Place of Wrong: A Study in the Method of Case Law

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Our inquiry into the cases may start appropriately with those which are stated by Beale as supporting the Restatement. For the proposition that "the place of wrong is the place where the person or thing harmed is situated at the time of the wrong," on the law of which place the bulk of the problems of the law of torts is said to depend, the following cases are adduced: Otey v. Midland Valley R. Co., Connecticut Valley Lumber Co. v. Maine Cent. R.R., Keeler v. Fred T. Ley & Co., Moore v. Pywell, and Cameron v. Vandergriff.

*This is the second and concluding installment of the present article, the first having appeared in 19 Tul. L. Rev. 4 (October, 1944).
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412 Beale, op. cit. supra note 4, at p. 1287, § 377.2.
42Id. at p. 1288 et seq., § 378.1 et seq., especially § 378.1: "It is impossible for a plaintiff to recover in tort unless he has been given by some law a cause of action in tort; and this cause of action can be given only by the law of the place where the tort was committed. That is the place where the injurious event occurs, and its law is the law therefore which applies to it." Restatement of Conflict of Laws (1934) § § 378 (whether a person has sustained a legal injury), 379 (liability-creating conduct), 381 (specific conditions of liability), 383 (causation), 384 (cause of action in tort recognized in other states only when created at the place of wrong), 385 (contributory negligence), 386 (fellow servant), 387 (vicarious liability, subject, however, to the proviso that the principal has authorized the agent to act in the state of the place of wrong), 388 (defenses on the merits), 389 (discharge or modification of liability to pay damages), 390 (survival of action), 391 et seq. (right of action for death), 412 (measure of damages).

43See infra notes 44, 46, 70, 59, and 58, respectively.
In *Otey v. Midland Valley R. Co.*, a farmer sued a railroad company for the destruction of his barn by a fire which was allegedly caused by a spark from one of the defendant's locomotives. The barn was located in Oklahoma at a short distance from the Kansas line, and the railroad was running across the line from Kansas into Oklahoma. The action was brought in Kansas. The lower court held for the plaintiff and error was assigned "because the trial court refused to instruct the jury that before they could return a verdict for plaintiff they must first find from the evidence that the fire originated from defendant's engine while it was being operated in the state of Oklahoma." To this argument the court replied as follows: "It is argued that if the fire was set by a spark which escaped from the engine before the engine crossed the state line, there could be no recovery. Such is not the law. It is highly probable . . . that the spark escaped while the engine was crossing the state line; but whether it was or not, a recovery was proper whether the engine was in Kansas, or on the state line, or in Oklahoma. The damage occurred in Oklahoma. If it was caused by defendant's engine, that was all that was necessary—unless it were shown that the Oklahoma law touching the right of recovery for damages or the measure of damages was different from our own."

This concise statement is followed by nothing more than a simple reference to the cases of *Cameron v. Vandergriff* and *Moore v. Pywell*. Since these cases are usually regarded as being among the main pillars of the place-of-harm rule, the decision may well be regarded as, indeed, adopting that rule. That interpretation is not absolutely conclusive, however. The language of the court might also be understood as a simple statement that both a factual inquiry into the place of acting and a legal inquiry into the applicability of Oklahoma or Kansas law would be superfluous as long as no diversity of the two laws was shown. Whatever interpretation of the court's ambiguous language might be correct, the decision contains

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44108 Kan. 755, 197 Pac. 203 (1921).
45See infra notes 58 and 59, respectively.
no articulate discussion of our problem, since, under the circumstances, the court had no need to choose between Oklahoma and Kansas law.

Connecticut Valley Lumber Co. v. Maine Cent. R.R. is stated by Beale as being in "accord" with the Otey case. However, its holding, far from being in accord with, is opposite to what the Otey case is said to stand for. The only conceivable justification for quoting the case as supporting the place-of-harm rule lies in the fact that lip service is paid to the place-of-harm rule, to which the decision of the case purports to establish an exception. The facts are similar to those of the Otey case. The defendant railroad company operated a line in Canada close to the New Hampshire boundary. A spark emitted by an engine set fire to a bridge owned by the plaintiff which connected the Canadian with the New Hampshire bank of the boundary creek. Recovery for the Canadian half of the bridge was admittedly precluded under the law of Canada, whose statute of limitation had expired. As to the New Hampshire half, the plaintiff sued in New Hampshire under the following New Hampshire statute: "The proprietors of every railroad shall be liable for all damages to any person or property by fire or steam from any locomotive or other engine upon their road."

No such statutory liability without fault existed in Canada. In discussing the applicability of the statute the court started out with the following fictional formulation of the place-of-harm rule:

If one, while in one jurisdiction, performs a negligent [sic] act which is the proximate cause of damage to property in another jurisdiction, the locality of the act is deemed at common law to be the same as that of the damage.

Cases and textbook passages were cited in support of this proposition. Nevertheless, the New Hampshire statute was

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4678 N. H. 553, 103 Atl. 263 (1918).
47 Supra note 44.
not applied. The court found that, when it enacted the statute, "evidently" the legislature did not attempt to exercise extra-territorial control over engines operating in a foreign country. This intention of the legislature was inferred from the legislative history of the statute, which re-enacted the following provisions of an 1840 statute:

Every railroad corporation or company now established, or which may hereafter be established within the limits of this state, shall be deemed and held liable to pay fully for all damages which shall hereafter accrue to any person or property within the same, by reason of fire or steam from any locomotive or other engine, used or to be used upon said roads respectively, for purposes of transportation or otherwise.\(^4\)

The spatial limitation of this statute seems to be pointed at incorporation in New Hampshire rather than at carrying on railroad operations in the state. At any rate, the limitation was not repeated in the new statute. It was nevertheless read into it by the court, which simply said that no intention to repeal it could be assumed.

In spite of its holding, the case has been cited as authority for the place-of-harm rule, not only by Beale, but also in other places.\(^4\) What are the bases for its dictum that as a general rule the law of the place of harm is decisive rather than the law of the place of acting? In support the court cited several authorities, which are enlightening as to the origins of the place-of-harm rule. The first of these cases, all of which are cited without any reference to their facts, is \textit{Worster v. Winnipesaukee Lake Co.}\(^5\) Land located in one county of New Hampshire was flooded by activities carried on in another county of the same state. The problem was whether venue

\(^4\)N. H. Laws of 1840, c. 561; the re-enactment is P. S. c. 159, § 29.
\(^5\)25 N. H. 525 (1852).
could be laid in the county where the activities were carried on. Following the ancient doctrine that actions for harm to land are "local" and must be brought at the place where the land is situated, the court answered the question negatively. The question bears an outward resemblance to the problem of our discussion; however, as it will be shown later,\textsuperscript{51} the doctrine that actions for harm to land are local and must be brought in the county and state where the land is situated is a survival from a period when English courts had not yet developed the technique of choice of law. Hence, a case applying that doctrine cannot constitute a precedent within the framework of choice of law. The policies which lie at the bottom of the local action theory and those underlying the technique of choice of law are too different to allow the mutual use of precedents.

The next case cited, \textit{Thompson v. Crocker},\textsuperscript{52} was likewise concerned with a diversion of water. The plaintiff, owner of a mill in Plymouth County, Massachusetts, claimed that the defendant, by erecting a dam below, had backed up the water and had thereby made the mill unworkable. The evidence showed that the defendant's dam was in Bristol County, and the defendant claimed that this fact amounted to a fatal variance from the declaration, in which the plaintiff had alleged that he had been deprived of profits in Plymouth County. The court decided this issue against the defendant, stating that "the injury done to the plaintiff's mill is the substance of the complaint, and the place where the injury was done, to wit, at the mills, gives the locality to the action, and not the source from which the mischief came."

Unless one resorts to conceptual jurisprudence of the worst type, it is difficult to see how this case can constitute a precedent for a choice-of-law case, especially when one considers that the action was one for harm to land, and therefore a local action in the sense just discussed.

\textsuperscript{51}See infra at p. 197.
\textsuperscript{52}9 Pick. 59 (Mass. 1829).
The next case we find cited, viz. Barden v. Crocker, was concerned with the same dam in Bristol County, which also interfered with a fishing right in Plymouth County. The action was brought at the place of the fishery, and the defendant objected to the venue. This time the doctrine of local action was ignored, the court stating that the plaintiff "may unquestionably maintain his action in either county; in Bristol, where the obstruction was raised, as well as in Plymouth, where the injury was sustained."

Quoting from Coke's Reports and other venerable English authority, the court held that "when one matter in one county is depending upon the matter in another county, the plaintiff may choose in which county he shall bring his action."

Thompson v. Crocker was expressly overruled.

"The remark in the opinion," the court now declared, "that the place where the injury was done, viz. at the mills, gives locality to the action, and not the source from which the mischief came, seems to be too much limited; the cases above cited showing that the action could have been maintained in either county."

Out of superabundant caution the court continued to state that even "if the case at bar should be governed by the limited rule, it would be supported, for the plaintiff was deprived of his fishery in the county of Plymouth; and to use the words of Parker, C. J., 'it was wholly unnecessary to allege in what county the obstruction was erected.'"

The last case cited in the Connecticut Valley case is Thayer v. Brooks. It too was concerned with a water diversion carried on in one place and damage to the water supply of a mill located in another. However, this time we are nearer to the field of choice of law, the two places having been situated in different states, viz. Pennsylvania and Ohio respectively.

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5310 Pick. 383 (Mass. 1830).
54The court's italics.
5517 Ohio 489, 49 Am. Dec. 474 (1848).
Action was brought in Ohio, the state where the harm was suffered, and the defendant's plea to the jurisdiction of the court was refuted by the now familiar argument that a local action is to be brought at the place of the *res sita*. The authority invoked was the celebrated case of *Livingston v. Jefferson*, in which the English doctrine of local action was transplanted to the United States by no less an authority than Chief Justice Marshall, who, sitting at the time as circuit justice, must have greatly welcomed that doctrine as an expedient to avoid deciding on the merits a case which was so full of political gunpowder as the action brought against ex-President Jefferson by one of the most prominent Federalist leaders. The dramatic facts of that case arose in the field of high politics, when Jefferson, shortly after the Louisiana Purchase, ordered Livingston ejected from extensive lands in New Orleans, to which the President claimed title as part of the public domain. When Jefferson's term of office was over, Livingston brought a personal action against him for damages in the only place where personal service could be had. The doctrine of local action, whose history was traced by Marshall with an amount of eloquence that might well betray the Chief Justice's doubts as to its reasonableness, afforded a welcome way to avoid a decision on the merits.

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56Fed. Cas. #8,411 (C. C. Va. 1811).

57The heat which was engendered by the case is reflected in the following words of District Judge Tyler, father of President Tyler, who sat together with Chief Justice Marshall and who relieved himself of the following oration: "While I freely acknowledge how much I was pleased with the ingenuity and eloquence of the plaintiff's counsel, I cannot do so much injustice to plain truth, as to say, that any conviction was wrought on my mind, of the soundness of the arguments they exhibited in a legal acceptation. It is the happy talent of some professional gentlemen, and particularly of the plaintiff's counsel (Mr. Wickham), often to make 'the worse appear the better cause'; but it is the duty of the judge to guard against the effects intended to be produced, by selecting those arguments and principles from the mass afforded as will enable him to give such an opinion at least, as may satisfy himself, if not others. These arguments and this eloquence, however, have been met by an Herculean strength of forensic ability, which, I take pride in saying, sheds lustre over the bar of Virginia." For a detailed story of the controversy see Hatcher, Edward Livingston (1940) ch. 8.
We thus find that the *Connecticut Valley* case, first, does not apply the place-of-harm rule, and, second, adduces, when it mentions that rule, as authority for it, cases which are exclusively concerned with the problem of whether an action for a trespass to land can be brought in any place other than the *situs* of the land. Among these cases there is cited, without distinction and as allegedly supporting the place-of-harm rule, a case which not only declares that an action for trespass to land must not necessarily be brought at the place where the harm occurred, but which also expressly overrules another case, also cited in the *Connecticut Valley* case, which had expressed that doctrine!

In *Cameron v. Vandergriff*, an Arkansas court allowed recovery for personal injuries caused by blasting operations. The very brief opinion of the supreme court of the state is exclusively concerned with general problems of negligence. Only at the very end does it say: “The rock which occasioned the injury was put in motion by the appellants in the Indian Territory; but, by the same force, its motion was continued, and the injury done in this state. The cause of action arose here.”

This is all. There is neither discussion nor citation of authorities.

*Moore v. Pywell* is cited by Beale as authority for the proposition that “where a person is injured by being caused to take by mistake or fraud some poisonous or deleterious substance which causes injury after being taken, the place of the wrong is the place where the substance first caused harm to the person of the person injured.” Does it stand for this proposition?

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5853 Ark. 381, 13 S. W. 1092 (1890). The case is stated as authority for the place-of-harm rule also by Goodrich, *op. cit. supra* note 38, at p. 222, § 90; 15 C.J.S., Conflict of Laws (1939) 899, § 12 (2); Goodrich, *loc. cit. supra* note 49; Annotation, 56 L. R. A. 193, 217.


602 Beale, *op. cit. supra* note 4, at p. 1238, §377.2; see also Restatement of Conflict of Laws (1934) § 377, n. 2. The case is also cited in 11
The action was one for death by negligent act. The administrator of the estate of the decedent filed an action in the District of Columbia against a druggist who had allegedly caused the death by negligently filling a prescription. At the trial the plaintiff's evidence tended to prove that the defendant, while in the District of Columbia, had committed an error and that the patient, after taking the medicine at his home in Maryland, had died there. The defendant moved to direct a verdict on the ground that the evidence did not tend to show "an injury done and happening within the limits of the District of Columbia," as alleged in the declaration, but in the State of Maryland, whose law was not pleaded. The ruling of the trial court amounted to a denial of the plaintiff's motion to amend his declaration by pleading the death statutes of both the District of Columbia and Maryland, and to the direction of a verdict for the defendant. The Court of Appeals of the District reversed the judgment and remanded the case for a new trial, holding that the trial court should have allowed the amendment and that it had improperly interpreted the death statute of the District of Columbia.

The opinion turns upon two arguments, each of which alone would have sufficed to decide the case. The first part opens with a discussion of Mr. Justice Brewer's decision in Stewart v. Baltimore & O. R. Co. In that case a death action was brought in the District of Columbia, both the death-causing conduct and the death having occurred in Maryland. The trial court as well as the court of appeals denied the action on the ground that the case was to be decided under the law of Maryland, whose death statute provided for a procedure which could not be followed in the District of Columbia. The United States Supreme Court reversed this decision, holding that an action for wrongful death had its origin not in any statute but in the tort committed; that the statutes did no more than remove the obstacle to recovery that resulted from the rule,

“actio personalis moritur cum persona”; and that, in any event, the death statute of Maryland was not so different from that of the District of Columbia as to exclude in the District a recovery upon a Maryland statute.

From this decision the court in Moore v. Pywell concluded that there existed no reason why the action should not be brought in the District of Columbia, “where the negligence which caused the death of appellant’s intestate happened.” “We are of opinion,” the court continued, “that the wrongful act alleged to have been committed in this District, and to have resulted in death therefrom in Maryland, is actionable in this District in which the wrongful act was committed. While the action lies to recover damages for death, the gist of this action for the tort is the wrongful act itself, resulting in death. The place of death ought not to determine the existence or nonexistence of a cause of action.”

This passage is followed by a reference to Van Doren v. Pennsylvania R. Co. and Rudiger v. Chicago, St. P., M. & O. Ry. Co. cases, which were concerned with a problem different from that raised in Moore v. Pywell. In the latter case the court had to choose between the place of acting and that place where both the first injury and the death occurred. In the other two cases the choice was between the place where both the actor acted and the injury was received, on the one hand, and the place where the death occurred, on the other; and the decision was in favor of the former.

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6394 Wis. 191, 68 N. W. 661 (1896).
64In spite of this holding, these and similar cases are not regarded by the advocates of the place-of-harm rule as incompatible with their approach. They argue that the existence or nonexistence of a cause of action being determined by the law of the place where the first harm occurs, death constitutes but a subsequent result and that, therefore, the place of the death is irrelevant. See 2 Beale, op. cit. supra note 4, at p. 1305, § 391.1; Restatement of Conflict of Laws (1934) § 377, n. 1, § 391, Comment (c). This argument would be conclusive if it referred to the cause of action by which the person harmed seeks to recover for the harm suffered by him and which either abates upon his death or survives to his personal representative under a survival statute. The argument
The tort, which is the gist of the action, is negligence, unlawful violence or a wrongful act proximately causing personal injury resulting in death. While the action lies to recover damages for death, death does not constitute the tort. The fact of death is not the tort, but its consequence. Negligence, unlawful violence or a wrongful act is the tort, although death must result from injury caused by such negligence, violence or act before the statutory cause of action accrues.\textsuperscript{65}

It is not made of the substance of the right of action that the death should have occurred within the state, but the gist and substance of the provision is that the death shall have been caused by a wrongful act, neglect, or default occurring in this state; but in what state the damages ensued thereon was not, we think, intended to be made material.\ldots The foundation of the action is obviously the wrongful or negligent act or default which caused the injury, and which is in contravention of the law of the state. This, as we have said, is the substantive ground of action.\textsuperscript{66}

If the court which decided \textit{Moore v. Pywell} had stopped at this point, its decision would constitute a clear authority for a rule directly opposite to that which the case has been cited as supporting. However, the court continued to discuss at length the second assignment of the appellant, who maintained


that the lower court should have allowed him to amend his declaration by pleading the death statutes of both Maryland and the District of Columbia. The court of appeals held that under the rules of procedure of the federal courts, the amendment should have been allowed, and that the lower court should even have taken judicial notice of the Maryland statute. But why was the Maryland statute relevant at all if the law applicable was that of the District of Columbia? The court's ideas are to some extent made understandable by its reference to *Foot v. Edwards*,\(^6\) and its renewed reference to the *Stewart* case.\(^6\) In *Foot v. Edwards*, action was brought in Connecticut on an alleged diversion of a stream in that state, in consequence of which the plaintiff's mill in Massachusetts was deprived of water. In affirming its jurisdiction, the court in Connecticut made the following statement:

The commission or omission of an act by the defendant, and damage to the plaintiff in consequence thereof, must unite to give him a good cause of action. No one of these facts by itself is a cause of action against the defendant ... A part of that which is essential to the plaintiffs' right to recover took place in Connecticut ... The act of diversion, which arose in Connecticut, and the other facts existing, give to the plaintiffs a cause of action. That which is essential, therefore, to the plaintiffs' right of recovery against anyone, or their cause of action, arose where the suit has been brought.

On this basis the District of Columbia court in *Moore v. Pywell* said:

If the prescription had been filled in Maryland, and the medicine had been given there and had caused the death there, and yet under the principle announced in the *Stewart* case, this plaintiff could have maintained his action for such tort here, what

\(^6\)Fed Cas. #4,908 (C. C. Conn. 1855).
\(^6\)Supra note 61.
reason of public policy, what principle of law, should lead us to deny the benefit of these remedial statutes solely because the prescription was filled here, negligently, and carried to Maryland, and, when the medicine was taken there, it caused the death of the plaintiff's intestate in that state? We are convinced that, if the wrongful act alleged to have been done here caused the death in Maryland, that circumstance does not only not forbid a recovery, but affords an additional ground for maintaining it in this District. (Italics ours.)

The court to which the case was remanded must have been embarrassed when it was told that it could apply the death statutes of both the District of Columbia and of Maryland simultaneously. However, this task is less formidable when, as in the Stewart case, death statutes are regarded not as creating new statutory causes of action but as merely removing an obstacle to an action already given by the common law. This approach becomes even more understandable when we consider that in 1907, when Moore v. Pywell was decided, much favor was given to the notion that in questions of the general common law it was unnecessary to determine which particular state's law should be applicable. The doctrine of Swift v. Tyson\textsuperscript{69} was the accepted law in the federal courts.

This lengthy inquiry was necessary to determine the importance of Moore v. Pywell as a precedent. In Beale's treatise, and consequently, in the Restatement, it figures as an authority for the place-of-harm doctrine. If it can be taken as an authority for anything, it is the opposite doctrine which adjudges problems of the law of torts primarily under the law of the place where the alleged tort-feasor was acting.

\textsuperscript{69}16 Pet. 1, 10 L. Ed. 865 (U. S. 1842). Cf. Stumberg, \textit{op. cit. supra} note 22, at p. 161: "The federal courts in diversity of citizenship cases, upon a so-called doctrine of general jurisprudence, often disregard the common law of the state where the tort occurred and apply their own rules." See also 2 Wharton, Conflict of Laws (Parmele's 3d ed. 1905) § 478b, n. 14.
There remains of Beale's cases only Keeler v. Fred T. Ley & Co., with respect to which he says:

So in an action for fraud by which the defendant induced the plaintiff to sell to the defendant the plaintiffs' land, it appeared that the land was in one state while the false representations were used [sic] in another state. It was held that the place of the fraud was the place where the property was actually obtained by the fraud, that being the injury to the plaintiffs' estate which the action for fraud is intended to redress.

When we look at the two opinions which were rendered in the Keeler case by the United States Circuit Court of Appeals, First Circuit, we find that the land in question was located in Albany, New York, but that no word whatever was said about the place where the fraudulent representations were made. The facts as stated render it quite probable that the fraudulent statements were made in New York, too. At any rate, we are not told anything on the point. The only statement made by the court with respect to the law applicable is the following laconic statement: "The case is to be governed by the law of New York . . . We have no occasion to determine whether the law of Massachusetts is in any way different."

7049 F. (2d) 872 (C. C. A. 1st 1931); 65 F. (2d) 499 (C. C. A. 1st 1933).

71§ 377.2.

72Here the court cites James-Dickinson Farm Mortgage Co. v. Harry, 273 U. S. 119, 47 Sup. Ct. 308, 71 L. Ed. 569 (1927) and Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892). In the former of these two cases an action was brought in a federal court in Illinois, for harm suffered by the plaintiff in Texas in consequence of his reliance upon fraudulent statements of the defendant's made in Texas. It was held that the case was to be decided under Texas law and that a particular statute of Texas was not of a penal character and was, therefore, not excluded from application by a court in another state. The case of Huntington v. Attrill has long been occupying a prominent place in casebooks and texts on conflict of laws as a leading case on the definition of "penal law" within the meaning of the conflict of laws. Attrill, as director of a New York corporation, signed a certificate falsely stating that all the stock of the corporation had been paid in.
On what ground the Massachusetts law was mentioned is not stated. Perhaps the defendant had sought to derive some benefit from the law of Massachusetts on the ground that it was the law of the place of its official seat of business; perhaps it had appeared in some part of the evidence not referred to in the published report, that indeed, all or some of the fraudulent statements had been made in Massachusetts; or, most probably, the Massachusetts law was simply referred to as the *lex fori*. But we are not told, and as the case is reported the fraudulent allegations were more probably made in New York than in Massachusetts. It was in New York City that Ley, the president and general manager of the defendant corporation, resided and had his business office at the relevant time.

For the proposition that the place of wrong is always located at the place of harm the cases so far considered are neither numerous nor convincing. But the lack of more impressive case authority in Beale's treatise might perhaps be

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A creditor of the corporation in New York obtained a judgment against him under a statute of New York which rendered him personally liable. When the Maryland courts refused to enforce it, the United States Supreme Court held that the New York statute was not of penal character and that, therefore, the refusal of the Maryland courts to enforce the New York judgment violated the full faith and credit clause of the Constitution of the United States. Huntington v. Attrill has nothing to do with the problem of determining the law applicable to a claim for fraud and deceit, and neither Huntington v. Attrill nor James-Dickinson Co. v. Harry has anything to do with multiple contact torts.

The opinion in 65 F. (2d) 499, 501 (1933) simply repeats the first sentence, without the rest of the quotation.

The same transactions which gave rise to the controversy decided in Keeler v. Fred T. Ley & Co., formed the basis of the action in the case of Ernest F. Carlson Co. v. Fred T. Ley & Co., 269 Mass. 272, 168 N. E. 812 (1929). The decision in that case is equally silent as to the place of the fraudulent allegations. The facts stated in the two opinions are too meager even to allow us to regard the court's omission of the place where the fraudulent allegations were made as an indication that it took the place-of-harm rule for granted and therefore regarded the place of acting as irrelevant. As the case stands, it is not only possible but even probable that the law of New York was apodictically declared applicable not as the law of the place of harm as opposed to the law of the place of acting, but simply as the law of the place of wrong as opposed to the law of Massachusetts as the *lex fori*.
explained on two grounds: upon the author's conviction of the unassailable truth of the theories of territoriality and vested right, from which the place-of-harm rule is derived as a logical necessity; and upon his belief that the place-of-harm rule actually constituted the accepted rule of American law. The first ground holds no weight for anyone who approaches choice-of-law cases with a different viewpoint; whether the second is tenable needs investigation.

It cannot be denied that the place-of-harm rule has been stated as established law in several texts and in a search-book enjoying great popularity with the legal profession. But other search-books of equal popularity were silent as to our problem, and W. W. Cook and Lorenzen had attacked the indiscriminate resort to the law of the place of harm during the very time the Restatement was under discussion. Since the publication of the Restatement, its rule has found its way into two new search-books, where the Restatement constitutes the principal authority. However, new criticisms have been voiced in scholarly writing. In such a state

76 Minor, Conflict of Laws (1901) 482; Wharton, op. cit. supra note 69, at p. 1105; Goodrich, op. cit. supra note 38, at p. 222, § 90; Goodrich, loc. cit. supra note 49.

77 The article, Private International Law, in 22 Am. and Eng. Enc. Law (2d ed. 1902) 1814, 1378, 1381, contains a general statement that in problems of torts a court ought to apply the lex loci delicti rather than the lex fori, but nothing is said as to the location of the locus delicti except for a brief statement that actions for torts to land are local and must be brought at the situs. The article, Conflict of Laws, in 12 C. J. (1917) 427 says nothing with reference to our problem.


80 Stumberg, op cit. supra note 22, at p. 163 et seq.; Cook, Tort Liability and the Conflict of Laws, 35 Col. L. Rev. 202 (1935); Lorenzen and Heilman, loc. cit. supra note 22, at p. 577; Comment, 44 Yale L. Jour. 1233, 1236 (1935). In Hancock, op. cit. supra note 31, § 54, several cases dealing with our problem are brought together. This section is stated by the author to contain "a number of miscellaneous multiple contact problems, none of which is sufficiently important to deserve a separate section," and in which no conclusions of the author's are drawn.
of affairs the place-of-harm rule could be regarded as established only if the cases stated in its support constituted unquestionable and well-considered authority. The cases scrutinized so far can hardly be said to fulfill this requirement. But we still have to scrutinize the cases invoked for the rule by other authors.

Foremost among them is *Alabama G. S. R. Co. v. Carroll*, a case which has found a place in numerous texts. A railroad employee was injured in Mississippi through the break of a link between two cars. Suing in Alabama, he alleged that the accident was caused by another employee's failure to discover the latent defect at an inspection in Alabama. The railroad pleaded the fellow-servant rule, which was in force in Mississippi but had been abolished in Alabama. Holding for the defendant, the court said:

> It is admitted, or at least cannot be denied, that negligence of duty unproductive of damnifying results will not authorize or support a recovery. Up to the time this train passed out of Alabama no injury had resulted. For all that occurred in Alabama, therefore, no cause of action whatever arose. The fact which created the right to sue, the injury, without which confessedly no action would lie anywhere, transpired in the state of Mississippi. It was in that state, therefore, *necessarily* that the cause of action, if any, arose; and whether a cause of action arose and existed at all, or not, *must in all reason* be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired. (Italics ours.)

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8197 Ala. 126, 11 So. 803 (1892).
The basic idea of the court is contained in these few sentences, after which is found the following amplification:

Section 2590 of the Code of Alabama had no efficacy beyond the lines of Alabama. It cannot be allowed to operate upon facts occurring in another state, so as to evolve out of them rights and liabilities which do not exist under the law of that state, which is of course paramount in the premises.

In addition to this formalistic argumentation, we find references to the following two cases: The Nashville, Chattanooga & St. Louis Railway v. Foster and Chicago, St. Louis and New Orleans Railroad Company v. Doyle.

The former case was similar to the Carroll case. A railroad employee suffered a fatal accident in Alabama, which was alleged to have been caused by a negligent brake inspection in Tennessee. Without discussion the Tennessee court held that the decision was to be rendered under the law of Alabama, the only relevant statement being contained in this single sentence: "There is no question but the laws of Alabama at the time the deceased was killed, controlled the rights of the parties . . ."

For this apodictical statement no reason is given and no authority is cited.

In the Doyle case, a train engineer was killed in a collision in Tennessee. While some allegation was made that the negligence of a fellow-servant, which caused the collision, had occurred in Mississippi, nothing in the decision indicates that the fellow-servant rules of the two states were different. Apart from the question of whether the general fellow-servant rule applied under the circumstances, the only problem was whether an action could be had at the forum (Mississippi) upon a death occurring in another state. What the court had to say is this:

8310 Lea 282 (Tenn. 1882);
8460 Miss. 977 (1883).
The right of action for damages for killing a husband given by the statute of Tennessee may be asserted in the courts of this State, because of the coincidence of the statutes of the two States on this point, and, independently of this, because a right of action created by the statute of another State, of a transitory nature, may be enforced here, when it does not conflict with the public policy of this State to permit its enforcement, and our statute is evidence that our policy is favorable to such rights of action instead of being inimical to them ... The right of the appellee is determinable by the law of Tennessee, in which State the killing of her husband occurred. The view that no recovery could be had here, except for a result traceable to an omission of duty in Mississippi is unfounded. Physical force proceeding from this State and inflicting injury in another State might give rise to an action in either State, and vice versa; but the omission of some duty in Mississippi cannot transfer a consequence of it manifested physically in another State to Mississippi. The cases of injuries commenced in one jurisdiction and completed in another illustrate our view on this subject. The true view is that the legal entity called the corporation is omnipresent on its railroad, and the presence or absence of negligence with respect to an occurrence at any point of the line is not to be resolved by the place at which any officer or employee was stationed for duty. The question is as to duty operating effectually at the place where its alleged failure caused harm to result. The locality of the collision was in Tennessee. It was there, if anywhere, that the company was remiss in duty, for there is where its proper caution should have been used.

Again, the argumentation is purely conceptual and fails to state authority as well as intelligible reasons.
An additional clue, however, is afforded by the opinion of the *Carroll* case itself. The plaintiff's attorney had cited an Alabama case in which it was held that a murderer might be prosecuted and punished where the fatal blow was delivered, irrespective of where death ensued. This argument was answered by the court in the following sentences:

This principle is patently without application here. There would be some analogy if the plaintiff had been stricken in Alabama and suffered in Mississippi, which is not the fact. There is, however, an analogy which is afforded by the criminal law, but which points away from the conclusion appellee's counsel desire us to reach. This is found in 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, it 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.

1 Bish. Crim. Law, § 110 et seq.; 1 Bish. Crim. Proc. § 53 et seq.

This reference to the "well-established doctrine of the criminal law," which we shall meet again, is more important than its seemingly insignificant role in the *Carroll* case appears to indicate.

Another case which one encounters in case-books and texts is *Le Forest v. Tolman*. The defendant lived in Massachusetts, close to the New Hampshire line. His dog strayed into New Hampshire and there bit the plaintiff. *Scienter*, required for holding the defendant liable at common law, could

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not be proved. However, the plaintiff pleaded a Massachusetts statute which declared a dog owner liable without such proof. In an opinion marked for brevity, Chief Justice Gray refused to apply the Massachusetts statute. All he had to say on the point was this:

This statute is not a penal but a remedial statute, giving all the damages to the person injured. *Mitchell v. Clapp*, 12 Cush. 278. It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible.

These words make it clear that the case does not constitute a precedent for the place-of-harm doctrine, which does not come into play in any cases other than those where the place of conduct and the place of harm are situated in different jurisdictions. In the conception of Chief Justice Gray, the place of wrongful conduct and that of the harm were both in the same state.

To complete the list of cases which one encounters in the texts and search-books as authority for the place-of-harm rule we still have to consider several cases which are adduced in the most recent search-book, *viz.* the fifteenth volume of Corpus Juris Secundum.87 In addition to our old friends, the *Carroll* case,88 the *Connecticut Valley* case,89 the *Otey* case,90 the *Keeler* case,91 *Cameron v. Vandergriff*,92 and *Moore v.*

87At pp. 899-900, § 12(2).
88Supra note 81.
89Supra note 46.
90Supra note 44.
91Supra note 70.
92Supra note 58.
Pywell,93 we find the cases discussed in the following paragraphs:

Kristansen v. Steinfeldt94 belongs to a group of cases about which we shall have more to say later on. A dock worker, while on board ship, was fatally injured by a force which had been set in motion by a person standing on land. The New York state court, in which the action for damages was brought, held that it was without jurisdiction, the case properly belonging to the admiralty jurisdiction of the federal courts. That cases of this type cannot properly be used as precedents in the choice-of-law cases, will be shown later.

Dallas v. Whitney95 was concerned with a situation analogous to that of Cameron v. Vandergriff96: blasting operations carried on in one state, viz. West Virginia, caused harm to the plaintiff's house situated in another state, viz. Ohio. Simply citing the Cameron case, the article in Ruling Case Law97 and the treatises of Beale and Goodrich, the court repeated the place-of-harm rule and decided the case accordingly.

Conklin v. Canadian-Colonial Airways98 has nothing to do with the problem for which it is cited. A passenger was killed in an airplane accident which happened in New Jersey. When sued in New York, the airline sought to limit its liability in accordance with a clause on the ticket, which had been sold in New York. Applying New York law as the law of the contract, the court held the clause invalid.

The cases discussed in the following paragraphs, together with the Carroll case, are cited in Corpus Juris Secundum for the propositions that in death actions the lex loci delicti is the place where the accident occurred, and that the right to recover for death depends upon the law of the place of the act

93Supra note 59.
94165 Misc. 575, 300 N. Y. S. 543 (1937).
96Supra note 58.
97See supra note 82.
98266 N. Y. 244, 194 N. E. 692 (1935).
or omission that caused it, the place where the first injury was sustained, and not upon the law of the place where death occurred:

Kansas City Ft. S. & M. R. Co. v. Becker99 and St. Louis, I. M. & S. Ry. Co. v. Brown100 seem, upon the facts, to be similar to the Carroll case. However, the problem actually discussed in the Becker case was whether the claim of an injured railroad employee was based upon tort or contract. This problem also appeared in the Carroll case, where it was held that the employee’s claim was to be characterized exclusively as a tort claim. In the Becker case it was held, however, that the employee had a power of selection between suing on the contract on the one hand, and waiving his contractual claim and suing in tort on the other. The accident had happened in Arkansas, and the question of whether an act of negligence had occurred was an issue of fact. That such an act, if it occurred at all, would have occurred in Missouri, is mentioned as a factual circumstance, but the opinion does not contain any discussion of the problem of choosing between the law of the place of harm and the law of the place of conduct. It cannot even be said that the former law was impliedly held to be applicable by the court. The plaintiff in his declaration had simply stated that an accident had happened to him in Arkansas, the state where he brought his action, and only when the defendant denied that any negligence had occurred did it appear that some conduct had been carried on in Missouri. Neither party used this newly raised factual allegation for a claim that Missouri law should be applied.

In the Brown case,101 a railroad employee suffered an accident in the Indian territory; the action was brought in Arkansas. The railroad company, alleging that the accident was caused through the negligence of a fellow-servant in Kansas, claimed that the law of that state should apply. The court,

10067 Ark. 295, 54 S. W. 865 (1899); the two cases also appear in Annotation, 56 L. R. A. 193, 217.
101 Supra note 100.
stating that the common law was presumed to be equally in
force both in Kansas and the Indian Territory, held that the
common law allowed the defendant to invoke the fellow-serv-
ant rule under the circumstances of the case. By way of addi-
tional argument the court expressed itself as follows:

In all actions ex delicto for injuries to person or
property ... the right to recover, and the limit of the
amount of judgment, are determined and governed
by the laws of the place where the injury was done 
... The injury in this case was done in the Indian
Territory. The common law was in force in that
country at that time.

Whatever weight one might be inclined to ascribe to this
dictum is destroyed by the court's reference to two cases which
had nothing to do with the problem but simply held that in
tort cases a court had to apply the lex loci delicti rather than
the lex fori.102

Melton's Adm'r v. Southern Ry. Co.103 was concerned with
the problem of whether in an action for wrongful death venue
was to be laid in the state where the death occurred or in the
state where the accident happened; the question was answered
in favor of the latter. With the proposition in support of
which the case is cited, it has nothing to do.

Darks v. Scudders-Gale Grocer Co.104 presented a factual
situation of some surface similarity to that with which the
Court of Appeals of the District of Columbia had to deal in
Moore v. Pywell.105 A wholesale grocer in St. Louis, Missouri,
sold a grocer in Oklahoma a product which was labelled as
ginger extract. The Oklahoma grocer drank from one of the
bottles and died shortly thereafter. The extract, it turned out,
contained poisonous wood alcohol. There were numerous is-

102Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38
L. Ed. 958 (1894); Carter v. Goad, 50 Ark. 155, 6 S. W. 719 (1888).
103236 Ky. 629, 33 S. W. (2d) 690 (1930).
104146 Mo. App. 246, 130 S. W. 430 (1910).
105Supra note 59.
sues of fact and law, the principal one being that of determining whether a wholesaler was responsible even though he had not himself manufactured and labelled a dangerous drug bearing a harmless label. Drawing on precedents from numerous jurisdictions without indicating in any way which state law governed the decision, the Missouri appellate court answered the question affirmatively. The only choice-of-law problem expressly raised and discussed as such was that of determining whether the statutory maximum amount of damages for wrongful death was that of the statute of Missouri, where the defendant carried on his business, or that of Oklahoma, where the decedent had taken the poisonous drink. In one short sentence the court declared the latter law applicable, simply citing Wharton on Conflict of Laws,\textsuperscript{106} the Carroll case,\textsuperscript{107} Cameron v. Vandergriff,\textsuperscript{108} Rundell v. La Compagnie Générale Transatlantique, an admiralty case of which we shall have to speak,\textsuperscript{109} Northern Pacific R. R. Co. v. Babcock,\textsuperscript{110} and the Brown case,\textsuperscript{111} both of which have just been discussed.

Of the remaining six cases cited in Corpus Juris Secundum, none has anything to do with our problem.\textsuperscript{112}

\textsuperscript{107}Supra note 81.
\textsuperscript{108}Supra note 58.
\textsuperscript{109}See infra note 113.
\textsuperscript{110}Supra note 102.
\textsuperscript{111}Supra note 100.
\textsuperscript{112}They are the following: Vancouver S. S. Co. v. Rice, 288 U. S. 445, 53 Sup. Ct. 420, 77 L. Ed. 885 (1933) (demarcation between "land" and admiralty law when accident happened on board ship and death occurred on land); Betts v. Southern Ry. Co., 71 F. (2d) 787 (C. C. A. 4th 1934) (determination of person entitled to bring a death claim by the workmen's compensation act of the place where the contract of hire was made or by the act of the place where the accident occurred); Hoodmacher v. Lehigh Valley R. Co., 218 Pa. 21, 66 Atl. 975 (1907) (law of place of accident or of place of death); Oberholzer v. Oberholzer, 12 Pa. Dist. & Cty. Rep. 271 (1928) (institution in Pennsylvania of action for New York accident and proper law applicable); Rositzky v. Rositzky, 329 Mo. 662, 46 S. W. (2d) 591 (1931) (institution in Missouri of action for wrongful death in Iowa); Stewart's Adm'x v. Bacon, 253 Ky. 748, 70 S. W. (2d) 522 (1934) (institution in Kentucky of action for wrongful death in Canada).
Of the cases alleged to support the place-of-harm rule there remains only one more for scrutiny, viz. Rundell v. La Compagnie Générale Transatlantique. A French passenger boat became involved in a collision on the high seas and sank, as a result of which numerous lives were lost. The survivors of an American passenger who had lost his life in the catastrophe sued the shipping company, alleging that the collision was caused by negligent navigation. The company pleaded that claims for wrongful death were unknown to the general maritime law as applied in American courts and that the French wrongful death statute could not be applied unless it were proved that the passenger was injured while he was still on board the French ship. The court upheld this defense, stating that, in the absence of proof, it was more logical to assume that the passenger had come to death by drowning in the high seas rather than by some event occurring on board ship. "The damage is the substance . . . of the injury," the court stated, "and from that alone springs the right of recovery."

On its face, this sentence seems to constitute a clear expression of the place-of-harm rule, but let us see which precedents served the court as authorities for its shocking decision.

The first of them is The Plymouth, a case of great fame in the field of admiralty. While a ship was lying at a pier in the Chicago River, a fire was started through the negligent conduct of some member of the crew. The fire sprang to the shore and caused damage to the plaintiff's warehouse and the goods stored therein. The plaintiff brought a libel in the federal district court which, however, denied that admiralty jurisdiction extended to the case. This decision was ultimately affirmed by the United States Supreme Court. Speaking through Mr. Justice Nelson, the court stated that admiralty jurisdiction over marine torts depended upon locality,

113 100 Fed. 655, 49 L. R. A. 92 (C. C. A. 7th 1900); it occupies a conspicuous position in the Annotation in 56 L. R. A. 193, 217, which has played such a prominent role in the history of the alleged place-of-harm rule; it is also quoted as the most prominent authority in 11 Am. Jur., Conflict of Laws (1937) 493, § 182.

114 2 Wall. 20, 18 L. Ed. 125 (U. S. 1865).
and that a marine tort was characterized not by the fact that the harm-creating activity was carried on upon the navigable waters but by the fact that the harm occurred on the water rather than on land.

One of the cases discussed was *United States v. Davis*, a decision rendered by Mr. Justice Story as circuit justice. While an American ship was anchored in Raiatea Harbor in the Society Islands, a despotic captain provoked a mutiny; firing a shot, he accidentally killed a man who was standing on board a native boat. The captain was indicted in the federal court in Boston under the federal Crime Act of 1790, by which jurisdiction over crimes committed on board American vessels on the high seas was given to the federal admiralty courts. In addition to the defense that Raiatea Harbor was not a part of the high seas, the prisoner pleaded that the offense was not committed on board the American vessel where the shot was fired, but on board the other vessel where the bullet hit the victim. Leaving open the first problem, whose decision was said to depend upon delicate questions of topography, Story held that the crime if any, was committed not on board of the American ship Rose; but on board of a foreign schooner belonging to inhabitants of the Society Islands, and of course, under the territorial government of the King of Society Islands, with which kingdom we have trade, and friendly intercourse, and which our government may be presumed (since we have a consul there) to recognize as entitled to the rights and sovereignty of an independent nation, and of course entitled to try offenses committed within its territorial jurisdiction . . . The act was, in contemplation of law, done where the shot took effect. So the law was settled in the case of *Rex v. Coombes*, 1 Leach 388 where a person on the high seas was killed by a shot fired by a per-

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115 Fed Cas. #14,932 (C. C. Mass. 1837).
son on shore, and the offence was held to be [sic]
committed on the high seas, and to be within the
admiralty jurisdiction.

Here, it seems, we have reached one of the very fountain-
heads of the place-of-harm doctrine: one of the earliest Amer-
ican cases concerned with marking off the criminal jurisdic-
tion of the federal admiralty courts from the jurisdiction of
the state courts over land crimes, a case which was decided
by one of the most influential of all American judges; a case
which was based on a venerable precedent of no less an Eng-
lish court than the Exchequer Chamber; a case which, in
turn, had been influenced by decisions on jurisdiction over
crimes in general, and which has nothing at all to do with
choice of law in the sense of the conflict of laws. The
other fountainhead, it will be remembered, was consti-
tuted by Livingston v. Jefferson,117 a case which, transplanting
to the United States the obsolete doctrine of local action, has
equally little to do with choice of law. Finally a third foun-
tainhead is found in that combination of territorialism and
the vested rights theory, whose portentous American career
extends from the Treatise on Conflict of Laws by the same
Joseph Story who decided the admiralty case of United States
v. Davis to Joseph Beale and the Restatement.

This historical connection is neatly illustrated by Minor's
treatise on conflict of laws, published in 1901, which seems
to be the earliest American treatise expressly dealing with the
problem of this article. On Pages 481-482, it is axiomatically
stated that "where the injury is the result of a series of acts,
some of which occur in one state, while the culmination takes
place in another . . . the rule in such cases is that the place
where the liability of the perpetrator first becomes fixed is the
locus delicti, or situs of the tort."

As authorities, we are referred to the Carroll case118 and

117Supra note 56.
118Supra note 81.
the Doyle case;\textsuperscript{119} Cincinnati, H. & D. R. Co. v. McMullen\textsuperscript{120} and Louisiana & N. R. Co. v. Williams\textsuperscript{121} are introduced with a "but see." "For analogous principles with respect to crimes" the reader is referred in a revealing footnote to the appropriate section of the book.

The precedents cited are meager. However, they are hardly important within the context of Minor's book, where the place-of-harm theory appears as a self-evident conclusion from the territoriality-vested rights approach, by which the whole book is permeated.\textsuperscript{122}

Such admiralty cases as that of The Plymouth\textsuperscript{123} appear to be quite similar to conflict of laws cases. They seem to be concerned with the conflict between the law of the land on the one side and the law of the sea on the other. Torts committed at sea are subject to maritime law, which differs from the ordinary common law in several respects, for instance, in respect to the treatment of contributory negligence. However, the difference as to the rules of substantive law is only an indirect consequence of the fact that two different sets of courts have respective jurisdiction over land and over maritime cases, \textit{viz.} the ordinary courts of common law and equity on the one side, and the courts of admiralty on the other. To draw the line of demarcation between these two sets of courts has been the task of the courts in those cases which are encountered in the torts field. For centuries, the two sets of courts have been rivals. From the days of Lord Coke to the eighteenth century, the English common law lawyers fought against the competition of the civilian lawyers with whom the courts of admiralty were staffed. The outcome of their long struggle was that the jurisdiction of the admiralty courts was limited to cases which were strictly confined to the

\textsuperscript{118}Supra note 84.
\textsuperscript{120}117 Ind. 439, 20 N. E. 287 (1889).
\textsuperscript{121}113 Ala. 402, 21 So. 938 (1897).
\textsuperscript{122}See, \textit{e. g.}, the programmatic statement in the last paragraph at p. 6.
\textsuperscript{123}Supra note 114.
When, as late as 1785, the problem of "mixed cases" was settled in *Rex v. Coombes*, the struggle had abated, and the common-law judges could afford to be so generous as to leave to the admiralty courts jurisdiction when the conduct was carried on on land and the effect took place at sea. In reaching this result, they were quite obviously influenced by the criminal law cases.

In the United States the problem of drawing the line between the jurisdiction of common law courts and admiralty courts assumed political importance because it coincided with the demarcation of state power from federal power, a delicate problem of explosive character. In 1851, the United States Supreme Court had taken the bold step of asserting that the federal admiralty power extended over all navigable inland waters. In accordance with time-honored judicial tradition, this innovation was not, however, labelled as such, but was expressed in terms of a conclusion derived from long-existing rules of law. When the considerably less important problem of "mixed torts" came up for decision in 1865 and when in that case the Court was expressly asked to carry on the policy of extending federal jurisdiction, the Court was obviously happy to have an occasion to prove that its decisions in matters of admiralty jurisdiction were rendered strictly in accordance with law, and following Story's decision in *United States v. Davis*, which as we have seen, was based on *Rex v. Coombes*, it decided that federal jurisdiction could not be exercised in a case where the harm had

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124 For descriptions of the long struggle between common law courts and admiralty courts, see Mears, The History of the Admiralty Jurisdiction, 2 Essays in Anglo-American Legal History (1908) 312; 1 Holdsworth, History of English Law (1922) 553; 5 id. (1924) 143.

125 Supra note 116.

126 See *infra* at pp. 195-197.


128 The *Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. Ed. 1058 (U. S. 1851).

129 The Plymouth, *supra* note 114.

130 Supra note 115.

131 Supra note 116.
occurred on land, even though the harm-creating conduct took place upon navigable waters. *The Plymouth* became the starting point for a long line of decisions which were all concerned with marking off the federal maritime jurisdiction from the land jurisdiction of the state courts;\textsuperscript{132} and which were all regarded as precedents in the peculiar case of the American passenger drowned in the disaster of the French ship,\textsuperscript{133} a case which, as we have seen, has come to occupy a prominent position among the cases claimed to support the place-of-harm rule.

In terms these admiralty cases "define" the "place of wrong," but they do so in their own context and for their own purposes, and the policies on the basis of which the jurisdiction of admiralty courts is marked off from that of state courts are different from those which are to be considered in choice-of-law cases.

The same sin of concluding that identity of words necessarily indicates identity of issues and policies was committed when criminal law cases were used as precedents for the decision of problems of choice of law. For reasons which were closely connected with the jury system and particularly with the principle that the jury was always to be summoned from the vicinage, the conclusion was drawn in England that venue in criminal cases was to be laid in the county in which the crime was committed. Even when this rule had been softened, it was analogously applied to the problem of jurisdiction.\textsuperscript{134} Jurisdiction over crime, it was said, is local and cannot be exercised by any state or country other than that where the


\textsuperscript{133}Rundell v. La Compagnie Générale Transatlantique, \textit{supra} note 113. \textsuperscript{134}As to the historical development, see Sack, \textit{loc. cit. supra} note 29.
crime was committed. When the perpetrator of an alleged crime is acting in one state and produces a criminal effect in another, the problem arises as to which of those two states shall have jurisdiction to prosecute and punish. After considering the background just stated, one can easily understand why this problem was expressed in terms of the determination of the "place where the crime was committed" or simply the determination of the "place of wrong." Seemingly we have the same problem as in the choice-of-law cases concerning civil liability for tort; but, again, the issues and, consequently, the underlying policies are different. The policies to be considered in criminal cases have resulted in a significant break with the old law. In England itself as well as in most American states jurisdiction over a criminal prosecution is now assumed by both the state where the accused acted and the state where the effect took place. A person is then held criminally responsible at the place whose standards of permissible conduct have been violated and by the state which wishes to protect the interests regarded to be located within it and declared by its law to be worthy of protection. This solution corresponds to sound policy provided a limitation is recognized: in order not to be incompatible with the principle of protection of justified expectations, a state must not punish a person for conduct which was permissible in the state where it was carried on and which could not reasonably be foreseen to produce harmful effects in a state where such conduct is criminal. Such situations will be rare, however. As contrasted with torts, most crimes require intent in the sense of foreseeability of the harmful effect. Indeed, the elaborate survey of the cases in Stimson's book on the conflict of criminal laws does not contain a single case in which an accused, while acting in one state, produced a criminal effect in another state which he could not

135 The cases are collected in Stimson, Conflict of Criminal Laws (1936) 20 et seq. See also Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, 29 Am. Jour. Int. Law (Supp.) 439 et seq. (1935).

have reasonably expected. Thus, as to criminal law the general place-of-harm rule, although not accurate, is at least innocuous. But its uncritical importation into the conflict of laws was a source of harm and confusion.

Equally unjustified was the uncritical use of cases dealing with "local actions." We have seen above that in England the choice-of-law technique was not used before the latter part of the eighteenth century. No law other than the common law of England was applied by the Royal Courts at Westminster, and whenever a case was brought before them in which the application of that law would have been inappropriate, they simply refused to take jurisdiction.\(^\text{137}\) When the choice-of-law technique was introduced into the courts of England, and actions requiring decision under foreign law became "transitory," the older approach survived in several exceptions. With respect to divorce cases, for instance, the old technique has been preserved to the present day both in England and the United States. Whether a ground for divorce exists is not decided by any law other than that of the forum, and the only question of conflict of laws considered in divorce cases is not one of choice of law but of jurisdiction. Once a court has found that it has jurisdiction to hear an action for divorce, it applies its own substantive law as a matter of course.

A similar situation exists in cases dealing with the internal affairs of corporations\(^\text{138}\) and in workmen's compensation cases to be decided by industrial commissions or similar boards. Finally, it has survived in actions concerning title to land, including actions for trespass to land. Such actions are still regarded as "local," \textit{i.e.}, as actions which cannot be brought in any place other than that where the land is situated.\(^\text{139}\) Whether this approach is justified need not be investigated here. Insofar as it exists, it is clear that actions

\(^{137}\)See \textit{supra} at p. 23.

\(^{138}\)\textit{Cf.} 2 Beale, \textit{op. cit supra} note 4, at p. 885, \S 192. 1.

\(^{139}\)See \textit{supra} at pp. 168-171.
for trespass to land brought in a place other than that of the
situs must be declared to be inadmissible, even though they
might have been brought at the place where the alleged tres-
passer was acting. To use such cases as precedents in choice-
of-law cases is inappropriate because they, again, have noth-
ing but words in common with cases where the problem is one
of choice of law.

The problem which we have discussed in this long article
is narrow, but it is significant. It neatly illustrates a way of
thinking which has done harm in many fields of law. A cer-
tain act which is disapproved in the legal order and which is
therefore called a "wrong" must be localized for a certain
purpose, and in so doing the court uses the short-hand term of
"place of wrong." At some later time some other wrong
must be localized for some other purpose. Without inquiring
whether the same localization is justified by similarity of
policies, the court seizes upon the term "place of wrong" and
uses it in the new context. This method of "lump concept
thinking" has been properly and severely criticized in re-
cent years. It has resulted in the abuse of such terms as
title, delivery, domicile, and marriage. If stare
decisis is to fulfill its proper function, it must free itself from
the blind assumption that homophonous words denote iden-
tical problems. A sound "jurisprudence of interests" must
consider the interests at stake in every particular problem in
the light of the policy judgments prevailing in the community
in question. Under such an approach even our proposals as
to the treatment of tort problems in choice-of-law cases will

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140 The term has been coined by Karl N. Llewellyn; see his Cases and
141 See Llewellyn, op. cit. supra note 140.
142 See Rabel, A Draft of an International Law of Sales, 5 Univ. Chi.
L. Rev. 543, 549 et seq. (1938).
143 See especially Cook, op. cit. supra note 23, ch. 7.
144 See Bingham, The American Law Institute v. The Supreme Court
in the Matter of Haddock v. Haddock, 21 Corn. L. Quar. 393 (1936);
Bingham, Song of Sixpence, 29 id. 1 (1943).
71 (1928).
probably turn out to be too broad. Our argumentation, though it is hoped to be applicable to the problem of whether a certain type of conduct subjects the actor to civil liability, may well appear to be inapplicable to such other problems as measure of damages, influence upon the tort-feasor’s liability of contributory fault of the tort victim, or to such peculiar defenses as the fellow-servant rule or assumption of risk. Upon closer investigation, the holding of the Carroll case may well turn out to be justified. The case, it should be noted, was not concerned with the tortious character of the conduct of the employee for which the railroad was sought to be held liable, but with the availability of the defense of fellow-servant. This very fact should have been a caution signal against the use of the decision as a precedent in cases concerned with the problem of whether certain conduct is tortious in the sense of creating liability in the absence of special defenses. Further investigation of problems of this kind is needed as well as investigation to determine the scope of problems to which the choice-of-law rule concerning tort liability can appropriately be applied. It will then turn out that the place-of-wrong rule, in whichever sense it is understood, is inappropriate for determining the law which decides whether personal injury claims are permissible as between husband and wife, or whether a personal injury claim is to be satisfied out of the assets of a decedent estate.\textsuperscript{146}