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

Max Rheinstein
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That problems of the law of torts are to be decided in accordance with the law of the place where the alleged tort was committed has long been regarded as axiomatic in the conflict of laws of the United States as well as of the so-called civil law countries. Were it not for the divergent attitude of the British courts,1 the rule that torts are “governed” by the lex loci delicti (law of the place of wrong) might be regarded as one of the few rules of conflict of laws which are uniform throughout the world. Among the reasons which recommend the rule and which have undoubtedly contributed to its almost universal acceptance, is the apparent simplicity of its application. Where a tort has been committed seems to be a question of easy determination. It is the place where the events occurred, as contrasted with the forum, i.e., the place where the action happens to be brought. However, cases occur where the determination of the place of wrong is not quite so easy. The alleged tort-feasor, acting in one jurisdiction, produces a harmful result in another. Is the place of wrong the place where the actor carried on his conduct, or is it the place where the harm occurred?2 The Restatement

*The concluding installment of the present article will appear in a subsequent issue of the Review.

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1See infra at p. 23; as to divergences to be found in other countries, see Kuhn, Comparative Commentaries on Private International Law (1937) 310; Ficker, in 4 Rechtsvergleichendes Handwoerterbuch 388 (1933).

2Even more complicated are the cases in which the conduct was carried on in, or in which the harm extends over, more than one jurisdiction, or in which both conduct and harm extend respectively over more than one jurisdiction. For instance, D, shooting in state X, hits P in state Y; or D writes in several states letters containing fraudulent allegations, which by their combined effect induce P to make in another state a harmful disposition of his property; or D, while speaking over a radio broadcasting station in state X makes defamatory statements about P which are heard in a whole number of states. In what jurisdiction has the alleged tort been committed? The follow-
of the Law of Conflict of Laws, in the first section of its chapter on "Wrongs," answers the question as follows:

§ 377. The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.

The Note to Section 377 of the Restatement contains the following "Summary of Rules in Important Situations Determining Where a Tort is Committed":

1. Except in the case of harm from poison, when a person sustains bodily harm, the place of wrong is the place where the harmful force takes effect upon the body.

2. When a person causes another voluntarily to take a deleterious substance which takes effect within the body, the place of wrong is where the deleterious substance takes effect and not where it is administered.

3. When harm is caused to land or chattels, the place of wrong is the place where the force takes effect on the thing.

4. When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made.

5. Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated.

These rules and the principle of which they are applications, are derived from general theories which underlie the entire structure of the Restatement of Conflict of Laws. In accordance with the thought of its principal author, the late Pro-
fessor Joseph H. Beale of Harvard, the Restatement conceives of the conflict of laws as that branch of the law which is concerned with the enforcement of foreign-created rights. Once a right has been created by the state or country which had jurisdiction to do so, it must be enforced by all other states or countries. The state which has jurisdiction to create a right in a certain situation is determined in each case upon the basis of the principle of territoriality: each state has jurisdiction over persons being within the territory, over things situated within the territory, and over acts done and events occurring within the territory. With respect to "legislative jurisdiction," the latter idea is spelled out more fully in Section 64, *et seq.*, of which the relevant passages are as follows:

§ 64. A state can provide for the creation of interests as a result of acts done in the state or of events which happen there.

§ 65. If consequences of an act done in one state occur in another state, each state in which any event in the series of act and consequences occurs may exercise legislative jurisdiction to create rights or other interests as a result thereof.

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3Professor Beale was the reporter of the subject. That his influence was decisive in determining the basic approach and system of the Restatement is a matter of common knowledge. His three volume treatise on The Conflict of Laws, which was published just one year after the Restatement was promulgated in 1934, and whose arrangement corresponds with that of the Restatement, is commonly accepted as an authentic commentary.

4Cf. 1 Beale, Conflict of Laws (1935) 64, 65.

5Restatement of Conflict of Laws (1934) § 42. As used in the Restatement, the word "jurisdiction" means "the power of a state to create interests which under the principles of the common law will be recognized as valid in other states." The word "state" in turn is defined as follows in § 2: "As used in the Restatement of this subject, the word state denotes a territorial unit in which the general body of the law is separate and distinct from the law of any other territorial unit."

6Restatement of Conflict Laws (1934) § 47.

7Id. §§ 48, 49.

8Id. § 55.
Hence, in the case of a multiple contact tort "legislative jurisdiction" appertains to the two states concerned, the state in which the alleged tort-feasor was acting as well as to the state in which the harmful effects took place. However, another principle, viz. that of vested right, points with necessity toward the latter place.

In order to have a wrong it is necessary to have a right which is injured by the wrong. Rights heretofore considered\(^9\) have been of the kind known as primary or static rights; that is, they have been created once for all, and remain existent until in some way put an end to. We are now to consider a class of rights which are different, in that they are rights constantly created anew in a continuous series . . . They are rights protecting the static rights or enabling the owner to enjoy them.

The injury of one of these protective rights by any person other than the owner is a wrong. If the right is that of a private person, the wrong is a tort. If it is in favor of the state, the wrong is a crime . . .

The place where any tort is committed depends upon the place where incidental right of protection is injured . . . Incidental rights are created in every place in which the ownership of the static right is to be enjoyed. It follows that the place of wrong is the place where the person or thing harmed is situated at the time of the wrong.\(^10\)

The idea is the same as that which underlies the sections of the Restatement dealing with contracts, according to which the law of that place governs where the alleged contractual right has sprung into existence, i.e., the law of the place where there occurred "the principal event necessary to make

\(^9\)I. e., property interests, contractual claims, etc.
\(^10\)Beale, op. cit. supra note 4, at pp. 1286-1287.
a contract,"^{11}$ or, as Beale expresses it, where there was done "the final act which made the promise or promises binding."^{12}

Indeed, this solution seems to be required with logical necessity for the fields of both contracts and torts: conflict of laws is concerned with the enforcement of foreign-created rights. "The plaintiff owns something, and we help him to get it."^{13}

The plaintiff cannot own anything until a cause of action has arisen for him. In a contract situation, no cause of action can conceivably arise before there has been done the last act to make the contract binding; an action for tort cannot conceivably arise until the plaintiff has suffered a harm. This cause of action for damages "naturally" arises not only at the time *when* the harm is suffered, but also at the place *where* it occurs. All that is to be done is to determine at what time and, consequently, in what place the cause of action arose whose enforcement is sought by the plaintiff. This task has been undertaken in the note to Section 377 of the Restatement, which has just been stated.

The rules of that note, it may be well to remember, are stated as being required by logical necessity. They *cannot* be otherwise without offending against elementary laws of logic, and laws of logic, constituting the rules of coherent thought, are inexorable. It is therefore with surprise that we meet Section 382 of the Restatement, whose two sub-sections read as follows:

1. A person who is required by law to act or not to act in one state in a certain manner will not be held liable for the results of such action or failure to act which occur in another state.

2. A person who acts pursuant to a privilege conferred by the law of the place of acting will not be held liable for the results of his act in another state.

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^{11}Restatement of Conflict of Laws (1934) § 311, Comment (d).
^{12}Beale, *op. cit. supra* note 4, at p. 1045.
The application of Sub-section (1) is explained by the following illustrations:

1. It is the duty of a health officer in state X to destroy infected rags by burning. The place for burning the rags is fixed by law. By burning the rags in that place, he causes a nuisance in state Y. He has a legal defense to any suit against him in Y based upon the burning of the rags.

2. The facts are the same as in Illustration 1, except that no particular place is provided by law for the rags to be burned. The officer has a choice of two places. One of them would obviously cause a nuisance in state Y and the other would obviously cause no nuisance; there is no other reason for preferring one place to the other. He burns the rags in the former place. He is liable for creating a nuisance in Y. (Italics ours.)

3. The master of a vessel registered in state X, whose vessel is in state Y, is compelled by an official of Y to take on board a person exiled by Y. He carries that person against his will to the high seas, and upon passing out of the territorial limits of Y, the person demands to be set at liberty. The master is forbidden by the law then controlling his conduct to turn aside from his course, and by keeping to his course he can set the exile at liberty only when he reaches port. The master is justified for the imprisonment of the exile during the voyage.\(^4\)

The rule of the second sub-section is illustrated by the following hypothetical cases:

4. By the law of state X, a person who, acting in a non-negligent manner, harms another in a reasonable attempt to save the life of a third person, is not

\(^4\)The facts are those of the English case of Regina v. Lesley, 1 Bell 220, 169 Eng. Rep. 1236 (1860).
liable to the other; by the law of state Y, he is liable.

A, in state X, seeing B about to murder C, shoots at B. The bullet fails to hit B, but does hit and wound C, who is at the time standing in state Y. The act of A is privileged by the law of X, not by the law of Y. If A is not negligent in the use of his gun, he is not liable to C.

5. By the law of X, an attacked party may lawfully stand his ground and defend himself by killing if necessary; by the law of Y, he should retire without killing if it is safe to do so. A, in X, is attacked by B, who apparently intends to kill A. A reasonably believes that the only way he can save his life without retiring is to shoot B. He stands his ground, shoots at B, misses him and hits C in state Y. If he shoots at B with reasonable care to avoid hitting third persons, he is not liable to C.

6. By the law of state X, a sheriff is authorized to shoot a fleeing murderer. X, however, having accepted as part of its law doctrines of international law, does not authorize its officers to shoot any person in the neighboring state Y. A sheriff of X pursues, in X, B, a fleeing murderer and shoots at him, but does not stop him. B crosses the line into Y. The sheriff may not thereafter shoot at him.

In all these illustrations, the decisions absolving the alleged tort-feasor of liability are eminently sound. But how do they fit in with the general scheme of the Restatement? If it is logically necessary that a cause of action arising at the place of harm be enforced everywhere, how can it be justified that a "privilege" existing at the place of acting, or a requirement to act or not to act in a certain manner established by the law of the place of conduct, prevents the enforcement of the cause of action which has arisen at the place of harm? No justification for this exception is even hinted at in the comments to Section 382; nor can any jus-
tification be found in Beale's Treatise. When we try to apply the exception, we find an antinomy. In explanation of the cryptic words of Section 382, Sub-section 2, Comment (c) to that section contains the following statement:

The word "privilege" denotes the fact that conduct which, under ordinary circumstances, would subject an actor to liability, under particular circumstances does not subject him thereto (see Restatement of Torts, § 10). It is necessary to distinguish between a situation in which an actor is not liable because of a privilege, and situations in which he is not liable because the policy of the law is not to impose liability for harm caused by a certain general type of conduct. Thus, one who intentionally shoots another is, unless privileged, liable for the harm caused. If the actor in such a case is privileged, he is not liable, but this is because of some particular circumstances which make the case exceptional. On the other hand, if a person, while driving his car with due care strikes a pedestrian and injures him, he is not liable; but in this situation, the actor is immune from liability not because of some particular circumstances which make the case an exception to the general rule, but because the general rule is that liability is imposed in such cases only when the actor has been at fault. This distinction is important in the Conflict of Laws because, as stated in § 379, the general question of the liability-creating character of the actor's conduct is determined by the law of the place of wrong, while under the statement of Sub-section (2) of this Section, the question of privilege is determined by the law of the place where the actor acts.

In the various legal systems of the world, and especially in the several variations of the Anglo-American common law, a certain line of human conduct is declared to be "tortious"
when it is anti-social, i.e., when it falls below a line of conduct expected of the members of a civilized society. On the other hand, conduct which is in accordance with the social standard of the members of the community is non-tortious. If the concept of privilege is more than a mere technicality, it means that conduct which per se is anti-social, is tolerated under certain peculiar circumstances. Hence, if a person engages in conduct which is regarded as being in accord with the standard of conduct of the community where he is and where he acts, but which happens to cause harm in a community where the actor's conduct, had he been there, would be regarded as anti-social, he is liable under the Restatement. If, however, he engages in conduct which, although generally regarded as anti-social at the place where the actor is and acts, appears excusable because of some peculiar circumstances, and harm is caused at a place where the conduct, had it been carried on there, would not be regarded as excused, the actor is not liable. In other words, the actor is not liable for conduct generally regarded at the place of acting as anti-social and dangerous and only excused because of peculiar circumstances, but he is liable for conduct which is generally regarded there as innocent and socially blameless!

This strange result follows from the rules of the Restatement when the concept of privilege is regarded as implying a social evaluation of conduct. More likely, however, the concept of privilege is a merely technical one, a device invented for the purpose of more conveniently stating a complicated set of legal rules. A certain line of conduct, for instance, conduct inducing another to breach a contract, is anti-social under some circumstances and perfectly correct in others. A person interested in a systematic presentation of the law, i.e., a presentation of the law which facilitates the retention of a variety of phenomena by the mind, may express the situation in either one of the following two ways:

Either he may say that inducing a breach of contract is a permissible activity, unless there are present certain ag-
gravating circumstances; or he may say that inducing a breach of contract generally constitutes a tort, unless there are present certain circumstances which amount to a privilege. The former technique is commonly used by German text-writers, who say that inducing breach of contract is not a tort unless the actor's conduct was carried on under such aggravating circumstances as to make it appear as a violation of the standard of *boni mores* in the technical sense of Article 826 of the German Civil Code. The second technique is used by numerous English and American writers, for instance, by the draftsmen of the Restatement of Torts.\textsuperscript{15} Shall the *mere accident* of different techniques of presentation being used in different states or countries determine liability? Assume that $D$, while acting in $X$, induced $T$ to break his contract with $P$; that the breach of contract occurred in $Y$, that under the law of $Y$, inducing breach of contract under the circumstances of the case amounts to a tort, while under the law of $X$ the actor is not liable. Under the Restatement, $D$ is liable if $X$ is Germany, where his conduct does not constitute a tort; he is not liable, however, if $X$ is the United States, where his conduct, while generally constituting a tort, is privileged under the circumstances of the case. Such a distinction is predicated upon *accidental* circumstances, which have no intrinsic connection with the policies of the case. The exception established by Section 382 of the Restatement can only be understood as an inadequate attempt to narrow down the scope of application of a bad rule.

The operation of another exception to the place-of-harm rule is illustrated by the case of *Scheer v. Rockne Motors Corporation*.\textsuperscript{16} The defendant, an automobile sales corporation, maintained a business office in Buffalo, New York. A salesman used a car of the corporation for a trip to Ontario. While there, he had an accident and the plaintiff, a passenger, was injured. Action was brought against the employer in a federal court in New York. The trial judge framed his

\textsuperscript{15}See Restatement of Torts (1939) § 766.

\textsuperscript{16}68 F. (2d) 942 (C. C. A. 2d 1934).
charge to the jury in accordance with an Ontario statute which imposed upon car owners a more severe liability than the law of New York, and he declared it irrelevant whether or not the defendant had authorized the employee to take the car into the province. The jury found for the plaintiff. On appeal, the circuit court held that the trial judge's refusal to make the distinction was erroneous.

"The judge did not charge the jury," the court stated, "that they might find for the plaintiff in case Clemens was acting within the scope of his authority when he went to Canada; he told them that his mere possession of the car was enough. It is clear that the defendant did not give him authority to go to Canada merely by giving him the car. Unless more than that was shown, the law of Ontario would not reach the defendant; the charge gave it extraterritorial effect, as much as though that province had pretended to fix liability upon Clemens for injuries suffered in New York. As this went to the very heart of the case as it was presented to the jury, the judgment must be reversed."

These words sound strange within the order of ideas of the Restatement. The harm of which the plaintiff complains was suffered in Ontario. Consequently, it was there that the cause of action arose. Ontario was the place of wrong. Therefore, the law of Ontario determines whether the plaintiff "has sustained a legal injury," and whether "a person is responsible for harm he has caused irrespective of his intention or the care which he has exercised," and it should be the one to determine whether in case of a harm caused by an employee the employer is liable. However, the section dealing with the problem of vicarious liability, Section 387, contains a qualification for which no justification seems to exist within the conceptual framework of the Restatement. This section reads as follows:

18 Id. § 378.
19 Id. § 379 (c).
When a person authorizes another to act for him in any state and the other does so act, whether he is liable for the tort of the other is determined by the law of the place of wrong. (Italics ours.)

Comment (a) to this section gives the following explanation:

In order that the law of the state of wrong may apply to create liability against the absentee defendant, he must in some way have submitted himself to the law of that state. It is sufficient if he has authorized or permitted another to act for him in the state in which the other's conduct occurs or where it takes effect. Thus, if $A$, in state $X$, authorizes $B$ to act for him in state $Y$ and $B$ does so act, $A$ is thereby subjected to the $Y$ law.

Not only was the rule of this proposition of the Restatement judicially applied in *Scheer v. Rockne Motors Corporation*, but it also found expression by Mr. Justice Brandeis in *Young v. Masci*. Young, a resident of a New Jersey town in the immediate vicinity of the New York state line, lent his automobile to Balbino without restriction upon its use. Balbino took the car to New York, and, while driving there, negligently struck the plaintiff, who then sued the car owner in a state court of New Jersey. If all the facts had happened in New Jersey, the defendant would not have been liable under New Jersey law. The court, however, applied a statute of New York, under which a car-owner is liable for an accident negligently caused by anyone driving the car with the owner's permission. From the state courts the defendant appealed to the United States Supreme Court, alleging that the Fourteenth Amendment of the Constitution of the United States was violated by the application to him of the statute of a state to whose law he had not submitted.

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20 Supra note 16.
himself. In denying the appeal, the court emphasized that "there was evidence to justify a finding that the car was taken to New York with Young's permission, express or implied. When Young gave permission to drive his car to New York," the court stated, "he subjected himself to the legal consequences imposed by that state upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant." Since the case was not one of the agent's acting in New York without the car-owner's permission, the court had "no occasion to decide where the line is to be drawn generally between conduct which may validly subject an absent party to the laws of a state and which may not." It is significant, however, that the court did not simply predicate the defendant's subjection to the New York statute upon the fact that New York was the place of the accident.

This limitation of the place-of-harm rule to situations where the party sought to be held liable "has in some way submitted himself to the law of that state," is sound either in all cases or in none. If we look for a reason for the distinction in Beale's treatise, we find that Section 387 of the Restatement is treated with the same silence as Section 382. However, Young v. Masci is discussed in Section 383.1, which is entitled "Causation," and in that section Beale disapproves of the decision on the ground that the lending of the automobile was not the proximate, but only a remote cause of the accident. "If a person who is a remote cause of an act is to be held responsible to the law of the state where the event occurred, a very wide door is opened for one state to impose its law upon persons acting in other states." What is the reason for this unexpected regard for the actor? Under the general place-of-harm rule the actor is disregarded entirely.

The theories of vested right and territoriality have been criticized frequently and severely. 22 The fallacies of its seem-

22See especially Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 Yale L. Jour. 736 (1924); Yntema, The Hornbook Method and the Conflict of Laws, 37 Yale L. Jour. 468 (1928); Cavers, Critique of the Choice-of-Law Problem, 47 Harv. L. Rev. 173 (1933);
ingly compelling logic have been pointed out repeatedly, among others by the late Professor Walter W. Cook, who has demonstrated the impracticality of the territorial approach. Jurisdiction over acts or things cannot be separated from jurisdiction over persons, because it is always persons who own or claim things or perform acts. If conflict of laws is to fulfil any useful function in society, its rules must be derived from principles other than those of a thought system of fallacious logic. They must be based, like all other rules of law, upon considerations of policy.

Indeed, why at all do we have a branch of law called conflict of laws? If we would consider this question more frequently and more thoroughly, a good many of the problems of the conflict of laws might look less formidable and less forbidding than they appear to us today. Presumably, the law of conflict of laws fulfills some useful function in our social order. What is that function?

Assume that John Jones is a druggist in, let us say, Georgia. He believes in competition and wishes to sell his toothpastes, shaving creams, soaps, tooth-brushes, et cetera, at a cheaper rate than the manufacturers want them to be sold to the public. He knows that there are other cut-rate drug stores in the state, and he has not heard that any one of them has ever had legal trouble. After several years of successfully conducting his business, he finally decides to retire and to live


Cook, The Logical and Legal Bases of the Conflict of Laws (1942) chs. 1, 2, 13. See also Rheinstein, Methods of Legal Thought and the Conflict of Laws, 10 Univ. Chi. L. Rev. 466 (1943).

How considerations of policy can and should be used has been admirably demonstrated in the article by Neuner, Policy Considerations in the Conflict of Laws, 20 Can. Bar Rev. 479 (1942).
with his daughter and son-in-law in Chicago. He moves from
Georgia to Illinois, transfers his savings from a Georgia bank
to one in Illinois and settles down to what he expects to be
a peaceful evening of a busy life. Suddenly, he is hailed
before a court in Cook County, Illinois, by another druggist,
perhaps a former competitor in Georgia, or by a drug manu-
ufacturer, and a suit for several thousands of dollars is brought
against him. When he asks upon what basis this claim is
sought to be justified, he is referred to the Illinois Retail
Price Maintenance Act, which declares price-cutting an ac-
tionable act of unfair competition. We can safely expect that
the court would decide the case in the defendant's favor.
Otherwise, we should feel shocked. A Georgia resident who
is exclusively engaged in business in Georgia has no reason
to expect that his business practices might ever be subjected
to scrutiny under the standards of the law of Illinois, or of
any other state or country with which neither he nor his
business has ever had contact. We regard him as justified
in expecting that the legality of his business activities will
be gauged by no law other than that of Georgia, or, perhaps,
of such other states or countries with which his business ac-
tivities had some obvious contacts. If the mere fact of his
removal to Illinois were suddenly to subject to Illinois liability
activities carried on before his removal to that state, we
would share his feeling of outrage and would denounce as
unjust, unreasonable and even intolerable a law that would
result in such a decision. His justified expectations would
have been disappointed and we, the public, would not stand
for it.

Or let us assume that John Doe sells a piece of land to
Richard Roe. Both parties to the transaction are native resi-
dents of Indiana, where the land is situated. The deal is
negotiated and consummated through an Indiana lawyer, who
has drawn the deed in accordance with Indiana law and prac-
tice. Roe, the buyer, has taken possession of the land, but af-
ter a short while he discovers that the land is charged with
an outstanding tax lien of which he had no previous knowl-
edge. When consulting his lawyer he is informed that he has no remedy against Doe, because Doe had not given in his deed any express warranty of freedom from incumbrances and because, under the law of Indiana, no such warranty will be implied. In the course of the conversation, the lawyer casually observes that the law is different in Missouri, where a warranty of freedom from incumbrances is read into a land deal unless it has been expressly contracted out by the vendor. It would help our purchaser little to hail the vendor before a court of Missouri, where Doe perhaps owns some property, or where Doe may some day be traveling. Again, it may be safely predicted that no court in Missouri would hold the vendor liable and that, if it did, its decision would be decried as outrageously wrong. The reason is again that, under the circumstances, Doe, when he sold his land had no reason to assume that Missouri law would ever be applied to his transaction.

Finally, let us assume that $H$ has been a lifelong resident of Illinois. In Illinois he went through a ceremony of marriage in accordance with Illinois law and settled down to live there with his wife, a native of the state. After several years of married life, $A$ deserted him, and $H$ obtained a decree of divorce in a court of Illinois, where desertion constitutes a ground for divorce. Some time later, $H$, still in Illinois, marries $B$, another native of the state. After three years of married life with $B$, he moves with her into South Carolina. What would we say if a district attorney of that state would indict $H$ and $B$ for bigamy, alleging that divorce is unknown to its law and that, therefore, as far as South Carolina is concerned, $H$ is still married to $A$? Or how would we feel if, under such an argumentation, at $H$'s death a South Carolina court would hold that $B$ was not entitled to a widow's share in $H$'s estate or was not entitled to workman's compensation as his widow? Again, we would feel shocked and appalled and, again, the reason would be the fact that justified expectations had been rudely disappointed.
It is for cases like these that the rules of choice of law have been elaborated. The courts of Illinois are organs of the social and political community of Illinois. As a general rule, they are expected to look to Illinois statutes and Illinois precedents. A law other than that of Illinois is of no concern to them. Yet, in the three cases just stated, we would regard it as unfair if the court would decide them under the law of its own state. The cause of this feeling of unfairness, we have already stated, is the fact that legitimate expectations of the parties would be disregarded, and that there would thus be violated a policy which is basic for the entire legal order, and which underlies numerous of the very fundamental institutions of the law, viz. the policy of protecting justified expectations.

One of the most obvious applications of this policy is constituted by the doctrine of estoppel, which simply means that a man who through his conduct has raised in others the expectation that he will follow a certain line of conduct, is not allowed to frustrate expenses which those others have incurred in consequence of the expectation raised.

Another expression of the policy that a legitimate expectation ought not to be disappointed, is found in the constitutional prohibition of *ex post facto* laws and in the maxim of *nulla poena sine lege*, which has been declared to constitute an indispensable part of the rule of law by the most prominent judicial body of the world.

The same idea that one should not be taken by surprise and suffer detriment for the non-obedience of a law of which he could not have any knowledge, is constituted by the rule that no law is to take effect before it has been properly promulgated.

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25U. S. Const., Art. 1, § 9, cl. 3; Art. 1, § 10, cl. 1.
26Permanent Court of International Justice, Judgments, Orders and Advisory Opinions, Series A/B, no. 65 (Dec. 4, 1935).
27For a forceful expression of this principle, see St. Thomas Aquinas, *Summa Theologiae*, c. 1, q. 90, a. 4: *utrum promulgatio sit de ratione legis*, where promulgation is declared to constitute one of the essentials
It is within the same order of ideas that the principle of *stare decisis* is being regarded as fundamental in the common law. One ought to be able to rely on the stability of judicial practice. Commercial practices and legal transactions are being based upon the expectation that courts will not easily reverse themselves. Countless are the judicial expressions of the deeply felt necessity to continue a line of precedents, even though it may appear theoretically unsatisfactory, once it has become the basis of conveyancers’ and business men’s practices and property-owners’ reliances.\(^{28}\)

Contract is one of the most basic and most far-reaching institutions of our whole legal and its underlying social order. A promise has been made by an individual and has been relied upon by another. The state with its overwhelmingly powerful machinery of law-enforcement through sheriffs, deputies, the militia and, as a last resort of latent power, the army, compels the reneging promisor to live up to his promise or, at least, to make the promisee whole for the damages he has suffered through the disappointment of his expectations. Truly, no more impressive illustration can be imagined of the fundamental importance of the policy of protecting justified expectations than the deputy sheriff who forcibly breaks a debtor’s resistance. This application of the state’s power machinery becomes understandable, however, when we consider that the entire economic structure of our age is based upon credit, i.e., upon investors’ and other creditors’ expectations that their debtors will make proper use of the capital entrusted to them and that they will honor the creditors’ ex-

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\(^{28}\)For a few illustrations among many, see the cases collected in Pound and Plucknett, Readings on the History and System of the Common Law (3d ed. 1927) 272 et seq.
peculations to receive interest and repayment. Only in passing may it be mentioned that the institutions of the trust and the will are nothing but special applications of the same principle. Such considerations will help us recognize that the protection of expectations is indeed one of the deepest necessities of all human life itself, social and individual. We could not live in a world in which we could not foresee that, in general, our expectations will not be disappointed. The forces of tradition, social etiquette, morality and religion combine in stabilizing social life and in thus rendering it predictable; and all our search for the hidden "laws" of nature is motivated by the yearning for greater predictability of the ways of nature, of the weather, for instance, or of the ways of bacteria or of gravitation.

Except where other higher aspirations interfere, expectations must be relied upon, and one of those expectations is that we ought not to be subjected to punishment, liability or other legal detriment for conduct which we had good reason to believe would not subject us to such troubles. It is in this order of ideas that we find the *raison d'etre* of the condemnation of *ex post facto* laws as well as of that branch of the legal order with which we are concerned here, viz. choice of law. This statement should not be misunderstood, however. It is not suggested here that the policy of protecting justified expectations is the only explanation of the fact that domestic courts occasionally apply a foreign law. There are others, for instance the policy to assist other friendly states or nations in the enforcement of social policies, which they regard as important. Still less is it suggested that the policy of protecting justified expectations explains those rules of the conflict of laws which are not choice-of-law rules, i.e., rules indicating whether a given case shall be decided under the domestic or under some foreign law. Rules on jurisdiction of courts, on recognition and enforcement of foreign judgments, or on the legal status of aliens are based on peculiar policies of their own. The only proposition made here is that among the policies motivating a state to refrain in
certain cases from the application of its own law in favor of some foreign law, the policy of protecting justified expectations plays a prominent role.

The technique of choice-of-law is not the only one by which there can be avoided the unfairness of deciding a case under a law whose application would take the parties by surprise. A different technique was applied by the English courts until the late eighteenth century; while they would not decide a case under any law other than the common law of England, they did not, as a general rule, assume jurisdiction of a case unless the facts giving rise to the controversy had occurred in England. Only when it became apparent that this technique resulted in frequent denials of justice, the English courts adopted the technique of choice-of-law; which had been developed for centuries on the continent of Europe, i.e., the technique of assuming jurisdiction of the "foreign" case but deciding it under its "proper" law.29 It is significant, however, that the new technique was not applied where it was not necessary to protect justified expectations. Thus in the very field of torts, English courts continue to apply English law, with the important modification, however, that an alleged tort-feasor will not be subjected to liability, when his conduct, although actionable under English law, is not disapproved by the law of the place where it was carried on.30 This technique is of easy application, it protects justified expectations, and it appears eminently satisfactory, in spite of criticism.31 In the United States, through the mediation of Story

30 "In order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . Secondly, the act must not have been justifiable by the law of the place where it was done." Phillips v. Eyre, L. R. 6 Q. B. 1, 28-29 (1870).
31 For details of application, see Cheshire, Private International Law (2d ed. 1938) 296; Dicey, Conflict of Laws (Bentwich's 5th ed. 1932) 770; Foote, Private International Law (Bellott's 5th ed. 1925) 517; Westlake, Private International Law (Bentwich's 6th ed. 1922).
and his precursors, Livermore and Chancellor Kent, the choice-of-law technique was taken over from the civilians directly and more completely than in England. It may be questionable whether it was fortunate for the common law of America that an entire branch of civilian learning was thus grafted upon it. But with few exceptions the choice-of-law technique has become an accepted part of American law and with it the rule that problems of the law of torts are to be decided in accordance with the law of the place of wrong. That rule serves its purpose just as well as the English technique does, viz. the purpose of preventing a person from being subjected to liability under a law whose application he could not foresee when he engaged in the conduct for which he is sought to be held responsible.

However, this purpose is easily perverted into its opposite when the place of wrong is interpreted as the place where the harm occurred rather than as the place where the alleged tort-feasor was acting. The vague feeling that something is wrong with the place-of-harm rule, that it tends somehow to prevent the accomplishment of some basic policies, has obviously induced the draftsmen of the Restatement to concede the exceptions of Sections 382 and 387 and has motivated the courts which decided such cases as Scheer v. Rockne Motors Corporation or Young v. Masci. But the lack of awareness of the function to be fulfilled in our social order by the conflict of laws has prevented the authors as well as the judges from finding a clearly articulated expression of the way in which the general policy of the conflict of laws ought to be applied to tort cases of multiple contact.

We have found that the raison d'être of the choice-of-law part of the conflict of laws is our desire not to disappoint

recent criticism, see Hancock, Torts in the Conflict of Laws (1942) 86; Hancock, Torts in the Conflict of Laws; The First Rule in Phillips v. Eyre, 3 Univ. Toronto L. Rev. 400 (1940).

32See infra at p. 31.
33Supra note 16.
34Supra note 21.
legitimate expectations. But whose expectations do we have to respect in torts cases, and what are they? In order to answer this question, it is necessary to have a clear conception not only of the policies underlying the choice-of-law rules, but also of those underlying the law of torts.

The law of torts is the law of loss shifting. An individual has suffered harm; as a general rule, this is his misfortune. "Casum sentit dominus," the Romans said, which freely translated means, "The loss lies where it falls." If lightning strikes my barn, or if a flood or an earthquake destroys my house, or if I am stricken with disease, it is my loss and I have to bear it, unless I have been foresighted enough to take out insurance. However, there are situations in which I shall be anxious to shift my loss to another, viz. when my loss was caused by the conduct of some other human being. Whether or not, and, if at all, in what cases, I shall be allowed to do so, is a question determined by the cultural norms, and consequently, by the legal order of the community. As a general rule, we can say that in our civilization, I am allowed to shift my loss to its author when that author has caused it through conduct which falls short of the standard of the community, i.e., through conduct which is either clearly prohibited or which falls short of that vague standard to which we expect "the ordinary prudent man" to conform and the violation of which we call negligence.

These very general statements could be further refined, but they suffice for our purpose. Once we have recognized that the law of torts is the law of loss shifting and that, in general, our society allows the shifting of a loss to its author only when that author has failed to live up to the standard of the com-

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35 Or unless the loss falls upon such a multitude of people that the community comes to the rescue, as in the case of a big flood or a large conflagration or some other mass calamity.

36 Or, under certain circumstances, when the author of the harm has engaged in conduct of which society, because of its social usefulness, does not disapprove, but which, on the other hand, it regards as so dangerous to others that it allows it only with the proviso that harm caused to others must be made good.
community, we know that, if we intend to be consistent, the standard can, at least as a general rule, be furnished only by that community with the application of whose standard the actor could reckon when he carried on his conduct; i.e., ordinarily, the standard of that community in which he carried on the conduct and, in addition, the standards of those communities within which the actor could reasonably expect that his conduct might possibly result in harmful consequences. To apply, however, the standard of a community with respect to which the actor could not reasonably expect that his conduct might result in harm, would take him by surprise and would be contrary to the policy of protecting legitimate expectations. A person engaging in business or in other activities must have a fair chance to know by what standard his conduct will be measured. Then and only then does he have the possibility of taking those precautionary measures which will save him from being ruined by becoming liable to others, or of taking out liability insurance. Nobody can avoid violating an unknown standard or can protect himself against the consequences of its violation. But this is exactly what the place-of-harm rule does: it exposes an individual to the risk of rendering himself liable under some rule of law against whose application no reasonable diligence can protect him.

A radio speaker can reasonably be expected to adapt his criticisms of other individuals to the defamation laws of those states or countries where his speech can ordinarily be heard. It would be outrageous, however, to apply the defamation law of, let us say, Great Britain, to an Illinois politician when the Chicago long-wave station happened to be heard in Great Britain in consequence of unusual meteorological conditions. It would be equally unjust to apply to the publisher of a small-town Texas newspaper the libel laws of England solely because a stray copy of his paper has reached that country.

So far, we have been concerned exclusively with the alleged tort-feasor and his expectations. We have not taken
into regard at all the person who has suffered harm, the tort victim. Are not his expectations equally worthy of protection? They certainly are, but what expectations does he have? He probably hopes not to be harmed by others, and if he should be harmed, nevertheless, to obtain some compensation. But the hope to be thus compensated is not an expectation actually influencing the course of human conduct. In order not to render myself liable to others I may, and frequently will, take precautions. I shall try to familiarize myself with the standard of the community and to live up to it and, frequently, I may protect myself against my own possible shortcomings by taking out liability insurance.

Expectations as to the state of legal protection may also influence significantly the conduct of a property owner or simply of an individual as such. Whether I find it necessary to build my house as a castle or whether I can leave the door open at night, nay, even whether I choose to live in a country at all or to invest my money there, may well depend upon the state of its criminal law, on the efficiency of its police, the stability of its currency, or on its other laws concerning the creditor-debtor relation. But the expectation that, when I suffer a loss, its author will make it good, does not influence my conduct. I avoid being run over by a car even when I know that the negligent driver will be held liable, because, if for no other reason, there is a possibility that the author of my harm, although legally liable, may be financially irresponsible. Just as little will the possibility of an eventual recovery of damages from an eventually solvent tort-feasor prevent me from taking out fire, theft or accident insurance. So far we have used the term "legitimate" or "justified" expectations without defining the qualifier. An expectation is ordinarily justified when it constitutes the motive of conduct which is socially useful or, at least, not socially disapproved. An expectation which does not motivate conduct is not worthy of legal protection, and the one whose conduct is, at least potentially, motivated by the structure of the legal norms of a given society is the one who engages.
in conduct rather than the one to whom harm may be caused through such conduct. It is for this reason that in the determination of the expectations regarded as justified and thus to be protected by the rules of choice-of-law, we may all but disregard the tort victim and concentrate on the author of the harm.\textsuperscript{37}

Yet, there is an indirect way in which the interest of the victim may play a certain role, \textit{viz.}, as it is reflected in an interest of an entirely different kind, not an individual interest at all, but the collective interest of the community in which the harm occurs. If that community, in pursuance of some policy of its own, wishes to make whole the person who has suffered the harm at the expense of its author, it may well do so, provided always, however, that the application of its law does not take the actor by surprise. Where the actor could not foresee that his conduct would cause harm in the state where it did occur, the application of the law of that latter state is always inappropriate. But, where it could reasonably be foreseen that harm might result in the state where it occurred, there is nothing inappropriate in that state’s applying its own law. On the other hand, nothing requires the state where the conduct was carried on, or a third state, where the case may come up for decision, to apply the law of the state where the harm occurred. While normally each court applies its own law, it decides an occasional case under some foreign law in order to avoid the disappointment of some justified expectation. But no such policy requires a court to decide such a case under the law of some other foreign state which, in applying its own law to conduct carried on abroad, does so solely for the purpose of protecting interests regarded as located within its territory.

There remains but one objection to be answered, \textit{viz.} the objection that the approach advocated here does not neces-

\textsuperscript{37}Hancock comes near to this idea when he says: "Does not history suggest that the recognition of foreign defences is more pressing and important than the recognition of foreign claims?" Hancock, \textit{op. cit. supra} note 31, at p. 57.
sarily result in uniformity of decision. While the law of the state where the conduct was carried on is applied by that state itself as well as by third states, the possibility is left open that another law, viz. its own, be applied by the state where the harm occurred.

Uniformity of decision has often been represented as the raison d'être of choice-of-law rules. It has been stated as the ideal of the conflict of laws that a case should be decided in the same way wherever it might happen to come up for decision. However, we ought to go a step further and ask ourselves why uniformity of decision is so desirable. To some minds, to be sure, uniformity appears as a value in itself. With anyone holding that faith, no further argument is possible. To us it seems that uniformity of decision is a means toward the end of protecting justified expectations. However, uniformity of decision does not serve this end unless the law to be applied uniformly is so chosen as to correspond to the parties' justified expectations. If it is not so chosen, uniformity of decision may well result in defeating its purpose.

The rule of lex loci delicti, when uniformly applied, fulfils the purpose as long as the place of wrong is the place of acting, and even where it is the place of harm and harm at that place could reasonably have been foreseen by the actor. However, where place of wrong is interpreted as place of harm and harm at that place was not reasonably foreseeable, the rule fails to fulfil its purpose, an antagonism arises between the ideal of uniformity and that of protection of justified expectations, and unless we worship uniformity for its own sake, the former ideal has to yield.

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39 The possibility of such a conflict has not been recognized by Hancock, op. cit. supra note 31, § 11, who regards uniformity of decision as the ideal end of the conflict of laws and then justifies the place-of-wrong rule as the one which best protects the parties' justified ex-
Once we have recognized that uniformity of decision is not an end in itself but a means toward an end, we are also prepared to give up uniformity where it is unnecessary for the achievement of that end.

But there still remains an objection. In proposing an approach under which different states may apply different laws, do we not give the plaintiff a chance to shop around for the forum most favorable to him? We do, but our answer is "why not?" If the state where the harm occurred can get hold of the actor or his property and can thus enforce its law, why should it refrain from doing so in cases where the application of that law is no surprise? But why shall other states with less rigid standards of their own apply the more rigid law, simply because the state of the place of harm cannot get hold of the tort-feasor? There is no reason unless we worship uniformity for uniformity's sake.

Thus, we can finally formulate those rules which appear as a more adequate expression of the policies underlying choice-of-law in tort cases than those arbitrarily derived from seemingly logical but impracticable doctrines of territoriality and vested right.

These rules are as follows:

(1) Problems of the law of torts are determined by the law of the place where the person sought to be held responsible was engaged in the conduct for which he is sought to be held responsible.40

40 The formulation of this rule is intended to indicate that in cases of so-called vicarious liability the law of that place is to be consulted
(2) If harm was caused in one state through conduct which was carried on in another state, the state where the harm occurred may apply its own law unless

(a) the person sought to be held liable could not reasonably foresee at the time the conduct was carried on that it would cause harm in the state where such harm actually occurred; or

(b) the actor was obliged to carry on his conduct in the way he did by some rule of law of the place where he carried on his conduct.

These rules, it is believed, express adequately those policies which have inspired the decisions of the American courts, with the exception of those cases which have been motivated either by the territoriality-vested rights doctrine, so thoroughly discredited today, or by precedents rendered upon issues which have only an apparent analogy to the problems of choice-of-law. These cases are, as we shall see, cases in admiralty, criminal cases and cases dealing with trespass to land.

where the person sought to be held liable was carrying on the line of conduct on the basis of which he is sought to be held responsible for a harm immediately caused by another person or a thing. If D carries on a business in X and his employee causes harm in Y, the law of X is primarily to be consulted. The same rule applies if a father is sought to be held liable for the act of his son, or a husband for the act of his wife, or a dog owner for harm caused by his dog; all this, subject, however, to rule no. 2 of the text.