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JUDICIAL METHOD AND ECONOMIC OBJECTIVES IN
CONFLICT OF LAWS

RAYMOND J. HEILMAN†

The rules of the subject described by the term “Conflict of Laws” undoubtedly are regarded by many persons as resting chiefly, if not entirely, upon non-empirical and unpurposive bases and obtained mainly by mechanical processes of logical derivation from a priori postulates or sets of such postulates which in themselves are relatively abstract and removed from the “stuff of experience” concretely presented in individual cases. Certainly the rules of Conflict of Laws generally are regarded by lawyers as less affected by considerations of expediency and objectives of a social or economic nature than the rules of intra-municipal law. The “theoretical school” of jurists professedly treat the subject as comprising very general and unparticularistic fundamental propositions and rules deductively derived from them. The American “theoretical territorialists” appear to take such an attitude especially uncompromisingly, whatever the extent to which they may be found to have departed from that attitude in the actual dispositions of specific problems. They rest their treatment of the subject upon the fundamental postulates that “. . . The Conflict of Laws deals primarily with the application of laws in space,”2 that “Some proper law must have governed the juridical situation at the moment of its occurrence,” that “the effort of the court is to determine what that law was,” and that “that is a question of the power of some particular law to extend to and rule the juridical situation.”3

However, it may not be supposed reasonably that the mode of treatment of the “theoretical territorialists” of this country has been adopted entirely without regard for practical or empirical considerations. Underlying its employment may be the belief that maximum certainty of legal consequences (as distinguished from assurance of certainty or proba-

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1. Dicey, Conflict of Laws (Keith’s ed. 1927) 14: “Their doctrine is . . . that the fundamental principles of their subject can be ascertained by study and reflection, and that the soundness of the rules maintained . . . can be tested by their conformity to, or deviation from, such general principles. . . . Their object is to construct a logically consistent series of rules, which either actually do agree with the rules as to the choice of law upheld in different States, or ought, consistently with sound theory, to prevail in every State.”


3. Id. at 2. “For the creation of rights, . . . there must exist some law with power to create them: or in the ordinary phrase, with jurisdiction.” 3 Beale, Cases on the Conflict of Laws (1902) 501, § 6. See note 15, infra.
bility of economic or social consequences) is the supreme juridical desideratum and the tacit assumption that such certainty can be attained only by exclusive adherence to deductive method. Yet, the dominating characteristic of the "theoretical territorial" mode of treatment is the complete exclusion of empirical and expediential considerations from the processes of determining what legal consequences shall be. Observation and investigation of economic and social phenomena in reference to the operation of legal rules are allowed no parts or functions in these processes. Avowedly, substantive conflict of laws rules are obtained solely by deduction from premises taken as corollaries of a fundamental postulate that for every non-procedural conflict of laws question which can be presented, the domestic rule of some particular state with which the factual situation is connected is inexorably coerced upon the state of the forum, and must be applied whatever the relation of the latter to the factual situation concerned. The particular foreign state, or its "law" (i.e., its domestic rules, if renvoi difficulties are to be avoided \(^4\)), is treated as having so-called conflict of laws "jurisdiction"—power in space of an ambulatory or ubiquitous character—by which the state of the forum is compelled to adopt whatever rule the particular state singled out would apply in a corresponding domestic factual situation.

This treatment necessarily is contradictory to the very idea of the "territoriosity" of law, the idea of the exclusive operativeness of a state's own law as such, within that state's boundaries, whatever the legal problem concerned and whether the problem is a domestic one or one

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5. "... the theoretical method has influenced Anglo-American writers... chiefly in the form of 'territorial' theories about law and legal rights. Such writers begin with reflecting upon and establishing to their own satisfaction the general or essential nature of law and legal rights. This leads them to certain general or fundamental principles, supposed to flow from the nature of law and legal rights as thus established. These fundamental principles take the form of general statements as to what,—in view of the essential nature of law and legal rights,—a state or country 'can' and 'cannot' do in the way of creating rights, duties, and other legal relations. They thus come to think that the conflict of laws 'deals with the recognition and enforcement of foreign-created rights' [Beale, *op. cit. supra* note 3, 501; also, Beale, *op. cit. supra* note 2, 106] or that it has to do with the application of law in space—back of which statements seems to be the assumption (also deduced from the nature of law and legal rights) that for every situation dealt with in the conflict of laws there is always some one and only one 'law' which has 'jurisdiction,' i.e., power, to determine what legal consequences shall be attached to the given situation." Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 Yale L. J. 457, 459.
of conflict of laws. Negatively, the concept of the territoriality of law involves the proposition that the law of a state is not operative as such outside the state's boundaries. In reality, the fundamental postulate of the theoretical territorialists is one of "extra-territoriality"; it asserts extra-territorial "jurisdiction" of states other than that of the forum, in particular cases, for the superimposing of their \textit{domestic} rules upon the state of the forum to make \textit{conflict of laws} law for that state out of their \textit{domestic} rules. The method based upon this postulate is, therefore, not \textit{territorial} but \textit{pseudo-territorial}. Plainly, it would be inconsistent with the concept of the territoriality of law to treat the state of the forum as subjected to the conflict of laws rule or rules of some other state in reference to a conflict of laws case, apart from the objection that this would allow the possibility of the creation of \textit{renvoi} situations. But, to treat the state of the forum as subjected to the \textit{domestic} rule of some other state and that rule as turned into a \textit{conflict of laws} rule for the state of the forum, as super-imposed \textit{law}, is no less inconsistent with the idea of the territoriality of law (although the inconsistency may be less noticeable on the surface). Besides, such treatment is manifestly absurd from the standpoint that a problem is hardly to be considered as satisfactorily \textit{solved} by applying the solution which has been or would be worked out for a distinct and different problem.  

It is said in explanation of the pseudo-territorial postulate of ubiquitous jurisdiction that "A right having been created by the appropriate law, the recognition of its existence should follow everywhere" and that "It is impossible that a single event should be followed by two contradictory consequences; only one law, therefore, can have jurisdiction." But a qualification is adopted (at least by Professor Beale) which in effect concedes the fallibility or falsity of the postulate which asserts

6. Note 4, \textit{supra}.  
7. A clear-sighted English jurist said over fifty years ago: "Looked at from the point of view of any particular system, Private International Law is that part of the Municipal Law of each civilized community which is determined by its relation to systems or rules of law other than its own. It will hardly avail to say, that these extraneous rules are \textit{borrowed} from other systems of law; much less that other systems of law or foreign rules \textit{overcome} the domestic in the conflict of laws. For it is plain that the whole Private International Law of any municipal system is really a substantive part of that system, and is in no way foreign law or doctrine of general jurisprudence. No part of Private International Law has any binding force on an English tribunal, except so far as it is incorporated in English decisions. So far it is strict \textit{law} in Austin's sense of that term. . . . It is imposed or adopted by the sovereign national authority; it is enforced by the same process as the rest of the Municipal Law." \textsc{Frederick Harrison, Jurisprudence and the Conflict of Laws} (1919) 104. Published originally in lecture form in 1879. Italics are those of the author quoted.  
the existence of "jurisdictional power" of foreign states or of their "law" to determine the legal consequences of conflict of laws factual situations for the state of the forum. To explain the statements which have been quoted just above and perhaps to account for instances of adjudications which have not conformed to the postulate, the following interesting declaration is added, differentiating "enforcement" of a "right" from its "creation" and its "recognition" and thereby extracting the concept of enforceability from the concept signified by the term right:  

"Though a foreign right must be recognized as existing, it does not follow that it will be given any legal force."  

"Since a right can have no legal force unless it is given force by law, and since nothing can have the force of law in a State except the law of that State, it follows that no foreign right can be enforced unless the law of the State so provides. This depends upon the law as to the enforcement of foreign rights, that is, upon a principle of the Conflict of Laws. The general principle is, that when a right has once been created by the proper law it will be enforced everywhere, even where it would not originally have been created upon the same facts."  

"But since the enforcement comes through the domestic law, that law may refuse to give any effect to the right; and though enforcement will not be denied merely because the creation of the right is opposed to the domestic law,
it will always be denied where there would be anything illegal in the enforce-
ment itself."^{14}

This takes all meaning and jural content out of the pseudo-territorial postulate.

Moreover, the basic premise for the pseudo-territorial method is con-
ceded to be illusory and not in correspondence with fact, viz:

"... by what law shall it be determined whether the law of a certain country
had the legal power to create an alleged right, since if the right was created
all civilized nations should recognize the fact. Certain jurists say it should
be determined by an alleged international law, upon the terms of which hardly
two of them can agree. Other jurists say that this question should be deter-
mined by the law of the country in whose courts it arises.

"As an actual fact it will of course be determined in accordance with the law
of the forum; since it will be determined by each court in accordance with
that court's understanding of the law, no matter by what name the court calls it.
Why not recognize and admit the truth?"^{16}

Professor Beale has also made the following statement:

"To explain the territorial theory in other terms, all that has happened outside
the territory, including the foreign laws which have in some way or other be-
come involved in the problem, is regarded merely as a fact to be considered by
the national law [i.e. of the forum] in arriving at its decision, and to be given
such weight in determining the decision as the national law may choose to
give it."^{16}

What does this statement do but describe a fact which Professor Cook
and Professor Corbin, respectively, describe in the following extracts
by declaring that the court of the forum, whatever rule it adopts, de-
termines the decision of any conflict of laws case^{17} by an adjudication
of the law of its own state, applying that law, as such, alone:

"... the forum, when confronted by a case involving foreign elements, always
applies its own law to the case, but in doing so adopts and enforces as its own
law a rule of decision identical, or at least highly similar though not identical,

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15. Beale, op. cit. supra note 2, at 112. Italics are mine. Cf. Conflict of Laws Re-
statement (Am. L. Inst., Proposed Final Draft No. 1, 1930) § 1: "DEFINITION OF CON-
FLICT OF LAWS. Conflict of Laws deals with the extent to which the law of a state oper-
ates, and determines whether the law of one or of another state shall be applied to a legal
situation. Comments: a. No state can make a law operative in another state, and the
only law in force in a state is its own law; but by the law of each state, a legal situation
in that state may depend upon the law of some other state or states." Cf. Conflict of
17. To the extent that the state of the forum is not subject to federal constitutional
restrictions and, in a sense, even to the extent that it is so subject, i.e., treating such re-
strictions as forming a part of its own law.
in scope with a rule of decision found in the system of law in force in another
state or country with which some or all of the foreign elements are connected
. . . The forum thus enforces not a foreign right but a right created by its
own law.”18 “Each jurisdiction, in so far as it is politically independent, can
and does choose the rule that it sees fit, and thus the court of the forum makes
for itself its own law in each case.”19

Thus the “theoretical territorial” method, better called pseudo-terri-
torial, admittedly builds upon a false foundation in an apparent en-
deavor to construct a system of rules directed exclusively to the singling
out of some one particular state’s domestic rule as the superimposed
binding rule, or as the only “proper” or appropriate rule, for application
in the decision of each conflict of laws question presented in each factual
situation. The illusion or fiction that some one particular state has
an exclusive “jurisdictional power” over each conflict of laws situation,
or that its domestic rule or rules are of necessity exclusively applicable
or appropriate thereto, appears to have no utility, even in assisting or
tending to bring about uniformity of decision.20 Inasmuch as it causes
considerations of expediency to be disregarded, it is inevitable that a
method based entirely upon it will more and more result in decisions
which are adverse to such considerations and will ultimately destroy
itself by opposition to them. On the other hand, a method which takes
empirical considerations into account and builds rules along the lines of
economic and social objectives can produce rules which will tend to be
lasting and will accomplish maximum uniformity of legal result along
with maximum production of desired economic and social consequences.

Danger also inheres in the employment of the pseudo-territorial meth-
method in that because of erroneous presuppositions as to the nature of the
function of a court in deciding conflict of laws cases, or because of
mistaken notions as to the court’s actual power or lack of power of
adjudication or as to the logical unavoidability of the application of
some particular rule, a court may forbear from making a highly desirable
disposition which it might otherwise have adopted.21 The greater the
social importance of the subject-matter involved the more serious is
this risk.

18. Cook, supra note 5, at 469.
19. ANSON, Contracts (Corbin’s ed. 1930) 111.
20. Moreover, the accompanying sleight-of-hand performance of treating the concept
of “right” as separate from any signification of “enforceability” appears to be designed
to keep up the illusion referred to. It certainly tends to promote confusion of thought and
to eliminate examination of the expediential issues involved. See note 10, supra.
21. For an illustration of the jural consequences of acceptance of the fallacious notion
that the so-called lex loci contractus “alone can attach an obligation to the act of making
a promise” in respect of “covenants” in deeds of conveyance of land, see Heilman, Conflict
of Laws Treatment of Interpretation and Construction of Deeds in Reference to Convenants
For the solution of certain sorts of problems concerning interstate transactions it might be most satisfactory to adopt conflict of laws rules requiring the application of the particular domestic rule, of those of the two or more states concerned, which would have the effect of enforcing interstate transactions rather than of rendering them unenforceable, or which would have the effect of enforcing them to a greater extent than would be possible under any one of the differing rules which might be adopted. The pseudo-territorial attitude would preclude this possible mode of disposition, on the ground that the rule to be adopted could not be selected with reference to anything but some single, arbitrarily specified territorial connection. On the pseudo-territorial basis it would be impossible to apply a conflict of laws rule flexibly adapted with reference to some other phase or element involved, as for example, enforceability, in addition to reference to the domestic rule or rules of a particular state with which the transaction had territorial connection. Employment of such a rule would take account of the territorial extent or scope of the transaction instead of treating a transaction connected with two or more states as if it had been confined in its factual elements to one state alone.

Examples of types of problems in regard to which the possibility of adoption of flexible rules of the sort described would seem pertinent and important are those concerning "intrinsic validity"\(^{22}\) or "formal validity"\(^{23}\) of alleged contractual promises or agreements (involving rule of place of promise or agreement, rule of place of performance, and so forth), and those concerning "formal validity" of alleged conveyances of interests in land\(^{24}\) (involving rule of situs, rule of place of execution of instrument and so forth). If rules of the kind discussed are socially desirable, it would be pitiful for courts to abstain from applying them on account of a presupposition that some intrinsically particular domestic rule automatically identified on an arbitrary basis must be applied in each case, regardless of its economic or social effect. It would seem to be far better in any circumstances that the court in determining each conflict of laws question should fully realize that it "is making its own law for each case" and should, therefore, consciously take into account economic and social factors or elements, including the desideratum of uniformity and consistency of judicial disposition in reference to these factors or elements, than that it should hide its head in the sand and imagine that its only responsibility is to single out by deduction

\(^{22}\) Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws* (1921) 30 *Yale L. J.* 565, 655; (1921) 31 *Yale L. J.* 53.

\(^{23}\) Lorenzen, *The Validity of Wills, Deeds and Contracts as Regards Form* (1911) 20 *Yale L. J.* 427.

\(^{24}\) Ibid.
OBJECTIVES IN CONFLICT OF LAWS

from certain assumed propositions or by abstract reflection the domestic rule of some particular state as the compelled rule, or as the only proper or appropriate rule for application.  

A legal method which articulates, as or in its subject-matter, economic and other social objectives, should serve much more effectually in their attainment than one which does not. From this standpoint the pseudo-territorial method appears to be palpably inadequate, especially in reference to "contract" factual situations and commercial transactions generally, and certainly is narrower than the "theoretical" method proper, as employed by Continental jurists. For although the latter method does not comprise the particularistic adoption or application of rules on expediational grounds in individual cases, it does not exclude the formulation and adoption of premises which state propositions of economic or sociological content from which conclusions to be applied in the form of rules may be derived. Of this method, Dicey has said:

"The advantages of the theoretical mode of treatment, when employed by a man of genius, such as Savigny, are in danger of being underrated by English lawyers, to whose whole conception of law it is at bottom opposed. It is therefore a duty to bring these merits into prominence. The two great merits of the method are, first, that it keeps before the minds of students the agreement between the different countries of Europe as to the principles to be adopted for the choice of law; and next, that it directs notice to the consideration which English lawyers are apt to forget: that the choice of one system of law rather than of another for the decision of a particular case is dictated by reasons of logic, of convenience, or of justice, and is not a matter in any way of mere fancy or precedent."27

With this statement, the following admonition concerning the sterility

25. "... the theory that a particular territorial law is exclusively applicable to a particular set of operative facts ... cannot be accepted analytically as a sound basis for the conflict of laws. Where all the operative facts occur in a single state it may be conceded that as a matter of expediency the rights of the parties should be determined ordinarily in accordance with the law of such state. But if the forum sees fit it may adopt another rule. ... That there is no logical necessity for the application of any particular rule selected by Anglo-American law is seen from the fact that different rules with respect to the same set of facts often prevail in foreign countries. Nor can our rules of the conflict of laws be explained by any theory of 'territoriality;' other than the general doctrine that the law of the forum selects the rules which shall control. In fact, the only answer that can be given to the question why the common law has chosen a particular rule to govern in the conflict of laws or in any other branch of law is that it has seemed to the forum sound policy to do so." Lorenzen, supra note 13, at 274. Italics are those of the author quoted.

26. "... a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Holmes, The Path of the Law (1897) 10 Harv. L. Rev. 457, 469, Collected Legal Papers (1920) 186.

27. Dicey, op. cit. supra note 1, at 15.
of the notion of territoriality, or rather pseudo-territoriality, as a source for the derivation of rules of conflict of laws should be borne in mind:

"... nothing can be gained by hiding the truth and making it appear that certain rules govern in the nature of things. Such rules have not been discovered by the theoretical writers of the greatest eminence, nor has a consistent set of rules been worked out as yet by either the English or the American courts. The common law has not hidden in its bosom a logical set of rules which can be derived from its notion of territoriality. Sound progress in this field of the law, as in all other departments of knowledge, can be made only if the actual facts be faced which show that the adoption of the one rule or the other depends entirely upon considerations of policy which each sovereign state must determine for itself."

Although the pseudo-territorial method, as formulated, excludes expeditious considerations from its content it is not to be supposed that no such considerations have been back of its formulation. In fact, Professor Beale has clearly declared that an expeditious purpose has motivated its construction: the purpose of bringing about the "protection" and "enforcement" of "vested rights." The territorial viewpoint, he has stated,

"... asserts that no law can exist as such except the law of the land; but that it is a principle of every civilized law that vested rights shall be protected, and therefore that in each country it is sought to find what rights have arisen anywhere, and to recognize them, applying in all else the law of the land to every question."

In considering this declaration of juristic aim and the purposes of the pseudo-territorial method as they have been delimited in the formulation of the postulates and corollaries which have been adopted as its content, it is necessary for complete analysis to observe that there are two main types of conflicts of laws factual situations and that they differ fundamentally, radically, from each other: (1) those in which all of the facts treated as operative have taken place within and pertain to one state alone, (2) those in which all of the facts treated as operative have not taken place within or do not pertain to one state alone. The failure to treat these separately in consideration of their difference, or the attempt to treat them in the same way or ways despite the difference, is a crucial fallacy and defect of the pseudo-territorial method. This non-differentiation makes the method radically non-territorial in reference to situations of the second type, to the extent that the territorial connection between only one state and a particular specified element of the factual situation is given sole consideration to the exclusion of the territorial

29. Beale, op. cit. supra note 2, at 63.
30. I.e., in addition to the respect stated above at note 5, supra.
connection between any other state, or states, and any other element or elements of the factual situation.

When a suit involving the first type of situation has been brought in another state than that in which the operative facts occurred, it is altogether natural and reasonable and, it would seem, extremely desirable, that the court of the state of the forum should generally adopt for application, to as great an extent as possible, the same rule or rules that the courts of the state of the factual situation would presumably have applied had the case in question been brought to litigation in the latter state. To apply such a rule or rules is sufficiently reasonable to remove all justification for resorting to some artificial explanation of this result. However, what the pseudo-territorialists have done has been to carry over to situations of the second type, i.e. those in which the operative facts have taken place in or pertain to different states, the sort of explanation applied by them to the first type of situations. They rest the explanation upon the basic postulate that as to any and all factual situations there is but one state or country the domestic rules of which can or appropriately may be applied to determine any question, and treat that state or country alone as having so-called conflict of laws jurisdiction. With this postulate they combine a corollary that only the law, i.e. domestic rules, of the state (or states) in which persons act can bind them. In situations of the first type, the application of the postulate and corollary places the transaction under the domestic rules of the state in which the behavior of all the parties concerned occurred. This result seems to the pseudo-territorialists to vindicate both propositions. In situations of the second type, however, their application will not accomplish the desideratum adopted in the postulate; for the actions of the various parties to the transactions have not taken place in the same state. To bridge this analytical gap, the pseudo-territorialists have evolved fictions by means of which they treat all operative acts as if they had occurred in the particular state the domestic rules of which are applied. For example, a tortfeasor is regarded as committing his wrongful act in the state in which the injury is received.

31. See Lorenzen, note 25, supra.
32. Beale, op. cit. supra note 3, at 515, § 41: “Rights being created by law alone, it is necessary in every case to determine the law by which a right is created. The creation of a personal obligation, which has no situs and results from some act of the party bound, is a matter which has to do with those acts. A personal obligation, then, is created by the law of the place where the acts are done out of which the obligation arises.” See also, as to torts, id. 539, § 86; as to contracts, id. 541, § 90.
And where contract cases are concerned, definitions of "the place of making the contract" have been framed so as to include factual situations the elements of which have not been confined to a single state or country. Thus a contract is regarded as having been made in the state in which occurred the last act or event treated as necessary to constitute it a "binding obligation." In this way the actions of the parties are treated as if they had taken place wholly within the state in which such last act or event occurred, although there is nothing inherently more important, essential or vital about the last act or event than about the first or the aggregate of all the other preceding acts or events.

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35. Conflict of Laws Restatement, op. cit. supra note 34, § 333: "Place Where Last Act Done. The place of contracting is in the state in which the last event necessary, to make a contract occurs." There can of course be no such "last necessary act or event" the specification of which can be worked out, if the states of the factual situation of the transaction differ by their domestic rules concerning what constitutes such final requisite act or event. But in spite of this difference the court (i.e. the forum), by a necessarily arbitrary selection, can designate a certain act or event as the last necessary one to the transaction in question, in accordance with the domestic rule of the forum or of a domestic rule of any other state. However, designation in accordance with a rule of some state other than that of the forum or of one connected with the factual situation of the transaction would be unlikely. In Proposed Final Draft No. 4, 1934, Section 333 is omitted; but the comment under Section 332 of that Draft provides "d. Determination of 'place of contracting'. Under its Conflict of Laws rules, in determining the place of contracting, the forum ascertains the place in which, under the general law of Contracts, the last event necessary to make a contract occurs. . . ." Section 332 reads "PLACE OF CONTRACTING. The law of the forum decides as a preliminary question by the law of which state questions arising concerning the formation of a contract are to be determined and this state is, in the Restatement of this Subject, called the 'place of contracting'."

36. In the case of a unilateral contract between parties who have acted in different states, the "place of contracting" is not the place where the promisor who is sought to be bound acted, but it is the place where the promisee performed his act of acceptance. In the place of a bilateral alleged contract, the "place of contracting" is the place where the defendant promisor who is sought to be held bound acted, only if his promise was made subsequently to that of the plaintiff promisor so as to be the consummating act of the alleged contract, i.e., acceptance. If the defendant promisor was the offeror and the plaintiff promisor was the offeree, by the "last act test" the "place of contracting" will have to be that place in which the latter acted. And in cases involving agency relationships a principal may be held bound by an undertaking of his agent under the domestic rule of the state in which the agent made the undertaking, although the principal himself was not even in the state. Resort to treatment of an alleged principal as if he himself had acted in a state in which an alleged agent of his had acted presents difficulty as a device of convenience only when there is difference between the domestic rule or rules of the state in which the principal acted and those of the state in which the agent acted,
When the screen provided by fictions of this sort is removed, the basic pseudo-territorial postulate reveals itself to be plainly unsuited for the more complex and essentially differing types of situations in which the operative facts have not been localized. However, this unsuitability has been hidden not only by the fictions above noted, but also by the suitability of the postulate where simpler types of situations are concerned: those in which all of the operative facts have happened in and pertain to one state only. The pseudo-territorialists either have been carried away by the plausibility of the postulate when considered in its application to factual situations localized within a single state so that they have failed to observe its obvious unsuitability for unlocalized factual situations, or else have employed its plausibility in reference to the former to camouflage its inapplicability and unsuitability in reference to the latter.

It is conspicuously important to notice that this non-differentiation is opposed to the juristic objective apparently indicated by the declaration that "vested rights shall be protected" and that therefore the courts should attempt "to find what rights have arisen anywhere and to recognize them." Clearly, unless the quoted statement is confined in application to a factual situation localized within one state or country, it departs from the pseudo-territorial method, if recognition of a right is treated as having anything to do with its enforcement. Unless the quoted statement is applied beyond the localized type of factual situation it amounts to no more than an expression that as to such a situation the rules of the state in which the facts have happened and to which they pertain ought to be applied wherever the factual situation may be brought to litigation. This, as has been said above, is too obviously sensible and desirable to be argued about. Apparently the quoted statement is designed to express a larger idea, viz: that in an interstate factual situation, if the domestic rules of any of the states in which any of the operative facts took place or with which any of them were connected would

as to whether or not in a domestic case involving facts corresponding to those of the conflict of laws case, the alleged agent would be treated as "agent," i.e., legally representative, of the alleged principal, so that the acts of the former would be treated as if they had been the acts of the latter in his legal relations with a third person. The same is also true, it would seem, when there is difference between the domestic rule or rules of the states where agent and principal acted, and such rule or rules of the state in which the third person acted, if he acted in a third state. All of these instances contradict the theory that one can be contractually bound only by application of the domestic rule of the state in which he has acted. For the points covered by this note and the statement to which it is appended, I am indebted, as pupil to master, to Professor W. W. Cook; and this is only a very small portion, indeed, of my debt to him.

37. Note 29, supra.
38. Ibid. (Italics are mine.)
recognize a "right" (i.e. enforce a claim) had all the facts treated as operative happened in and been connected with that state, then every other state should treat a similar or corresponding conflict of laws "right" as existing, i.e. should treat a claim as similarly or coextensively enforceable and enforce it if occasion is presented for doing so. Obviously such an aim in reference to conflict of laws situations which are not confined to a single state is contrary to the basic pseudo-territorial postulate that for any given factual situation the domestic rule or rules of only one state, identifiable exclusively on the basis of the territorial incidence or connection of some arbitrarily selected factual element, can be or should be applied; for, by the postulate, the rules of every other state are excluded from application. This inconsistency is illustrated by Professor

39. This would seem to be practically workable in reference to alleged "contract" claims, though not in reference to alleged "tort" claims. Using the term "claim" here as meaning the assertion of a "right," in the sense that a "duty" is treated as correlated with the latter, suppose that in a given "tort" situation the operative facts have been distributed between States X and Y and that under the State X local rule the plaintiff would have a right and the defendant a duty for the violation of which the plaintiff would have been entitled to damages had the factual situation taken place wholly within State X, but that under the state Y local rule the plaintiff would have had no such right and the defendant would have had a privilege of doing as he has done in the conflict of laws case presented in a court of State Z. To the defendant the privilege which he would have had according to the local rule of State Y is no less important and valuable for him than the right which the plaintiff would have had according to the local rule of State X would be for the plaintiff. Therefore, there would seem to be no sensible justification for enforcing a right in favor of the plaintiff by applying the State X rule than for enforcing a privilege in favor of the defendant by applying the State Y rule. In contrast, alleged "contract" claims represent and in most instances correspond with promises or undertakings assumed, which have apparently created in the persons to whom they have been made reasonable expectations of their fulfillment. This it is felt furnishes not only a justification but an urgent reason for rather enforcing a right for a plaintiff promisee than a privilege for a defendant promisor in an alleged conflict of laws "contract" factual situation. On the same basis, i.e., that of effectuation of undertakings to the extent of their having apparently created reasonable expectation or reliance, a privilege purported to be created by the agreement for the extinguishment of a right should, it would seem, be judicially established. So, of powers and immunities, also. The duties, no-rights, liabilities and disabilities correlative with rights, privileges, powers and immunities would, of course, correlative become and be treated as existent with them, respectively. As between two or more states, both or all giving some legal effect in domestic factual situations corresponding to those raising problems in conflict of laws factual situations, to promises, undertakings or stipulations, but giving such effect variantly as between those states, it would seem impracticable to apply the domestic rule or rules of that state which by such rule or rules would give the greater or greatest effect to a promise, undertaking or stipulation in a "contract" factual situation.

40. "Not only must every political society have some law, but it must have only one law. If two laws prevailed at the same time, they might be mutually destructive. It is impossible that a single event should be followed by two contradictory consequences. Only one law, therefore, can have jurisdiction." BEALE, op. cit. supra note 3, at 502, § 11.
Beale's own expressions. In connection with the extract quoted just below it should be borne in mind that by a rule of convenience in Anglo-American law a "contractual" agreement is usually treated as having been made in that state in which the last operative fact happened which was necessary for a "contract" according to the requisites existing in common under the domestic rules of the different states with which the factual situation was connected. This treatment has been adopted into the pseudo-territorial method. Both or all of the parties are treated as if all their acts had been done where the last act took place which supplied the last necessary operative fact. In discussing the so-called rule of "the place of contracting" in contrast with the rule of the place of performance, Professor Beale has said:

"In all these cases the matter must, it seems, be determined theoretically by the law governing the transaction, i.e., by the law of the place where the parties act in making their agreement. If by that law their acts have no legal efficacy, then no other state can give them greater effect. If by the law of that state their acts created a binding obligation upon the parties, then the parties who have acted under that law must be bound by it." 

Against the background of the foregoing analysis and discussion the following declarations by Professor Beale would seem to be of interest:

"Instead of the Dutch theory of comity, the common law has worked out indigenously a theory of vested rights, which serves the same purpose [as the theory of comity], that is, the desire to reach a just result, and is not subject to the objections which can be urged against the doctrine of comity. Story accepted and developed this theory, which from his time has been the accepted theory in the English and American courts."
These statements have real significance only if they describe an aim broader than the mere purpose of treating "rights" as "vested" in reference to factual situations localized within but one state, and also broader than the project to which the pseudo-territorial method is limited in reference to interstate factual situations. The results of the decisions in the aggregate, as well as the articulated disclosures of the aims of the courts in rendering these decisions, strongly contradict that any "theory of vested rights," limiting the courts strictly to uniform employment of the domestic rules of some one particular state arbitrarily specified solely on the basis of territorial factual incidence or connection, has become established in the "contract" field of conflict of laws jurisprudence. With the possible but doubtful qualification that in regard to questions of "formal validity," an approach to uniformity in application of "the rule of the place of contracting" may have been reached, no single rule described in terms of factual incidence or connection has been established as a general rule in interstate "contract" cases of any sort. Nor can the courts be shown to have become strait-jacketed or to have felt strait-jacketed generally concerning the employment of any rule depending upon the connection of a specified kind of operative fact with a particular state. Professor Beale's own conclusions after investigation support the statements made just above. Concerning questions of "the intrinsic validity of contracts," Professor Lorenzen has said:

"A few years ago Professor Beale undertook the laborious task of examining in detail the English and American cases on this subject. It appears from his article that our law is in a state of great confusion and that the courts of the same state often follow different theories. By way of general summary Professor Beale concluded that at the time of writing six states, one of which was doubtful, had adopted the law of the place of making; that 16 states, of which 5 were doubtful, had adopted the law of the place of performance; and that 11 states, besides the District of Columbia, had adopted the law intended by the parties. The federal courts have generally applied the law of the state or country intended by the parties. Some of them have presumed that the parties intended their contract to be governed by the law of the place of making; others, by that of the place of performance."

Even as to so-called questions of "formal validity" the following observation has been made some time ago:

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45. See note 23, supra.
46. Lorenzen, supra note 22, 30 Yale L. J. at 565.
47. Beale, supra note 42.
48. Id. at 207.
49. Id. at 100-103.
"It cannot be said that the English and American cases have definitely adopted the *lex loci* as determining the validity of contracts as regards form, with the qualification that, where under the general rules of the forum governing the validity of contracts in general some other law is applicable, the contract may conform also in the matter of form to such other law."\(^{50}\)

No theory has been applied with uniformity which accords enforcement to a "right," as "vested" in an interstate factual situation, only if a similar right to that claimed would exist by the law of an arbitrarily designated territorially-specified state, in a corresponding but hypothetical domestic factual situation. Not only have the courts generally avoided an objective of such a restricted and restrictive character, but actually the decisions, it is believed, reveal that the predominant endeavor of the courts is to attach legal operativeness to interstate transactions and thereby effect their economic consummation in spite of differences between states as to the enforceability of similar domestic transactions. This has been accomplished by employment of the particular domestic rule or rules, of those in force in the various states with which elements of the factual situation are connected, which in their application will produce enforceability or the closest possible approach to enforceability. Clearly this objective is economic, beyond being merely legal; the judicial disposition is treated as the solution of an economic as well as of a legal problem. The decision is used as an instrumentality for the realization of the desired and anticipated economic consequences of transactions, notwithstanding the existence of local rules for domestic transactions the employment of which in application to conflict of laws factual situations would prevent that realization. It is submitted that this legal-economic objective ought generally to be adopted and adhered to for interstate "contractual" transactions. It might then be possible to obliterate rules which rest merely upon the fortuitous element of the territorial incidence or connection of some artificially designated fact, isolated from the aggregate of the facts, and bearing no distinctive relation to the case in regard to economic and social consequences.

The adoption of such an objective would not invariably require the employment of a rule by which the fullest possible enforceability is attached to interstate transactions. Exceptions may be needed, as for example, in cases involving usury.\(^{51}\) Generally, however, rules achieving maximum enforceability should be employed. The courts appear to be

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51. See Note (1921) 21 Col. L. Rev. 585. However, the objective under discussion has been very generally adopted in usury cases. See Stumberg, *Conflict of Laws—Validity of Contracts—Texas Cases* (1932) 10 Tex. L. Rev. 163, 184. But transactions of possibly usurious character are condemned and refused enforcement if "bad faith" is shown. Note, *supra*. 

tacitly striving for enforceability. Their efforts to avoid holding promises unenforceable have been conspicuous in the many decisions which employ the rationale that where possible that state's domestic rule is to be applied which the parties presumably intended should be applied. In many of these cases, the rules of some state which otherwise would not have conflict of laws “jurisdiction,” have been presumed by the courts to be those which the parties intended to be applied, even though no indication of the existence of such an intention has appeared. Such attributed or imputed intention, Professor Cook has very aptly called “nominal intention.”

It should be borne in mind, moreover, that even where the courts have adopted some territorial rule, such as the rule of place of contracting, rule of place of performance, and so forth, without employing any explanatory basis of actual or presumed intention of the parties, they have often succeeded in holding the alleged contractual promise enforceable. It is possible that in a substantial portion of these cases the rule employed was adopted in order to enforce the agreement and not because the court concluded that the rule was appropriate in itself.

Even for one who does not believe in a viewpoint which deliberately shuts out economic or other social objectives as factors to be considered in the judicial process, or who does not regard the processes of Conflict of Laws as more essentially deductive than those of intra-municipal law, it is not unnatural to assume superficially that a problem of Conflict of Laws involves nothing more than making a selection in some way between differing but equally desirable local rules. That each possible rule under consideration has been adopted as a domestic rule of at least one state indicates that each is or has been considered of value as such a rule. If these differing local rules are presented on an equal footing in conflict of laws cases, there is danger that their economic and social effects in operation as conflicts of laws rules may be overlooked. It must always be remembered that owing to interstate considerations, one rule may be clearly more desirable for application to a conflict of laws situation although each different domestic rule may be the best that could be adopted for local application in the state in which it exists.

Possibly as to international conflict of laws cases generally the problem

52. “... the question of intent can hardly be said to involve the actual mental operations of the parties, for, as a matter of fact, they probably did not stop to consider what was the legal effect of their agreement, or whether there was any diversity in the law of two states; and, therefore, when we speak of the 'question of intent' we are making use of what might be termed a 'legal fiction'...” Grand v. Livingston, 4 App. Div. 589, 595, 38 N. Y. Supp. 490, 494 (1896). See Dicey, op. cit. supra note 1, at 625. To the effect that the English courts similarly use the term “proper law of a contract” as an explanatory device, see Dicey, id. at 591. Cf. Westlake, PRIVATE INTERNATIONAL LAW (7th ed. 1925) 302. On the “intention theory” in England and the United States, see
of judicial decision satisfactorily may be confined to trying to adopt in each case such a disposition as can be applied uniformly with the most simplicity and legal certainty, without comparative weighing of the specific effects which each of the differing domestic rules would produce in actual application in individual instances or in the aggregate. In such cases no concern need be felt as to whether or not, for example, a rule the application of which would effect enforcement of a particular kind of transaction, would, in the aggregate of instances, work better than a rule the application of which would result in non-enforcement. However, the greater the frequency of the kind of international transaction in question the less sound would these observations be. Certainty of predictability of the judicial fate of transactions (i.e. legal certainty), it should be noted, is ultimately an economic desideratum. The following comments would seem to have their greatest possible weight where international transactions are concerned, but their cogency varies inversely with the frequency of occurrence of such transactions:

"The most practical use of a rule of law is to enable individuals to avoid a breach of the law, a dispute, and an expensive litigation. In short, the first test of the practicability of a rule of law is its certainty and the ease with which it can be stated to parties by counsel in advising them, in advance of action, upon the legality of their contemplated acts. In determining the rules for the validity of a contract it must be borne in mind that what the parties desire is to learn in advance whether their intended agreement would be a valid one, how it should be made, and what its effect would be."53

"In many situations in the Conflict of Laws, where there are no social or economic considerations of a decisive character, the task of choosing the proper rule becomes extremely difficult. Whether the local rule shall be applied in these cases or some 'foreign' rule will have to be determined as best it may in the light of analogy and the experience and practice of other states or nations.

Lorenzen, supra note 22, 30 YALE L. J. at 576. As to oral ‘acceptances’ of bills of exchange, see Lorenzen, THE CONFLICT OF LAWS RELATING TO BILLS AND NOTES (1919) 87-90.

53. Beale, supra note 42, at 264. A rule may from its terms appear to have greater certainty of application than proves to be the case in its actual employment on account of great variation among the types of factual situations in which it may be applied. Consider the following comment concerning the rule of the “place of contracting”: “... the forum, having adopted the place-of-making rule, gives it content by designating the event which must occur at a particular place to make it the place of making. In the very nature of things, because of the variety of kinds of contracts, such as formal and informal, unilateral and bilateral, or because of the diversity of means of negotiations, such as agents, correspondence, etc., ‘the event’ is not always the same but varies so that the place of making instead of being determined by a constant content becomes a general term to designate places with which particular events have sufficient connection to give, according to circumstances, jurisdiction.” Stumberg, supra note 51, at 170. See notes 32 to 36, supra.
In these instances, it matters less what the rule is than that it should be certain and so far as possible uniform.\textsuperscript{54}

On the other hand, in cases presenting problems of Conflict of Laws among the states of a federal country the close and vital interconnections created by the constant flow of transactions of great value to individuals and to communities, may require the consideration of factors other than certainty of predictability of legal consequences by lawyers.\textsuperscript{55} Beyond \textit{legal} uniformity of consequence, it may be necessary to consider how far the adoption of particular rules in conflict of laws cases would result in uniformity of the sorts of \textit{economic} consequences most generally or most strongly desired. It may be conceivable that courts could succeed in working out uniform conflict of laws rules by which in each type of "contract" case some particular domestic rule would be applicable because of the territorial incidence of a particular kind of fact, so that a competent lawyer could safely and with assurance advise the parties as to the \textit{law} which would affect their prospective transaction. But even if this be assumed, it is nevertheless a fact that in reference to many matters involved in economic transactions, local differences between states as to "validity" essentials, both of the "intrinsic" and the "formal" sorts, are of such petty kinds, and the considerations back of local rules which oppose enforcement are of so much less importance than enforceability is to the parties and to the public, that these petty differences between local rules should not be permitted to prevent the enforcement of agreements and the realization of the expectations based upon them in interstate transactions. Accordingly, it should be considered whether or not it would be desirable to adopt a conflict of laws rule or set of rules which would have the maximum consequences of contractual enforceability of promises in respect to "intrinsic validity", "formal validity" and so-called "effects."\textsuperscript{56}

If this is desirable, then the rule or rules adopted should be stated as simply and directly as possible in terms of description of the very objective sought, viz: maximum contractual enforcement of promises. The following statement of such a rule is proposed:

The formal validity, the intrinsic validity, or the extent of the enforceability or effect of any alleged contractual promise or undertaking, other than one concerning an interest in land, shall be determined by applying that rule, of the domestic rules of the states in which operative facts\textsuperscript{57} of the factual situation of

\textsuperscript{54} Lorenzen, \textit{supra} note 28, at 750.

\textsuperscript{55} And the same observations would no doubt be applicable or nearly as applicable in reference to differences of domestic rules of nations closely situated with respect to each other and closely connected commercially.

\textsuperscript{56} See discussion at note 67, \textit{infra}.

\textsuperscript{57} "Operative, constitutive, causal, or dispositive facts are those which, under the general legal rules that are applicable, suffice to change legal relations, that is, either to
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the transaction concerned have happened or with which such operative facts are connected, which, if applied, will have the consequence of attaching validity or the maximum enforcement or effect to the promise or undertaking in question, subject to the qualification that in any case in which there is both a problem of intrinsic validity and a further problem of extent of enforcement or effect of a promise or undertaking (if held contractually valid, i.e., operative) or a further problem of any other kind, the further problem shall be treated as subsidiary and its solution shall be determined by applying the domestic rule or rules of the same state as are applied to determine the solution of the former problem.

The following rule is also proposed:

To determine the effect upon a contract, other than one concerning an interest in land, of a transaction or fact subsequent to the transaction of the making of the contract, there shall be applied the domestic rule or rules of that state, of the states in which or with which operative facts of the factual situation of the transaction of the making of the contract have taken place or are connected, which by its domestic rule or rules would give the greatest operative effect to such a subsequent transaction or fact had this transaction or fact and the transaction of the making of the contract taken place in and been connected solely with that state.

create a new relation, or to extinguish an old one, or to perform both of these functions simultaneously." Horfeid, Fundamental Legal Conceptions (1923) 32. The operative facts in a conflict of laws factual situation include each fact which, in a domestic case of the sort presented, would be operative in any of the states with which the factual situation is connected. They also include the domestic rules of those states. See Beale, op. cit. supra note 2, at 106.

58. E.g., fact of contemplated place of performance.

59. Questions of contractual "capacity" would be treated as questions of intrinsic validity under the rule now proposed; it is suggested that the fact of the place of domicile of the person whose "capacity" is in question perhaps should be treated as an operative fact.

60. "The contract," if held to exist, should be treated as much as possible as an entirety in respect of its legal characteristics. To prevent incongruity of treatment, if two or more legal characteristics of "the contract" are involved, the same system or aggregate of rules, consistent between or among themselves, should be applied when that can be done. Consistency and compatibility can be assured most completely if domestic rules of the same state are applied whenever possible where two or more conflict of laws questions have to be determined in reference to one transaction.

61. For example, a transaction or fact alleged to have effected assignment, modification, rescission or discharge, etc.

62. See note 60, supra. The rule or rules of the state or states in which the subsequent transaction or fact has happened or taken place, as for example in the case of an alleged assignment or discharge, are excluded for the following reasons: (1) because the problem involved is properly treated not as being what effect shall the subsequent transaction or fact have in itself, independently of the original contract transaction, but whether by reason of that original transaction a contract was made which was or should be treated as subject to being affected by a subsequent transaction or fact of the kind in question, e.g., whether the contract right or rights were created as assignable or not and created
The following rule is submitted for contractual transactions concerning interests in land:

All questions concerning alleged contracts which pertain to interests in land shall be determined by applying the rule or rules of the state of the situs of the land.

The first of the proposed rules does not differ essentially from the first proposition of the following rules which have been suggested by Professor Lorenzen for disposition of problems of "intrinsic validity," viz:

"... 1. That the intrinsic validity of contracts should be recognized if the local law of any state with which the contract has a substantial connection be satisfied. 2. That such contracts be regarded as invalid, a. if their execution is prohibited by some stringent policy of the place of contracting; b. if their performance is illegal under the law of the place of performance."63

Professor Lorenzen's second proposition is not included in the rule now proposed. If the agreement is one which is localized within one state as to the entire factual situation, including the fact of the place of performance, but suit has been brought in another state, the rule now proposed would have the same effect as Professor Lorenzen's second proposition; for the proposed rule applies the domestic rule of the state where the contract was executed, if all the other factual elements of the transaction likewise occurred in that state. But if the agreement is one as to which, although all the operative facts of its making have happened in one state, the performance was or is to take place in another state, the application of Professor Lorenzen's second proposition will not produce the same result as the proposed rule; for the proposed rule will sometimes give enforcement despite invalidity under the law of the place of execution. Where performance is thus to occur in a different state, there is no more reason for applying a rule of the place of agreement as assignable or not by such a subsequent transaction as the one which took place; (2) because it should be determined and be possible to know as soon as a contract is made what kind and how much of a contract it is. This concerns not only the extent of its enforceability and what will constitute full performance, but whether the contract rights are assignable or not, how otherwise than by performance the contract (as a set of legal relations) can be discharged, etc. It should not be necessary to wait for a subsequent transaction or fact to occur to see where it took place in order to be able to ascertain its effect upon the contract legal relations. The entire aggregate of contract legal relations, not only the right-duty and privilege-no-right relations but the power-liability and immunity-disability relations regarding the changing of the right-duty and privilege-no-right relations by assignment, discharge, etc., should be established by the transaction of the original making of the contract and be ascertainable on the basis of the operative facts of that transaction, which include the facts as to what the domestic contract rules of those states are with which that transaction is connected.

63. Lorenzen, supra note 22, 30 YALE L. J. at 673.
which would invalidate than for applying a rule of the place of performance, if necessary to validate the transaction contractually.\textsuperscript{64}

As to questions of "formal validity," Professor Lorenzen has recommended that "the law otherwise determining the existence of a legal act should control also its formal requirements"; that "compliance with the lex loci shall be regarded as sufficient" except in the case of commercial paper, where "compliance with the requirements of form of the place of issue should be obligatory, subject to the qualifications suggested by the English Bills of Exchange Act"; that "inasmuch as the law should be liberal in matters relating to mere form, contracts ... should be regarded as valid if they satisfy the lex fori ...."\textsuperscript{385} There is much merit in this proposal that fulfillment of the formal requisites of the lex fori should be held sufficient even though the requirements of no other rules of local law have been satisfied. The day of formalism in law is passing if it is not over. The only possible objection would seem to be that in cases in which formal validity was forced to depend solely upon the rule of the forum, there would be uncertainty as to formal validity or invalidity until suit had been brought, thereby determining the location of the forum. However, under this rule there would be at least a chance of saving the enforceability of a promise or agreement. Moreover, a claimant could enforce the agreement by suing in a state having a local rule by which the agreement would be upheld as valid, provided that he could get proper service upon the party sought to be sued.

\textsuperscript{64} If the agreement is not one in which all of the operative facts of its making have happened in one state but is such that one of two or more states in which the totality of these facts have happened is treated as the "place of contracting" by application of the "last act test," there is still less reason for applying the rule of that state. And the fact that the effect of applying its rule would invalidate the transaction when the effect of applying the rule of the other state or states with which the operative facts are connected would validate it, would seem to make the application of the so-called rule of the "place of contracting" more unjustified. Especially would this be true if besides the operative facts of the agreement as such having happened in two different states the place of performance were to be in a third state.

In a case of this sort, the point of difference between an interstate and an intrastate transaction, which the pseudo-territorial method leaves out of consideration, is important. Since the prohibitory rule in question relates to performance of domestic transactions it does not have a priori application to interstate transactions. Likewise, a policy as to a domestic aggregate of facts is not as such a policy as to an interstate aggregate of facts. Conceivably there may reasonably be a policy of one kind in a particular state with reference to an intrastate transaction and a different policy as to a similar interstate transaction. For the court of a state other than that of the place of performance to apply the conflict of laws policy and rule of the place of performance would be to apply renvoi (see note 4, supra), but this does not signify that that state's domestic policy and rule are necessarily applicable just because, under the terms of the agreement sought to be enforced, performance was to take place in that state.

\textsuperscript{65} Lorenzen, supra note 23, at 461-462.
Professor Lorenzen has also proposed certain alternative rules for the determination of contractual “effects,” viz:

“(1) The effects of contracts are governed by the law of any state chosen by the parties. (2) If the intention of the parties is not expressed, the effects of contracts shall be governed by the law of the specified place of performance. (3) If the intention of the parties does not appear and no place of performance is specified the law of the place of contracting shall control. (4) The law so governing determines not only the primary rights and duties arising from the contract but also the secondary rights arising from its breach. However, the legal rate of interest for the non-payment of money shall be determined by the law of the place of payment. (5) The mode of performance is governed by the law and usages of the place of performance. (6) Where the effect of a contract depends upon the meaning of certain terms designating the price, weight, or measure, or the time of performance, reference shall be had to the terminology of the place of performance, unless it appears from the circumstances that the parties used them in a different sense.”

Insofar as a question of “effect” is one of extent of enforceability of a promise or undertaking (or of so-called extent of “obligation,” sometimes called simply a question of “obligation”) there would seem to be no weighty reason for not determining the question by the same mode as a question of intrinsic validity and so, by applying the domestic rules of the states in which the operative facts have happened or with which they are connected, to effect maximum enforceability or maximum consequences. Here the question is how much enforcement there shall be. The question of “validity” is whether there shall be any enforcement at all or not. In this connection it should be noted that frequently if not in most instances in which the issue of “validity” or “invalidity” is determined, what is actually decided is not merely whether or not any “validity” shall be attached to a promise but whether the promise shall be held altogether “invalid,” or shall be held fully “valid.” There seems to be no sense in applying a different rule if the issue is between total invalidity and partial validity than if it is between partial validity and entire validity.

As to “performance,” where there are differences of legal rules between states regarding what “performance” shall constitute complete fulfill-

66. Lorenzen, supra note 22, 31 Yale L. J. at 72.
67. This might be otherwise stated in terms of effect, viz.: as between (1) no effect or full (or fullest possible) effect, (2) no effect or partial effect, (3) partial effect or full (or fullest possible) effect. These alternatives are reducible to: (1) no effect or some effect, (2) more, or less effect—to be attached. The latter alternative is what is generally signified by the term “effect” as differentiated from the former alternative which is classified as signifying “validity” or “invalidity.” The mere difference of concept thus signified is not sufficient in itself to require or to justify the employment of two or more different rules instead of applying the same rule for both classes of questions.
ment of a duty held to have been created by the making of a particular kind of promise (sometimes called a question of "obligation" or kind of "obligation"), the question involved is really what the duty created shall be held to be and what its extent shall be held to be. Where more is required of the promisor by the rule of one state than by the rules of another or others, as constituting "performance," i.e. complete fulfillment of duty, the difference is clearly of less or greater enforceability and so can be and should be dealt with as such under the rule proposed. If there is a difference of legal rule involved as to mode of performance, without any quantitativeness as to what constitutes fulfillment of duty, performance according to either or any mode required in the different states with which the operative facts are connected should be held to constitute full performance. If a difference as to mode of performance in question is not one as between or among domestic legal rules but merely of custom or usage in two or more states, it would seem that the problem involved is merely one of interpretation and should be so treated and determined as well as can be done from the facts and circumstances of the case. If performance in a particular state has been expressly or impliedly specified, it would ordinarily be natural and reasonable to conclude that the mode of performance usual in that state was manifestly intended by the parties. A rule of construction to this effect, to be applied in the absence of actual indication of intention as to mode of performance would seem not to be subject to criticism.68

As for damages, it must be remembered that a question of the measure of damages is one of the extent of enforceability of the secondary "duty" or "obligation." It is therefore suggested that under the proposed rule, the domestic rule of the state in which the greater or greatest amount of damages would be imposed in a domestic case be applied to such questions.

As to "intrinsic validity" particularly, and perhaps even as to "formal validity," the courts apparently are struggling against theoretical preconceptions and formulistic habits of thought in efforts to apply rules which produce maximum enforcement of promises. They do so because they feel that in this way the most desirable economic consequences are produced,69 even though their opinions have not reached the point of openly describing the economic objective as the legal test by which their dispositions are actually determined. The securing of general adoption throughout the country, of conflict of laws rules which would assure in advance of transactions, uniformity of desired economic consequences, without dependency on haphazard factual circumstances extrinsic of the

68. See Heilman, supra note 21.
69. And the effect seems especially strong and general in the federal courts. Supra, note 42, at 100-103.
transactions themselves would, it is felt, be an attainment far greater than the general establishment of conflict of laws rules capable of certainty and precision of application as to any transaction only after it had reached a court in litigation. The latter type of rule would sometimes result in one kind of legal consequences (e.g., enforcement) and sometimes in another kind (e.g., non-enforcement), and its economic consequences would depend not on the intrinsic characteristics of the transaction itself but upon the place of occurrence or anticipated occurrence of some factual element, artificially designated from the aggregate of facts of an interstate factual situation, or would even be dependent upon the place of litigation. Such fortuitousness should, to as full an extent as possible, be eliminated as a determinant of legal consequences and of the economic and social consequences dependent upon them.

Perhaps nothing better illustrates this uncertainty in the "contract" field and its undesirability than the condition of the decisions on conflicts of laws problems concerning Statute of Frauds provisions. These problems not only present considerations involved generally in questions of "formal validity," including the possibility of applying any of the various rules (e.g., rule of "place of contracting," rule of "place of performance," rule of "place presumably intended") and a possible objective of effecting enforceability, but also embrace the possibility of the application of the rule of the forum. There is involved, further, the possible objective, usually unarticulated, of producing results, by applying the lex fori, of the sort which would be produced by application of that rule in a domestic case. Such an inclination is, of course, by no means non-existent in the "contract" field generally or in any other field of conflict of laws adjudication, but the possibility of employing the formula "lex fori determines questions of procedure" offers special temptation. This condition of the decisions on Statute of Frauds problems, it should be noted, is to no little extent the effect of the influence and unanalytical acceptance of an English decision which adopted the rule of the forum. This decision applied the formula just mentioned to the Fourth Section of the Statute of Frauds on the specious basis that its phraseology, "No action shall be brought," etc., made it solely procedural in its effect when applied, and distinguished it from the Sev-

70. "To apply the law which will uphold the contract if it have some bona fide substantial connection with the place of that law would, it is believed, in carrying out the purposes that the parties had in view in their negotiations, a contract, better serve business convenience in making the acts of the parties legally conform to what they purport to be." Stumberg, supra note 51, at 184.

71. Leroux v. Brown, 12 C. B. 801 (1852). This decision contradicted at least two previous ones: Carrington v. Roots, 2 M. & W. 248 (Exch. 1837); Reade v. Lamb, 6 Exch. 130 (1851).
enteenth Section (the phraseology of which was "No contract shall be allowed to be good," etc.), which was still treated as substantive in effect, as it had been treated previously in decisions. Not only do the statutes of the different American states vary in phraseology, but the American courts differ as to what rule should be applied. Moreover, there is much contrariety of treatment even of identically-worded and similarly-worded statutes, notably as to statutes phrased more nearly like the Fourth Section than like the Seventeenth Section of the English statute. Thus, after a case involving a Statute of Frauds provision has been brought before a particular forum there may be no doubt as to what rule will be applied under the particular facts, but in the greater number of instances it is impossible to predict the judicial fate of a particular transaction before it is known in what state suit will be brought.

It should not be overlooked that the interest of a particular state in a domestic rule of its own may pertain only to its local application in domestic cases and may be unconcerned with its employment as a conflict of laws rule for interstate transactions. This is implicit in the very fact that any rule adopted in the decision of a domestic case is only a domestic rule which encompasses no more than what is involved in the factual situation presented. This is a point which the pseudo-territorial method totally excludes from consideration, thereby ignoring the social and economic effects of the employment of particular rules as conflict of laws rules affecting the larger community concerned with an interstate factual situation. It may be of importance, conceivably, in the economic situation of a state which has an inhibitory domestic rule, that interstate transactions of the kind to which the rule pertains should be given enforcement, although as to domestic transactions the nullifying effect of the rule may be locally expedient and desirable.

The above observations would seem to be applicable with especial strength to domestic rules which are no longer regarded even locally as having any distinguishable social utility, but which still exist as mere remnants of earlier times in which they may have served some social purpose or may have been regarded as doing so. Such domestic rules certainly should not be permitted to stand as obstacles preventing the enforceability of interstate contractual transactions. Legal theory


73. Statute of Frauds provisions, it is believed, are examples of rules which ought not to be given the far-reaching inhibitory effects which they have in not a few instances been employed to impose with reference to interstate transactions. This attitude concerning such provisions is not infrequently taken judicially. "Whether the Statute of Frauds does more harm than good is an open question; but there is no doubt that the courts are taking all cases out of its operation when they can give an apparently reasonable ground for doing so." Corbin, Contracts of Indemnity and the Statute of Frauds (1928) 41 HARV.
which cannot give enforcement despite such domestic rules should be discarded. Moreover, by embodying strong economic and other social objectives in conflict of laws rules, momentum may be added to the sweeping away of domestic rules which have no justification for continued existence.

The chief functions which the rules of Conflict of Laws ought to be made to serve are: to provide certainty and uniformity as to predictability of legal consequences of specific factual situations; beyond that, to provide to the greatest extent possible through the imposition of legal consequences, uniformity of economic and other social consequences of the kind generally thought desirable throughout the larger commonwealth. The domestic rules of particular states should be excluded from application to the extent that their employment might impede or defeat this accomplishment.

L. Rev. 689, 707. There may be not a few types of domestic rules of law, possibly including a number of general statutory ones and certainly including some local statutory ones which are not general, which, when considered from an economic and social viewpoint in reference to conflict of laws problems, would be seen as not justifiably employable to bar the judicial enforcement of interstate transactions. Particularly may this be true of subjects concerning which the greatest diversity exists in the domestic rules of the states of this country, indicating that there is by no means general recognition of the merit of any particular kind of domestic rule in reference to those subjects.

74. "Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject." Holmes, supra note 26, at 477, COLLECTED LEGAL PAPERS (1921) at 200.