conduct rule (XCN). Being limited to such defenses, those exceptions are inadequate, however, in that they fail to recognize causes of action based on the law of the place of conduct (XCL, FCL), which courts have never ceased to impose as to any one of the intentional torts now to be discussed in detail.

(a) In this inquiry certain intentional torts will have to be entirely or partly omitted. Assault and malicious prosecution, having found only passing attention, fail to furnish significant material, though preference of the law of the place of conduct over that of the place of harm seems imperative here. That this last

144. Professor Beale in the Commentaries, supra note 143, at 55, objects to such a liability since “a law which held an actor under such circumstances would not be holding him because of his own negligence, but because it set up an arbitrary rule of liability.” That this “arbitrary rule” has been recognized by the courts, this writer has attempted to show in Negligence Without Fault (U. of Calif. Press 1951).

145. See note 76 supra.

146. See Restatement, Conflict of Laws § 411, Comment (b), Illustr. 4 (Proposed Final Draft No. 3) (1932): “Two parties are at the opposite ends of a railroad car. The assailant starts shaking his fist from the other end of the car as he comes toward the assailed. The car passes the state line so the assailed is in another state at the moment when he apprehends immediate violence from the assailant, who remains in the first state. The assailant has committed an assault in the state into which the assailed has come.” The Commentaries of the American Law Institute (1926) contain no authority supporting this peculiar case. And Professor Beale fails to mention assault in his treatise, Conflict of Laws (1935).

147. See Vancouver Book & Stationery Co. v. L. C. Smith & Corona Typewriters, 138 F. 2d 635, 637 (9th Cir. 1943), cert. denied, 321 U. S. 786 (1944). Though invoking the Restatement, the case fails to present a choice between the laws of the places of conduct and harm.
rule is wholly inadequate as to intentional torts, is nowhere clearer than in the much litigated law of multistate defamation, which, in view of problems presented by multistate publication and distribution, has found little assistance in Rule 5 accompanying Section 377 of the Restatement referring to the place "where the defamatory statement is communicated."145 This was dramatically demonstrated in the much discussed Pennsylvania case of Hartmann v. Time, Inc.146 concerning a libel allegedly committed in LIFE, a magazine first published in Illinois and distributed in other states of the Union as well as abroad. Although the statutory conflicts rule of Pennsylvania in connection with her "single publication rule" would have required dismissal of the action under the Illinois statute of limitations, the court allowed recovery under the law of each state not adhering to the single publication rule. The circuity and unwieldiness of this interpretation of the Pennsylvania conflicts rule has often been criticized.160 A different approach was employed in the case of Mattox v. News Syndicate Co.151 by the New York court which, rejecting as "unmanageable" in multistate tort cases the rule of the place of last event, applied the law of the state of plaintiff's residence as that of the harm. That these decisions lack any uniform foundation and fail to comply with the Restatement is obvious. Yet it is not suggested that in such cases the solution can be found by a mere return to the place of conduct.152 De-

148. Though this rule may suffice in simple cases [cf. Campbell v. Willmark Service System, 123 F. 2d 203, 205 (3d Cir. 1941) (N.Y. law applied to report sent to New York from Pennsylvania)], it is probably contrary to such early cases as Stout v. Wood, 1 Blackford 70 (Ind. 1820) [followed Offutt v. Earlywine, 4 Blackford 460 (Ind. 1838); Linville v. Earlywine, 4 Blackford 469 (Ind. 1838)], where the Ohio non-liability rule was applied to slanderous words "spoken" in Ohio, although these words charged plaintiff with fornication in Indiana where she apparently lived.


150. See Notes, 48 Col. L. Rev. 932 (1948); 61 Hary. L. Rev. 1460 (1948); 16 U. of Chi. L. Rev. 164 (1948); 43 Ill. L. Rev. 556 (1948). The case was approved in Howser v. Pearson, 95 F. Supp. 936 (D.C. 1951) because "it would be unfortunate if practical obstacles were to stand in the way of applying a correct rule of law" (at 939).


152. Cf. Spanel v. Pegler, 160 F. 2d 619 (7th Cir. 1947) (place of newspaper publication); Spanel v. Pegler, 166 F. 2d 298 (2d Cir. 1948).
famation and similar torts, such as impairment of privacy,\textsuperscript{153} if committed by one of the ubiquitous processes of modern technique, defy all traditional rules. Resembling enterprise liabilities without fault more than other intentional torts, these torts, for the solution of their conflict problems, must probably await legislative action.\textsuperscript{154}

For other reasons the tort of \textit{conversion} fails to admit of a uniform solution. Since that tort requires "an act of interference with the dominion or control over a chattel,"\textsuperscript{155} both wrongful conduct and harm can quite regularly be localized at the situs of the chattel, the law of which has been applied, therefore, in several cases.\textsuperscript{156} It is perhaps for this reason that the only provision of the Restatement dealing with conversion assumes identity between the places of harm and conduct.\textsuperscript{157} And it is apparently with this consideration in mind that the Minnesota court in \textit{United States v. Rogers & Rogers}, classifying conversion generally as a "property tort" in contrast to a "personal tort," felt that the rights of the plaintiff must always depend on the law of the situs of the chattel mortgage.\textsuperscript{158} This

\textsuperscript{153} See, e.g., Layne v. Kirby, 208 Cal. 694, 284 Pac. 441 (1930); Sheldon-Claire Co. v. Judson Roberts Co., 88 F. Supp. 120, 121 (S.D. N.Y. 1949) (place of utterance). See also Black & Yates v. Mahogany Ass'n, 129 F. 2d 227, 233 (3d Cir. 1941, on rehe', 1942), where the court, while assuming absence of a conflict problem, interpreted the Restatement rule as referring to the "place or places where the acts complained of occurred."

\textsuperscript{154} See Note, \textit{The Choice of Law in Multistate Defamation and Invasion of Privacy: An Unsolved Problem}, 60 Harv. L. Rev. 941 (1947); Ludwig, \textit{supra} note 153. See also Goodrich, J., in \textit{Campbell Soup Co. v. Armour & Co.}, 175 F. 2d 795, 796 (3d Cir. 1949). The Commissioners on Uniform State Laws now have under consideration a Uniform Multi-State Defamation Act. See Proceedings in Committee of the Whole, Sept. 10-15, 1951 (Minn.).

\textsuperscript{155} See, e.g., M. Salimoff & Co. v. Standard Oil Co. of N. Y., 262 N. Y. 220, 186 N. E. 679 (1933) (confiscation and sale of oil in Russia); Riley v. Pierce Oil Corp., 245 N. Y. 152, 156 N. E. 647 (1927) (Mexican oil "there converted," at 156 N. E. 648).

\textsuperscript{156} Restatement, Conflict of Laws § 415, Comment (b) (1934) "... If the carrier has delivered the goods to the wrong person, such misdelivery constitutes a conversion ... and the place of wrong is the place where the goods were thus delivered." Cf. Morris, \textit{The Proper Law of Torts}, 64 Harv. L. Rev. 881, 886 (1951).

\textsuperscript{157} United States v. Rogers & Rogers, 36 F. Supp. 79 (Minn. 1941), \textit{app. dism.}, 121 F. 2d 1019 (1941). Defendant, a Minnesota merchant, had, in the course of his business, presumably in Minnesota, sold two head of cattle subject to a Wisconsin chattel mortgage, which he had received for sale from a Wisconsin resident. A suit by the United States as mortgagee was dismissed with reference to the law of Wisconsin. See also Mason City Production Credit Ass'n v. Sig. Ellingson & Co., 208 Minn. 537, 286 N. W. 713, 715 (1939).
very case, however, illustrates one of at least two situations in which multistate tort problems will typically arise: Intangibles may be converted at a place other than that of chattels representing them, and rights to possession, such as those of the bailor, conditional purchaser or mortgagee, may be interfered with at a place other than that of the situs. While numerous cases and writers have discussed the effectiveness of chattel mortgages outside the state of recordation, neither Professor Beale nor, for that matter, any other writer on the subject, attempts to localize the tort of conversion and the case authority is inconclusive. Since the law of conversion “looks to the owner’s loss, rather than the good intentions of the defendant,” and is thus frequently classified as liability without fault, the compensatory place of harm rule may, indeed, be preferable. Yet not only the Restatement but several of the few cases in point, while not always facing the multistate issue, use place of conduct language. Thus, in Federman v. Verni the Federal New York court held against defendant mortgagee who, on the strength of a chattel mortgage duly registered in New York and thus valid against bona fide purchasers under the law of that state, had removed the plaintiff-bona-fide-purchaser’s truck from Pennsylvania, where such purchasers were protected, because “according to Pennsylvania law the defendant committed a wrong” and “the law of the place of the wrongdoer’s conduct determines his liability.” While the first statement merely illustrates the circuitous nature of the traditional approach, the second statement, though hardly supported by the authorities relied upon, flatly states the place of conduct rule. Similar language was used in Personal Finance Co. of New York v. General Finance Co. where, how-

159. Prosser, Torts 99, n. 56, and 98, n. 45 (1941).
161. Prosser, Torts 104 (1941).
162. See note 157 supra.
164. Id. at 114.
ever, there was a coincidence of place of conduct and situs. Additional, though equally inconclusive, support for a place of conduct rule may be found in the *Plesch* cases, involving the conversion of securities, where the New York Court of Appeals, finding with the court below under New York law in the plaintiff's favor "at least" with regard to securities deposited in New York, the place of conduct, failed to deny a similar claim, based on the same New York conduct, as to securities located abroad without inquiring into the law of the situs. 167 Finally, in *Irving Trust Co. v. Maryland Casualty Co.* 168 a transfer in New York by a foreign corporation of land situated in other states, which was illegal under the statutory law of New York, though possibly legal under the lex rei sitae, was held to entitle plaintiff to reconveyance or damages because "the law of the place where acts occur normally fixes their jural character." 169 This case, involving what can perhaps be qualified as a statutory conversion of land, is on the borderline between conversion and fraud and may serve as a transition to that field of tort conflicts law where the place of harm rule has never gained even a semblance of acceptance, either as to defenses or causes of action.

(b) *Fraud.* If liability in conversion cases looks to the loss rather than to the defendant's intentions, 170 this can hardly be said of the liability for fraud. 171 Nevertheless, we find the attempt to deal with fraud as a "property tort," 172 in the same manner as with conversion, and to apply the law of the situs whenever a situs is ascertainable. Indeed, at one time the Restaters thought they could find in each fraud case an injury or loss relating to "land or chattels," 173 and the first illustration of the Restatement (inducement to part with chattels) seems to lend itself to this treatment.

Easy of application as the situs rule seems to be, not a single case supporting it has been found. Although in *Geller v. Transamerica Corp.* 174 a fraud claim based on representations which had induced plaintiff to part with certain stock in a Kentucky corporation, was held governed by Kentucky law because "the place of wrong is

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168. *Irving Trust Co. v. Maryland Casualty Co.*, 83 F. 2d 168 (2d Cir. 1936).
169. *Id.* at 171.
170. See note 161 supra.
171. See note 158 supra.
where the final act occurred" and "the offer was accepted and payment was made in Kentucky," that case is no exception since both conduct and harm seem to have occurred in one state. Moreover, only in extremely rare cases will it be possible to identify an alleged fraud with the loss of a particular piece of property.\textsuperscript{175}

Recognizing this fact, the original draft of the Restatement speaks generally of the location of the plaintiff's "property" and the present language has even abandoned this test and speaks rather vaguely of the place of loss. If the courts had ever paid more than lip service to this rule they would have had to apply the law of the plaintiff's residence or business wherever they were concerned with a loss to the plaintiff's total estate.

Rule (4) of the "Summary of Rules," attached to Section 377 of the Restatement, states that "when a person sustains loss by fraud the place of wrong is where the loss is sustained, not where the fraudulent representations are made." As long as this "place of loss" rule is invoked to defeat defenses under the law of the place of defendant's conduct, it could perhaps be justified in certain situations favoring the plaintiff's right to choose.\textsuperscript{176} However, purporting to represent the only "logical" solution, the Restatement rule of place of loss aspires to exclusiveness, overriding both defenses and claims based on the lex actus. Its two "Illustrations" cover situations in which the plaintiff would be denied a recovery provided by the law of the forum if the defendant can claim a defense under the law of the place of loss, even if the state of the forum is that of the wrongful conduct. Under these Illustrations a defendant who, in state F (the forum) induces plaintiff in state X by false representations to send him certain chattels, could not be held for fraud in accordance with F law, if the law of X where plaintiff "parted with the chattels" denies recovery. And a defendant who fraudulently persuades plaintiff in state F not to sell certain shares held in X, thus causing him to sustain a loss from a subsequent drop in the market price, could defend himself under the law of X, even if the law of the forum would allow recovery. But this is not the law.

\textsuperscript{175} See the excellent analysis by Beach, Conflict of Laws in Multistate Fraud and Deceit, 3 Vand. L. Rev. 767, 772, 774 (1950); also 2 Rabel, Conflict of Laws 326 (1947).

\textsuperscript{176} Text supra at notes 100 et seq. Criminal law cases are almost exclusively concerned with questions of jurisdiction and depend largely on the phrasing of statutes defining the completed crime. In most cases jurisdiction will be assumed, often by reference to the place of acting. See, e.g., People v. Harden, 14 Cal. App. 2d 489, 58 P. 2d 675 (4th Dist. 1936); and in general Note, 50 Harv. L. Rev. 1119, 1170 (1937).
Not a single case has been found in which the defendant escaped liability by successfully invoking the law of the place of loss as opposed to the law of the place of his act. And those cases presently to be discussed, which purport, or are said, to recognize foreign causes of action under the law of that place, can at least equally well be rationalized under a place of conduct rule. The only case seemingly constituting an exception involved a problem of jurisdiction rather than choice of law. In *Boulevard Airport v. Consolidated Vultee Aircraft Corp.*, plaintiff had entered into an agreement in Michigan with the defendant, a Delaware corporation with offices in Michigan and authorized to do business in Pennsylvania, under which plaintiff was to be the sole distributor in certain parts of Pennsylvania and New Jersey. From plaintiff's notification by defendant without proper cause of the termination of this agreement the Pennsylvania court inferred the perpetration of a fraud. Since the court's statutory jurisdiction depended on whether defendant's liability had been incurred within the Commonwealth, the court had to localize the tort. Invoking the last event rule of Section 377 of the Conflicts Restatement and Section 889, comment c, of the Torts Restatement, according to which this tort is complete "when the other person acts thereon to his detriment," the court found that "since most of the plaintiff's territory was in Pennsylvania it is logical [sic] to conclude that the plaintiff acted in Pennsylvania." It was apparently mainly this case on which the author in a recent analysis of the conflicts law of fraud bases his suggestion that fraud claims should be governed by the law of "the place where the plaintiff first acts in reliance on the defendant's misrepresentations." But, being concerned with the interpretation of a jurisdictional statute and not involving a conflict between the laws of loss and conduct, this case, while significant for the difficulty presented by the plain place of loss formula, cannot be considered as authority for either proposition.

Equally inconclusive is the only authority relied on by Professor


178. *Id.* at 880. See also *Iasigi v. Brown*, 17 How. 183, 194, 58 U. S. 182, 193 (1854), reversing dismissal under a Massachusetts statute by the Massachusetts District Court, of a suit for false representations made in writing in New York because "the letter was intended to operate in Massachusetts."

179. *Beach*, *supra* note 175, at 776. Neither of the two other cases relied on (*id.* at 778) are of any assistance: *Smyth Sales, Inc. v. Petr. Heat & Power Co.*, *infra* note 188; *Commonwealth Fuel Co. v. McNeil*, *infra* note 196.
Beale for the place of loss rule. In *Keeler v. Fred T. Ley & Co.*, defendant had induced the plaintiff to sell land situated in New York, and the Massachusetts court, deciding for plaintiff, held New York law applicable, although "false representations were made in another state," the theory being in Professor Beale's opinion that the transfer of the property constituted "the injury to the plaintiff's estate which the action for fraud is intended to redress." What the court said in fact was that it "had no occasion to determine whether the law of Massachusetts (the presumable place of the representations) is in any way different," thus possibly implying the exact opposite of Professor Beale's rule, namely that, if Massachusetts laws had been ascertained to be different, the court might have had to apply that law as that of the place of that conduct which, we might add in paraphrasing Professor Beale, the action for fraud is intended to amerce.

Nor is Professor Beale's thesis supported by the cases cited in the *Keeler* case. *Huntington v. Attrill*, though stressing the identity of the two laws in question, refrains from deciding the conflicts points apparently raised by the defendant. If supporting any test, this decision (again in plaintiff's favor) supports a place of conduct rule since the law of that state (New York) was applied in which the defendant had sworn a false oath and the place of loss if anywhere was in Canada or Maryland. And in *James Dickinson Farm Mortgage Co. v. Harry*, Justice Brandeis upheld recovery in an Illinois court under a Texas fraud statute, where plaintiff had been induced by acts committed in Texas to purchase land in that state, although the loss, if anywhere, had been sustained in Illinois since the land purchased was neither "injured" nor "lost" in the transaction. That the location of the property will be given little weight as the place of loss is suggested by the very similar case of *Israel v. Alexander*, where the New York court applied the Illinois fraud rule against defendant, because "the defendant's allegedly fraudulent representations [concerning purchase of an interest in a Louisiana oil well] were made in Illinois; it was there

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180. *Keeler v. Fred T. Ley & Co.*, 49 F. 2d 872 (1st Cir. 1931), *second appeal*, 65 F. 2d 499 (1st Cir. 1933).
that the agreement was made.” Since the court also stressed that Illinois was the place where “plaintiff parted with his money” the case is not unambiguous support for a place of conduct rule, but it certainly fails to apply the law of the place of the situs or loss. Nor was that rule applied in the similar case of Brown v. Ohman,\footnote{Brown v. Ohman, 43 So. 2d 727 (1949) aff’d on suggestion of error from 42 So. 2d 209 (Miss. 1949), cited with approval in Dodson v. McElreath, 210 Miss. 160, 167, 48 So. 2d 861, 865 (1950) (dictum).} where the Mississippi court decided for plaintiff in a fraud suit refusing to adopt the reasoning of the dissenting minority, according to which Tennessee law applied as the law of the state in which plaintiff relied on misrepresentations made partly in Mississippi.\footnote{Id. at 43 So. 2d 733, deciding the case under both Mississippi and Tennessee law, declared to be identical. But cf. dissent id. at 747.}

Not furnishing any authority as to the conflicts rule in fraud cases, the Keeler case, so prominently relied on by Professor Beale, has not been cited in a single case involving fraud.\footnote{The case was cited in Hunter v. Derby Foods, 110 F. 2d 970 (2d Cir. 1940); A. B. v. C. D., infra note 200; and in The Medric, [1945] Am. Mar. Cas. 159, 160 (Ct. Cls. 1945) (no conflicts problem).} But the question was expressly discussed again in a recent case decided by Judge Goodrich. In Smyth Sales v. Petr. Heat and Power Co.\footnote{Smyth Sales v. Petr. Heat & Power Co., 128 F. 2d 697 (3d Cir. 1942), on second appeal on other grounds 141 F. 2d 41 (3d Cir. 1944).} plaintiff’s predecessor, operating in New Jersey, sued in the New Jersey court in fraud for a loss occasioned by the sale of its business to defendant in Connecticut for an inadequate consideration accepted because of certain misrepresentations of fact. Relying on Section 377 of the Restatement, Professor Beale’s treatise, and three cases at least permitting, if not compelling, inferences to the contrary,\footnote{A. B. v. C. D., infra note 200; Bradbury v. Central Vermont R. R., infra note 193; Commonwealth Fuel Co. v. McNeil, infra note 196.} for the rule that “in actions for fraud and deceit, the place of wrong is the place where the loss is sustained,”\footnote{Smyth Sales v. Petr. Heat & Power Co., supra note 188, at 699.} the court, reversing the dismissal of the suit, held the law of Connecticut applicable because “the event which occasioned these losses was the execution of the contract in Connecticut.” If anywhere one should assume the loss occurred at the place of the plaintiff’s business. This test was in fact applied quite openly to the plaintiff’s claim for damages for malicious interference with his business as to which New Jersey law was declared applicable, both as to the foundation of the claim and exemplary damages\footnote{Smyth Sales v. Petr. Heat & Power Co., supra note 188, at 702, with further references to Judge Goodrich’s text.} because, “whatever the acts are which are supposed to support this claim, they occurred in New
If the Smyth case itself fails to support the place of loss rule, this is equally true for the following cases relied on by the court.

In Bradbury v. Central Vermont RR., the suit was based on the false representations made in Vermont by defendant's agent, that the plaintiff could according to the law of Canada send Christmas trees to that country. The Massachusetts court upheld the verdict for the plaintiff based on the ruling that "the rights of the parties must be determined in accordance with the law of Vermont, where the cause of action arose." Notwithstanding the citation of Section 377 of the Restatement, both the holding and the cases relied on by the court can be reconciled with the rule that the place of conduct governs rather than that of any harm. For if the place of loss in this case can be identified at all, it was Windsor, Ontario, where the Christmas trees had to be destroyed as having been imported contrary to Canadian regulations.

The second case relied on by Judge Goodrich in the Smyth case is that of Commonwealth Fuel Co. v. McNeil. Plaintiff, a Pennsylvania corporation, had been induced by defendant's representations in New York to enter into a certain contract with a New York corporation and to abandon a valuable contract then in force with a Connecticut corporation. The Pennsylvania court, holding for the plaintiff, declared applicable the law of New York as that of the locus delicti since "both the Connecticut company and the New York company contracts were made in New York and the fraudulent representations, found proven, were also made in New York." A later similar case is equally inconclusive. In Phillips v. Belding-Hemingway Co., plaintiff, presumably a New York corporation, charged defendant, a Connecticut corporation, for having induced Southern Mills, a North Carolina corporation, to breach its contract with plaintiff by concluding another contract with Southern in North Carolina. Though stating that the decision for

192. Ibid.
194. Id. at 233, 12 N. E. 2d at 734.
197. Id. at 404, 130 Atl. at 800.
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defendant would have been the same whether New York or North Carolina law applied, the New York court purported to follow Sections 377 and 378 of the Restatement and the Hunter case by referring to the place of the second contract as that of the "last event." Whether or not that place or New York as the situs of plaintiff's harm should be considered as the place of the last event, a conduct rule would have supported the same result.

Finally, the court in the Smyth case cited the case of A. B. v. C. D. where the Pennsylvania court dismissed a suit for breach of a promise made by defendant, a New York resident, to marry plaintiff, a Pennsylvania resident, inter alia because, even if the wrongful conduct had occurred elsewhere, the "loss was sustained in either Pennsylvania or New York" where relief was barred, and "the law where the loss was sustained determines whether there was actionable fraud." Relying on Section 377(4) of the Restatement and the Keeler case, the court also stressed that the wrongful conduct, too, had occurred in either one of these states.

To complete the picture one might add that neither of the two cases which in turn have cited the Smyth case as authority, supports the proposition for which it is said to stand. In Moran v. Pittsburgh-Des Moines Steel Co. Ohio law was applied to a wrongful death action arising from the explosion of a tank because "the tank was built and the catastrophe occurred" in that state. And Cowley v. Anderson involved a damage suit for breach of contract.

We may conclude that none of the fraud conflicts cases so far decided compels the assumption that the courts will apply a law of "last event," harm, or "loss" different from that of the place of conduct, either as to defenses or causes of action and that the courts' reasoning in many cases indicates a clear preference for the law of the place of acting as the law the defendant was expected to obey.

(c) Unfair competition. Closely related to the law of fraud is that of unfair competition. But Judge Goodrich only recently exe-

199. Hunter v. Derby Foods, 110 F. 2d 970 (2d Cir. 1940).
203. Id. at 262. Italics added.
204. Cowley v. Anderson, 159 F. 2d 1, 2 (10th Cir. 1947).
pressed his apprehension that in this field, as in the field of multistate defamation, the conflict of laws rule might “depart from the general rule of reference to the place of wrong, because of the complications involved in such reference in a multistate tort.” Indeed, if the place of wrong, contrary to authority and in keeping with the teachings of Goodrich and the Restatement, is generally identified with the place of the last event, rather than with that of the wrongful conduct, the place of wrong rule must fail. But courts have, as far as I can see, never followed this theory except in order to couch in acceptable language their preference for their own law which, regularly, is identical with the law of the place of defendant’s main place of business and thus of the center of his wrongful conduct. Maybe, then, it is not quite so “strange” that the only case which has applied the laws of more than one state referred to the “place of act” rather than to the “place of impact.”

The fascination of the last event rule, however, is so strong that Callman’s leading text on unfair competition repeats it without critical examination, though correctly reporting judicial references to the place of conduct. Beginning with the leading Vacuum Oil case, the authorities relied on fail to support this approach. In that case an injunction by the New Jersey Federal Court was held


206. See, e.g., Criddlebaugh v. Rudolph, 131 F. 2d 795 (3d Cir. 1942), cert. denied, 318 U. S. 779 (1943); Margarete Steiff, Inc. v. Bing, 215 Fed. 204 (D.C. Cir. 1914). The writer of the Note, 60 Harv. L. Rev. 1315, 1320 (1947) reports that “among all decisions studied, only two have not exclusively applied forum law, or, in the case of federal courts, the law of the state in which the court was sitting,” citing Purcell v. Summers, 145 F. 2d 979 (4th Cir. 1944) (federal law applied to equitable remedy); Zephyr American Corp. v. Bates Mfg. Co., 59 F. Supp. 573 (N.J. 1945) (infra note 225). Neither case supports the place of last event rule. Forum law as such seems to have been applied in Cook Paint & Varnish Co. v. Cook Chemical Co., 85 F. Supp. 257 (W.D. Mo. 1949); Coca-Cola Co. v. Dixi-Cola Laboratories, Inc., 155 F. 2d 59, 67 (4th Cir. 1946); Saperstein v. Grund, 85 F. Supp. 647, 650 (S.D. Iowa, 1949). See also Neuhoff, Inc. v. Neuhoff Packing Co., 167 F. 2d 459, 466 (6th Cir. 1948).


208. 2 Callman, Unfair Competition and Trademarks 1750 (1945). But cf. id. at 1754 (“acts”), 1757 (“open question”).

properly decreed under American law, even though it concerned a fraudulent scheme involving the purchase and shipment from this country of oil for sale abroad in unfair competition with the complainant, an American corporation. While the court could have easily based this ruling on the place of harm clearly situated in this country, it stressed, somewhat laboriously, the fact that the law at the foreign place of conduct was presumed to be the same as in this country and that, anyway, part of the acts had been committed in this country.²¹⁰

All other cases referred to by Callman as supporting the last event rule, either may or must be rationalized under a rule applying the law of the place of conduct. In Rehbein v. Weaver²¹¹ the Illinois court, while holding for defendant on other grounds, conceded the possibility of recovery under a Missouri infringement statute for "acts" committed in that state. In Coty v. Prestonettes²¹² a general injunction was granted under the common law, the court pointing out that a pertinent New York statute would have had to be restricted to "acts done by the defendant within the state of New York"; and the decision in Hecker-H. O. Co. v. Holland Food Corp.,²¹³ enjoining defendants from labeling in this country their goods with colorable imitations of the plaintiff's brand, was apparently distinguished in George W. Luft Co. v. Zande Cosmetic Co.²¹⁴ with reference to the law of the country where the acts "are to be consummated." A similar distinction under the Sherman Act was drawn as to the American Banana case²¹⁵ in United States v. Sisal Sales Corp.²¹⁶ And in Norris v. Altstaedter²¹⁷ a place of conduct rule was clearly assumed. Defendant, a New York resident, was enjoined by the New York court from continuing unfair competition by "fraudulent acts" in Canada of imitations of plaintiff's merchandise, under the law of Ontario presumed to be the same as that of the forum, in reliance on the similar presumption in the Vacuum Oil case.²¹⁸

²¹⁰ Id. at 875. See on the same facts Vacuum Oil Co. v. Eagle Oil Co., 122 Fed. 105 (C.C. N.J. 1903), declining jurisdiction because "an act legal in the country where performed" cannot be punished elsewhere (at 106).
²¹¹ Rehbein v. Weaver, 133 Fed. 607 (N.D. Ill. 1904).
²¹⁴ George W. Luft Co. v. Zande Cosmetic Co., 142 F. 2d 536, 540 (2d Cir. 1944).
That no fundamental change has occurred since most of these cases were decided appears from an analysis of a series of recent lower court decisions all of which, though not always very articulately, apply the law of the place of conduct in preference to whatever law could be considered as the law of the place of the "last event" rendering the defendant liable. In *Triangle Publications, Inc. v. New England Newspaper Pub. Co.*\(^{219}\) Massachusetts (forum) law was applied "in view of the fact that defendants prepared all their material in Massachusetts and the further fact that the greater part of the competition between defendants and plaintiffs occurred in Massachusetts."\(^{220}\) In *Safeway Stores, Inc v. Sklar,*\(^{221}\) Pennsylvania (forum) law was held to support plaintiff's claim as the law of "the place of the alleged wrong," because "all the acts of the defendant . . . have taken place within the boundaries of the Commonwealth,"\(^{222}\) though plaintiff was a Maryland corporation and received protection "in a territory in which it [had] only potential customers"\(^{223}\) thus clearly not suffering any loss in that territory. Similarly, a Michigan corporation was allowed to recover in Pennsylvania under the law of that state because "the specific acts of defendants complained of occurred in this district."\(^{224}\)

The same trend appears in decisions of federal circuit courts. In *Zephyr American Corporation v. Bates Mfg. Co.*\(^{225}\) plaintiff, among other things charged unfair competition committed in New Jersey by the mailing in that state of infringement notices. The court, referring to the conflicts rule of New Jersey that the right to recover for an alleged tort is "governed by the law of the

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\(^{222}\) Id. at 102.

\(^{223}\) Id. at 105.


particular State where the torts were committed, held New Jersey law applicable in this regard, without examining the question in which state the loss was sustained. A similar approach was taken in *Adam Hat Stores v. Lefco*, where the place of wrong was found at the place where defendants had opened their store; and in *Addressograph-Multigraph Corp. v. American Expansion Belt & Mfg. Co.* which involved a claim of misappropriating a novel system of mechanically addressing business forms by the sale by defendant of blank plates to be used in conjunction with the plaintiff's machines. In the last case, the Illinois court, rejecting the lower court's application of federal law as well as the plaintiff's argument that "no wrong was committed until the plates were actually used in a foreign state," applied the law of Illinois as that of the state of the place of the "manufacture and sale by the defendant of plates" as "the essential element of this alleged wrong."

True, the place of conduct rule in unfair competition cases is probably based on reasons of expediency rather than the promotion of an admonitory policy. But, whether or not it should be

226. *Id.* at 386. See also Judge Goodrich in Browning King Co. of New York v. Browning King Co., 176 F. 2d 105, 107 (3d Cir. 1949).


229. Similar considerations seem to underlie similar trends in other countries. See, e.g., the decision of the Supreme Federal Court of Switzerland in *Wille v. Bachschmid*, BGE 22, 1164, 1170 (Nov. 6, 1896), where Swiss law was held applicable to a suit for unfair competition committed by publications in India because the tort was alleged to have been "committed from Swiss territory."

Of particular interest in this regard is the development of the practice of the German Supreme Court. As early as 1903 (RGZ 55, 199) we find a rule subjecting all foreign acts to German law if affecting German nationals, and summarized on a "place of harm" theory. In 1933 (RGZ 140, 25) the Court returned to a place of conduct rule, which it interpreted on November 15, 1935 (J.W. 1936, 923) as covering the preparation in Germany of pamphlets which were to, and did, become effective abroad. (See also RGZ 150, 265, of 2.14.1936). However, progressing nationalism prompted a writer in 1936 to demand liability of all Germans for their acts committed abroad, since German nationals anywhere owed National Socialist "faith" to their competitors. See Lorenz, 7 Giurisprudenza Comparata Di Diritto Internazionale Privato 85, 88 (Instituto Italiano di Studi Legislativi, Rome 1941). See also Eckstein, *id.* at 90.

230. *But cf.* to this effect Raape, *op. cit.* supra note 5, at 365: "The German firm which competes with an Italian firm in this country will be liable to the latter only according to the German law of unfair competition, even if it knows that its opponent's property harmed by its acts, and thus the place of loss, is located abroad. For the question whether or not its act is lawful . . . must in fairness be adjudged under German law as the law of the activity . . . . Similarly, in the converse case of a Paris firm causing difficulties to the agent of a Hamburg firm traveling in France . . . only French rather than German law is applicable. An action considered lawful under the law of the place of conduct must not be considered unlawful by us . . . ." (transl.)
generally adopted, and whether or not one might prefer to this or any other "place of wrong" rules giving the plaintiff or the court the choice between several laws, references to the last event rule of the Restatement should be abandoned as incorrect and misleading here as with regard to all other intentional torts.

(d) Alienation of Affections and Plurality of Tort Conflicts Rules: A Summary. "Classification changes as the classification is made."

That recovery is possible against a manufacturer in a "negligence" action for injuries caused by his defective products, without proof of "privity" or personal fault, has been true since Judge Cardozo in MacPherson v. Buick Motor Co. classified the wheel of an automobile as a "thing of danger." This reclassification and other adjustments of the negligence rule to new social and economic policies have resulted in the need for new categories within that rule, taking account of the inclusion of what I have termed liabilities for "negligence without fault." In this paper I have analyzed some of the implications of this development for the law of conflicts, by following the "policy approach" now so widely and forcefully advocated by eminent writers.

Early "admonitory" liability for fault was governed by the lex actus which the wrongdoer could most fairly be expected to "obey." Once, however, with the growth of the hazards of modern mechanical enterprise, liability without fault came to govern large areas of tort law, the place of wrong lost its original meaning as that of the defendant's conduct. Thus, when legislation imposed absolute liability on employers, responding to the state's prevailing compensatory interest, a new conflicts rule of workmen's compensation came to stress (under various dogmatic disguises) the law of the plaintiff's residence or activity over that of the place of the "wrong." And a similar shift was effected as to new common law rules of quasi-strict liabilities within the place of wrong rule by the substitution of the place of the plaintiff's harm for that of defendant's conduct.

231. See note 102 supra.
235. See note 1 supra.
Whether or not these primarily compensatory liabilities are adequately served by the Restaters' place of harm rule, can be decided only after further study. It may well be that this rule will prove tenable only if reinterpreted as referring to the plaintiff's residence or center of activities as the place of harm, and as entirely inapplicable to certain torts such as defamation or anti-trust claims. In this paper the attempt has been made to show that whatever the justification of the place of harm rule elsewhere, it has never been, and should not be, applied to what has remained of the original admonitory liability for "wrongs." The court in a multistate tort case should ask itself, therefore, at the outset whether or not the liability claimed would, under the forum's notion, be one primarily aimed at a wrongdoer's admonition. If the answer is in the affirmative, as will be the case regarding most intentional torts, the court will look to the law of the place of defendant's conduct, even if the harm complained of was sustained in domestic territory. True, if the harmful conduct occurred outside the forum, the foreign law might still be held inapplicable as being contrary to public policy. But this much seems certain: wherever liability for an intentional tort is asserted under the law of the forum as that of the place of acting, law and reason, contrary to the Restatement, require the forum to hold the defendant liable. and Judge Wyzanski in Gordon v. Parker could have held as he did simply by finding the place of wrong at the place of the wrongful act.

237. Additional support for this proposition could have been derived from Wawzin v. Rosenberg, 12 F. Supp. 548 (E.D. N.Y. 1935), where a New York statute barring actions for alienation of affections was held not to prevent the bringing of such an action in a New York federal court if "the wrongful acts of the defendant were committed within the state of New Jersey" (at 549). But cf. Thome v. Macken, 58 Cal. App. 2d 76, 136 P. 2d 116 (1943).