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DEVELOPMENTS IN THE CONFLICT OF LAWS,

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THE writer's interest in the conflict of laws coextends substantially with the life of the *Michigan Law Review*. This may be some excuse for attempting to trace some of the developments in this field in the intervening years. Let us consider first what has happened in this country and thereupon what has occurred in the rest of the world.

DEVELOPMENTS IN THE UNITED STATES

If one compares the place of the conflict of laws in the law school curricula of today with its position at the beginning of the century, one observes a very marked change. Through Professor Beale the conflict of laws became, since 1894, one of the major and most popular courses at the Harvard Law School, and as the influence of that school spread over the country, it carried with it an enthusiastic interest in this subject. Through Professor Beale's influence also one of the first subjects to be restated by the American Law Institute was that of the conflict of laws, with Professor Beale as Reporter. After ten years of unremitting labor the *Restatement* of this subject was brought to a conclusion in 1934. In this *Restatement* we have the most detailed collection of rules of the conflict of laws to be found in any country.¹

Characteristic of the American conflict of laws is that it is applicable both between the different states of this country and between this country and foreign countries; that is, it has both an interstate and an

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¹ The Conflict of Laws Restatement contains 625 sections. The Code Bustamante (Pan-American Code of Private International Law), covering a wider field, has 437 sections.

international aspect.² Characteristic of our system of the conflict of laws is likewise that the authority of the individual states to lay down conflicts rules is subject to various limitations imposed by the Constitution of the United States as interpreted by the Supreme Court. Text-books on the conflict of laws published prior to 1902 scarcely touched upon the constitutional aspects of the subject, except in connection with the jurisdiction of courts and the enforcement of judgments of sister states. Beale's casebook on the conflict of laws followed the same trend. How different the latest edition of the casebook on that subject by Cheatham, Dowling, Goodrich and Griswold! Forty years ago it appeared that the states and their courts were practically free to adopt the rules of the conflict of laws deemed most convenient. During the last twenty-five years the Supreme Court has invoked the full faith and credit clause, the due process clause and other clauses of the United States Constitution in an increasing number of cases to limit the power of the legislatures and courts in this regard, so that the question came to be asked whether the conflict of laws in this country had become a part of constitutional law.³ Late decisions of the Supreme Court would suggest that the Court as now constituted may be disposed to call a halt to the movement alluded to.⁴

From early times the question has been whether our federal courts should follow the rules of the conflict of laws obtaining in the states in which they sit so that there might be uniformity of decision between the federal and state courts in the same state, or whether the federal courts should develop conflict of laws rules of their own so as to secure uniformity between the federal courts of this country. As early as 1842 the case of *Swift v. Tyson*⁵ decided that the federal courts were not bound by the state rules in matters of general law, from which it followed that they were not compelled to follow the conflict of laws rules of any state.⁶ This long-established doctrine was overthrown in 1938,⁷

² See Du Bois, "The Significance in Conflict of Laws of the Distinction between Interstate and International Transactions," 17 MINN. L. REV. 361 (1933).

³ Ross, "Has the Conflict of Laws Become a Branch of Constitutional Law?" 15 MINN. L. REV. 161 (1931).

⁴ See especially *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941).

⁵ 16 Pet. (41 U. S.) 1 (1842).

⁶ Thus, up to 1938 the federal courts required the existence of reciprocity for the enforcement of judgments of foreign courts, *Hilton v. Guyot*, 159 U. S. 113, 16 S. Ct. 139 (1895), whereas the state courts regarded them generally as conclusive. *Johnston v. Compagnie Générale Transatlantique*, 242 N. Y. 381, 152 N. E. 121 (1926); *Cowans v. Ticonderoga Pulp & Paper Co.*, 219 App. Div. 120, 219 N. Y. S. 284 (1926), *affd.* 246 N. Y. 603, 159 N. E. 669 (1927).

⁷ *Erie R. R. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (1938).

and it is now the duty of the federal courts to follow the conflict of laws rules of the states in which they sit.⁸ This obligation exists, of course, only to the extent that the state has the power to adopt its own rules of the conflict of laws, free from any constitutional restraint.

In the matter of the jurisdiction of courts, our law has approached during the last forty years to a certain extent the continental point of view. On the continent of Europe and in Latin America a person may be sued upon any personal cause of action at his domicile and in other places with which the transaction is deemed to have a sufficient connection. In this country there were recognized forty years ago only two general bases of jurisdiction in personal actions, resting on personal service or consent. A third basis—that of domicile—was adopted in some states by statute, which conferred power upon the courts to enter a personal judgment upon constructive service against a defendant who was domiciled in the state, but in some states the validity of such legislation was challenged by the courts.⁹ The Supreme Court of the United States did not pass upon the question until 1940 when it sustained the power of the legislatures to confer such jurisdiction.¹⁰

The rapid increase in business carried on by foreign corporations and nonresident individuals early induced the legislatures of the various states to confer jurisdiction upon their courts over causes of action arising out of such business. Forty years ago our courts still relied on the consent theory to sustain such legislation with respect to foreign corporations. Since then, and especially since the decision of *International Harvester Company v. Kentucky*¹¹ the consent theory proved insufficient, whereupon the *presence* theory came into being.¹² This theory in turn does not solve the problem.¹³ The view is finding more and more acceptance today that, where contract or tort obligations are in-

⁸ *Sampson v. Channell*, (C. C. A. 1st, 1940) 110 F. (2) 754, cert. den. 310 U. S. 650, 60 S. Ct. 1099 (1941); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020 (1941); *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941).

⁹ See *De la Montanya v. De la Montanya*, 112 Cal. 101, 44 P. 345 (1896); *Moss v. Fitch*, 212 Mo. 484, 111 S. W. 475 (1908); *Raher v. Raher*, 150 Iowa 511, 129 N. W. 494 (1911); *McCormick v. Blaine*, 345 Ill. 461, 178 N. E. 195 (1931).

¹⁰ *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339 (1940). In *McDonald v. Mabie*, 243 U. S. 90, 37 S. Ct. 343 (1917), the case went off on the due process clause, the best practicable mode of constructive service not having been used.

¹¹ 234 U. S. 579, 34 S. Ct. 944 (1914).

¹² See *International Harvester Co. v. Ky.*, 234 U. S. 579, 34 S. Ct. 944 (1914); *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 S. Ct. 233 (1918).

¹³ See remarks of Judge Learned Hand in *Hutchinson v. Chase & Gilbert*, (C. C. A. 2d, 1930) 45 F. (2d) 139.

curred in connection with the business of foreign corporations or non-resident individuals, it is only fair that the parties injured should be able to obtain redress through the courts of the state where the business is carried on instead of being able to bring suit only in the home state of the foreign corporation or nonresident.¹⁴

As long as jurisdiction over foreign corporations was predicated upon the theory of implied consent, the privilege and immunities clause seemed to present an insurmountable obstacle to the exercise of jurisdiction over nonresident citizens, for the reason that whereas foreign corporations could be excluded from doing business in the state or admitted upon terms, citizens of other states could not.¹⁵ This difficulty disappears if the latest theory of jurisdiction referred to above is recognized.

As regards damage caused by automobiles of nonresidents, it is now settled by the decisions of the Supreme Court of the United States that a state may confer jurisdiction upon its courts by authorizing service upon some state official as the representative of the nonresident owner and requiring that the owner be notified of the pendency of the suit, generally by registered mail.¹⁶ The police power of the states over their roads has been invoked as a legal justification for the exercise of this exceptional mode of jurisdiction. The *Restatement of the Conflict of Laws*¹⁷ would go beyond and recognize the power of states to assume jurisdiction over causes of action arising out of any act done in the state, provided some reasonable mode of constructive service be required. The recognition of such a formula would extend the jurisdiction of our courts even beyond the accepted theories in continental and Latin-American countries. The Supreme Court of the United States has not as yet approved such a broad doctrine.

Jurisdiction in rem over interests in land presents no serious problem in the conflict of laws. With respect to chattels, difficulties arise when they are brought into a state without the owner's consent¹⁸ or where the chattel is represented by a negotiable bill of lading or ware-

¹⁴ The troublesome question as to what constitutes doing "business" and the further question whether a corporation conducting a continuous business in a state should not, upon proper notice, be subject to suit with respect to causes of action arising out of foreign transactions still remain. See *Hutchinson v. Chase & Gilbert*, (C. C. A. 2d, 1930) 45 F. (2d) 139.

¹⁵ See *Flexner v. Farson*, 248 U. S. 289, 39 S. Ct. 97 (1918).

¹⁶ *Hess v. Pawloski*, 274 U. S. 352, 47 S. Ct. 632 (1927); *Wuchter v. Pizzutti*, 276 U. S. 13, 48 S. Ct. 259 (1928).

¹⁷ Sec. 84 (1934).

¹⁸ See CONFLICT OF LAWS RESTATEMENT, §§ 102, 103, and caveat (1934).

house receipt which is in another state.¹⁹ No final conclusions have been reached by our courts in these matters. As regards intangibles, Professor Beale has contended that in the nature of things jurisdiction in rem is impossible.²⁰ Courts and legislatures have not taken this view, however, and have assumed jurisdiction under varying circumstances. The matter was brought before the Supreme Court of the United States in 1905 in a case where the local legislature allowed the garnishment of a debt owed by a nonresident debtor, which was neither contracted nor payable in the state.²¹ The Supreme Court allowed the exercise of jurisdiction, provided the principal debtor was suable in the state, and stated that the garnishee could set up the garnishment proceedings and payment thereunder as a defense in a suit by his creditor only if he had notified him of the pendency of garnishment proceedings or if his creditor had otherwise learned of the proceedings in time to put up any defense.

Where the debt or other intangible interest is represented by a note, bill or stock certificate, the question has been raised whether the document can be proceeded against in rem on the ground that it has incorporated the chose in action. A considerable number of decisions has been rendered on the point during the last forty years, but there is still much confusion in our law on the subject.²² There is some trend in favor of allowing such a proceeding in the state in which the certificate is found.

Some new developments have taken place since 1900 in the enforcement of judgments of sister states. For example, it has become settled that a state may not decline to enforce such judgments on the ground of public policy.²³ The Supreme Court of the United States has held likewise that tax judgments, like any other judgments for the payment of money,²⁴ are entitled to full faith and credit. A most striking development has been in the direction of extending the doctrine of *res judicata*. Until recently the defense of lack of jurisdiction was available in a suit upon the judgment of a sister state. This defense was

¹⁹ Heldendall, "The Res In Transitu and Similar Problems in the Conflict of Laws," 17 CAN. B. REV. 7, 105 (1939).

²⁰ Beale, "The Exercise of Jurisdiction *in Rem* to Compel Payment of a Debt," 27 HARV. L. REV. 107 (1913).

²¹ See *Harris v. Balk*, 198 U. S. 215, 25 S. Ct. 625 (1905).

²² See Andrews, "Situs of Intangibles in Suits against Nonresident Claimants," 49 YALE L. J. 241 (1939).

²³ *Fauntleroy v. Lum*, 210 U. S. 230, 28 S. Ct. 641 (1908); *Roche v. McDonald*, 275 U. S. 449, 48 S. Ct. 142 (1927).

²⁴ *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 56 S. Ct. 229 (1935).

cut off by the Supreme Court, however, in 1931 with respect to jurisdiction over the person,²⁵ and still more recently in various cases involving jurisdiction over the subject matter, where the defendant had litigated the question of jurisdiction in the lower court.²⁶

Disputes regarding the status of foreign equitable decrees for the payment of money were set at rest early in this country by statutes which placed them on the same footing with judgments at law.²⁷ Whether an equitable decree for the doing of some act other than the payment of money creates an obligation which is entitled to full faith and credit, or if not, should be enforced on principles of the conflict of laws, or whether it constitutes merely a conclusive determination of the equities of the case which the other courts must respect, is not yet finally determined.²⁸

Arbitration agreements have been regarded in this country as valid but unenforceable, that is revocable at any time before an award was rendered. The revocability rule was first changed in New York in 1920 by statute and thereupon in other states. Congress enacted the United States Arbitration Act, in force since 1926, which is applicable to suits arising in admiralty and in foreign and interstate commerce, except contracts of employment. The legislation with respect to arbitration is so recent that no major developments from the standpoint of the conflict of laws can as yet be recorded. The greatest contrast between our law and that of all other countries consists in the fact that according to our courts the enforcement of foreign arbitration agreements relates to procedure instead of to the substantive rights of the parties.²⁹

Courts have declined to enforce the laws of foreign states or countries normally applicable when they were sufficiently distasteful to them. In such a case they are wont to say that the enforcement of the foreign law is contrary to the public policy of the forum. Writing in 1918,³⁰ Judge Beach contended that such a doctrine had no place be-

²⁵ *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U. S. 522, 51 S. Ct. 517 (1931).

²⁶ *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3 (1938); *Treinius v. Sunshine Mining Co.*, 308 U. S. 66, 60 S. Ct. 44 (1939).

²⁷ See *Post v. Neafie*, 3 Caines (N. Y.) 22 (1805).

²⁸ See *Fall v. Eastin*, 215 U. S. 1, 30 S. Ct. 3 (1909), especially concurring opinion by Justice Holmes, and *CONFLICT OF LAWS RESTATEMENT*, §§ 447, 450 (1934).

²⁹ *Meacham v. Jamestown, F. & C. R. Co.*, 211 N. Y. 346, 105 N. E. 653 (1914); Lorenzen, "Commercial Arbitration—International and Interstate Aspects," 43 *YALE L. J.* 716 (1934).

³⁰ Beach, "Uniform Interstate Enforcement of Vested Rights," 27 *YALE L. J.* 656 (1918).

tween the states of this country. Although the tendency to narrow the public policy doctrine has continued during the last forty years,³¹ it has still the sanction of the Supreme Court of the United States.³² But what is the legal effect of the application of the public policy doctrine? May the plaintiff who is denied recovery because the enforcement of a claim is deemed to be against the public policy of the forum sue the defendant again in some other state, on the ground that the first judgment affected merely matters of procedure and for that reason is not *res judicata*? Brandeis has given an affirmative answer to this question,³³ but there is authority to the contrary.³⁴ So far as the public policy doctrine can be invoked against a defendant, by excluding his defense,³⁵ he is clearly out of luck, for the judgment against him is conclusive. To what extent the full faith and credit to be accorded to the public acts of sister states will be held to restrict the power of the courts of the forum to invoke their public policy doctrine in cases of this sort cannot be stated with any degree of assurance.

Until 1910 courts and writers in this country were unaware that differences in the conflict of laws rules of two countries raised a problem which had been debated a great deal on the continent, viz. whether the conflict of laws rules of the forum should be deemed to refer to the law of the foreign country inclusive of its conflict of laws rules or exclusive of such rules.³⁶ The problem is technically known as that of *renvoi*. If the courts apply foreign conflict of laws rules, they are said to adopt the *renvoi*.³⁷ We have no decisions as yet clearly supporting the *renvoi* doctrine.³⁸ Griswold³⁹ would justify it in the interest of uniformity if the courts of the forum would decide the case in the same manner as the courts of the foreign country. Such uniformity would be achieved, however, only between countries having the same conflict of laws rule

³¹ *Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 120 N. E. 198 (1918).

³² *Union Trust Co. v. Grosman*, 245 U. S. 412, 38 S. Ct. 147 (1918); *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941).

³³ *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145 at 160, 52 S. Ct. 571 (1932).

³⁴ *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172 (1912).

³⁵ See *Fox v. Postal Telegraph Cable Co.*, 138 Wis. 648, 120 N. W. 399 (1909).

³⁶ See Lorenzen, "The *Renvoi* Theory and the Application of Foreign Law," 10 COL. L. REV. 190, 327 (1910).

³⁷ It may lead either to the application of the law of the forum (case of remission) or to that of another state or country (case of transmission).

³⁸ The only decision in this country in which the matter is fully discussed is that of *In re Tallmadge*, 109 Misc. 696, 181 N. Y. S. 336 (1919), decided by the Surrogates Court of New York County. The court reached the conclusion that the *renvoi* doctrine had no place in our law.

³⁹ Griswold, "Renvoi Revisited," 51 HARV. L. REV. 1165 (1938).

and then only if the courts of the foreign country would reject Griswold's version of the *renvoi* doctrine.⁴⁰

Although the courts in question have the same rules of the conflict of laws, different meanings may be attached thereto. For example, both may apply the law of domicile in the case of intestate succession regarding movables but their notions of domicile may vary. Again, both may say that the law of the place where the contract is made governs its validity and yet reach different conclusions when the contract is made by correspondence as regards the place of contracting. This problem is part of what is technically known as the qualification, classification or characterization problem. The first article on this subject written in English appeared in 1920.⁴¹ On the continent the subject has aroused the interest of a large number of jurists who have enlarged its scope to such an extent as to cover practically the entire subject of the conflict of laws. Under such circumstances no useful statement of a general character can be made regarding it. In a second article I attempted to limit the problem so as to keep it within proper bounds.⁴² Professor Cook quotes a portion of my article and says that the arguments there used "make no sense in any usable terminology" of legal logic.⁴³ I agree, but it ought to have been apparent that the arguments advanced by me were not intended to express my own point of view on the subject of substance and procedure⁴⁴ but the kind of reasoning usually indulged in by our courts.

⁴⁰ If A, a citizen of State X, dies domiciled in State Y and State X distributes personal property upon death in accordance with the law of domicile and State Y in accordance with the law of nationality, under the Griswold formula uniformity would actually be obtained only with respect to countries adopting the law of domicile in the distribution of personal property upon death. They would all distribute the property as the courts of Y would do. Courts distributing the property in accordance with the national law of the decedent would distribute it as the courts of State X would do. Such uniformity in each group could be achieved only if the courts of the foreign country whose law is applicable reject the Griswold formula and use the *renvoi* as an excuse for applying the law of the forum. If they were to accept the Griswold formula, they would fall into circular reasoning from which there would be no logical escape,—the courts of X would have to distribute the property as it would be distributed by the courts of State Y and the courts of State Y would have to distribute it as the courts of State X.

⁴¹ Lorenzen, "The Theory of Qualifications and the Conflict of Laws," 20 *COL. L. REV.* 247 (1920).

⁴² Lorenzen, "The Qualification, Classification, or Characterization Problem in the Conflict of Laws," 50 *YALE L. J.* 743 (1941).

⁴³ Cook, "Characterization' in the Conflict of Laws," 51 *YALE L. J.* 191 at 198 (1941).

⁴⁴ See Lorenzen, "The Statute of Frauds and the Conflict of Laws," 32 *YALE L. J.* 311 (1923).

Besides the renvoi theory and the qualification problem, the notion of fraud upon the law has aroused considerable interest on the continent in modern times, especially in France. In this country there are isolated instances in which courts have dealt with the problem, especially in the case of marriage and divorce, but no attempt has been made to develop general theories regarding it.⁴⁵

The courts of all countries will enforce only foreign substantive rights and not foreign rules of procedure. This is in accordance with the necessity of the situation, for the courts of one state cannot use the legal machinery of the state governing the right in question. In the nature of things courts enforce all causes of action only in accordance with the local legal machinery. Matters of procedure, pleading and rules of evidence are, therefore, naturally governed by the law of the forum, although they may affect the decision in a particular case. Anglo-American courts, however, have not drawn the line as indicated above and have called matters procedural in the conflict of laws because they had been so regarded for other purposes. The line between substance and procedure is a flexible one and can be drawn in different places in accordance with the objectives in view, so that the label "procedure" attached to a matter in other branches of the law is not determinative of the question in the conflict of laws.⁴⁶ In recent years our courts have become somewhat aware of this fact, especially with respect to the statute of frauds.⁴⁷

Anglo-American law determines various questions in the conflict of laws with reference to the law of domicile. In most countries of the world a married woman takes at the time of marriage the domicile of her husband and her domicile follows that of the husband throughout the marriage.⁴⁸ This rule was modified, however, in the United States by the middle of the last century in the matter of divorce, to the extent of its being recognized that a married woman who was justified in living apart from her husband could acquire a separate domicile for the purpose of securing a divorce.⁴⁹ The unitary concept of domicile as between husband and wife having once been broken, it was inevitable that a married woman should be allowed to acquire a separate domicile for

⁴⁵ See by CHEATHAM, DOWLING, GOODRICH and GRISWOLD, *CASES AND MATERIALS ON THE CONFLICT OF LAWS*, 2d ed., 582-584 (1941).

⁴⁶ Cook, "Substance and Procedure in the Conflict of Laws," 42 *YALE L. J.* 333 (1933).

⁴⁷ See *Lams v. F. H. Smith Co.*, 6 W. W. Harr. (36 Del.) 477, 178 A. 651 (1935).

⁴⁸ See *Attorney-General for Alberta v. Cook*, [1926] A. C. 444.

⁴⁹ *Cheever v. Wilson*, 9 Wall. (76 U. S.) 108 (1869).

other purposes than divorce. Thus it was held by the Supreme Court of the United States in 1915⁵⁰ that she could do so for the purpose of bringing an action for damages against her husband in a federal court. Some courts took the position that as long as the marriage ties were in fact broken a married woman could have a separate domicile without respect to whether or not she was the guilty party in breaking up the home.⁵¹ One or two recent cases have taken the most advanced position to the effect that a wife takes the husband's domicile on marriage no longer as a matter of law and that she may retain her old domicile by agreement with her husband.⁵²

At common law legitimate children took the domicile of their father. This rule has been modified by modern statutes which confer upon the mother equal rights of guardianship and by the developments in our law regarding the capacity of a married woman to acquire a separate domicile from that of her husband. Children living with their mother are frequently held, therefore, to take the domicile of their mother.⁵³ They will continue to do so after the mother's remarriage, provided they continue to live with their mother.⁵⁴

The dogma, deeply rooted in Anglo-American law, that a person can have but one domicile has been challenged in recent times and it is said that a person may have different domiciles for different purposes. A troublesome question has arisen in recent years with regard to the inheritance taxation of intangible property when two or more states claimed the decedent to be domiciled in their state. Except in one case,⁵⁵ in which four states imposed an inheritance tax, the total amount of which would consume the entire estate, the Supreme Court has declined to interfere.⁵⁶ The only relief in sight at present seems to be the enactment of state legislation providing for the voluntary submission of controversies of this sort to arbitration.⁵⁷

The law was settled in this country at the beginning of the century

⁵⁰ *Williamson v. Osenton*, 232 U. S. 619, 34 S. Ct. 442 (1913).

⁵¹ *Saperstone v. Saperstone*, 73 Misc. 631, 131 N. Y. S. 241 (1911); *Chapman v. Chapman*, 129 Ill. 386, 21 N. E. 806 (1889).

⁵² *Commonwealth v. Rutherford*, 160 Va. 524, 169 S. E. 909 (1933).

⁵³ *CONFLICT OF LAWS RESTATEMENT*, § 32 (1934).

⁵⁴ *Id.*, § 38, comment d.

⁵⁵ *Texas v. Florida*, 306 U. S. 398, 59 S. Ct. 563, 830 (1939).

⁵⁶ See *In re Dorrance's Estate*, 309 Pa. 151, 163 A. 303 (1932); 115 N. J. Eq. 268, 170 A. 601 (1934), cert. den. 298 U. S. 678, 56 S. Ct. 949 (1936).

⁵⁷ Harper, "Final Determination of Domicil in the United States," 19 PA. B. A. Q. 213 (1934); reprinted in 9 IND. L. J. 586 (1934); 28 NAT. TAX ASSN. CONF. PROC. 201 (1935); Knapp, "Solutions of the Double Domicile Problem—History and Prospects," 15 CONN. B. J. 251 (1941).

that the law of the state in which a tort was committed, that is, where the injury or harm was done, determined the substantive rights of the parties.⁵⁸ In connection with wrongful death statutes the question has been debated whether the place of impact or that of the death should control. The law is now settled in favor of the former rule.⁵⁹ Early in the century many courts professed to enforce claims arising under foreign wrongful death statutes only if there was a substantially similar statute at the forum. This similarity test has been abandoned today in practically all the states.⁶⁰

The advent of the automobile has raised the problem whether the owner shall be held in accordance with the law of the place of the injury for damages caused by his auto when driven by a servant, a friend or a member of the family in a state other than the one in which the owner lived. In *Young v Masci*⁶¹ the Supreme Court of the United States held that the owner should be liable if the auto was in the state in which the injury occurred with his express or implied consent. Judge Learned Hand has interpreted *Young v. Masci* as holding that the owner would not be liable if the auto was taken into the other state without his consent.⁶² It would not be surprising, however, if the Supreme Court should hold that when an owner entrusts his auto to someone he takes the risk of its being taken to a state not contemplated by him, so as to be liable even in that event in accordance with the *lex loci delicti*.

Workmen's compensation acts were unknown forty years ago. Now they exist in all states except Mississippi. At first the question was asked whether the legislation belonged to the law of torts or to the law of contracts. Today it is admitted that the application of these acts should not be determined on such a technical basis and that they should be construed to achieve the social purpose for which they were designed.⁶³ The law has not crystallized as yet as to the means best calculated to attain this end. The tort theory has been generally aban-

⁵⁸ In England an action will lie only if the facts constitute a tort under English law and the conduct was justifiable under the foreign law. *Machado v. Fontes*, [1897] 2 Q. B. 231, 66 L. J. (Q. B.) 542 (Court of Appeal).

⁵⁹ See *Vancouver Steamship Co. v. Rice*, 288 U. S. 445, 53 S. Ct. 420 (1933).

⁶⁰ See *Loucks v. Standard Oil Co. of N. Y.*, 224 N. Y. 99, 120 N. E. 198 (1918).

⁶¹ 289 U. S. 253, 53 S. Ct. 599 (1933).

⁶² *Scheer v. Rockne Motors Corp.*, (C. C. A. 2d, 1934) 68 F. (2d) 942.

⁶³ *Quong Ham Wah Co. v. Industrial Accident Commission*, 184 Cal. 26, 192 P. 1021 (1920); *Ocean Accident & Guarantee Corp. v. Industrial Commission of Arizona*, 32 Ariz. 275, 257 P. 644 (1927).

doned. The so-called contract theory is numerically still prevailing, but other theories, such as that of the localization of business⁶⁴ or the localization of employment,⁶⁵ have come to the front. The question under what circumstances the workmen's compensation act of one state is entitled to full faith and credit by the courts of another state came before the Supreme Court of the United States in 1932.⁶⁶ The Court held that under the facts of the case the Vermont act was entitled to full faith and credit and that New Hampshire could not apply its own act, notwithstanding the fact that the injury had been received in New Hampshire. Since that time the Supreme Court has taken the position that any state whose public policy is sufficiently involved has the power to apply its own act.⁶⁷

In some states the employee who has accepted compensation under the workmen's compensation act may sue a third party who has caused the injury, the employer being subrogated to the extent of his payment. In others the employee is deprived of such cause of action but the employer may sue the third party in the name of the employee to recover to the extent of his outlay. Owing to such differences in legislation, troublesome questions of subrogation have arisen which are not as yet worked out by the courts with any degree of clarity.⁶⁸

The subject of contracts has not advanced much beyond the state in which it was forty years ago. The early cases, in agreement with Story,⁶⁹ held that the law of the *lex loci contractus* controlled except when the contract was to be performed elsewhere, when, in accordance with the presumed intention of the parties, the law of the place of performance would control. Professor Beale⁷⁰ has regarded this as an importation of continental ideas inconsistent with the principle of territoriality adopted by the common law, according to which the state in which a contract is technically made has exclusive power to attach legal con-

⁶⁴ State ex rel. Chambers v. District Court of Hennepin County, 139 Minn. 205, 166 N. W. 185 (1918).

⁶⁵ Cameron v. Ellis Construction Co., 252 N. Y. 394, 169 N. E. 622 (1930).

⁶⁶ Bradford Electric Light Co. v. Clapper, 286 U. S. 145, 52 S. Ct. 571 (1932).

⁶⁷ Alaska Packers Assn. v. Industrial Accident Commission, 294 U. S. 532, 55 S. Ct. 518 (1935); Pacific Employers Ins. Co. v. Industrial Accident Comm., 306 U. S. 493, 59 S. Ct. 629 (1939).

⁶⁸ See Dwan, "Workmen's Compensation and the Conflict of Laws," 11 MINN. L. REV. 329 (1927); Dwan, "Workmen's Compensation and the Conflict of Laws—The Restatement and Other Recent Developments," 20 MINN. L. REV. 19 (1935).

⁶⁹ CONFLICT OF LAWS RESTATEMENT, § 242 (1934).

⁷⁰ Beale, "What Law Governs the Validity of a Contract," 23 HARV. L. REV. 1, 79 (1909), 194, 260 at 267-268, 270 (1910); 2 BEALE, CONFLICT OF LAWS, 1078 et seq. (1935).

sequences to the operative facts. As Reporter of the Conflict of Laws for the American Law Institute, Professor Beale succeeded in making his views the basis of the *Restatement*.⁷¹ This is most unfortunate. How can the manifold legal relations affecting the nature and validity of contracts of greatly varying types be brought within such a simple formula and be made dependent upon the frequently accidental circumstance regarding the last act which is deemed to make the agreement a binding contract? The Supreme Court of the United States has been of no aid in the solution of this problem. In some cases it appears to follow Professor Beale's point of view⁷² and in others, that of Story.⁷³ In usury cases, in agreement with most state decisions, it allows the parties to contract in good faith with reference to either the law of the place of making or the law of the place of performing.⁷⁴ There is no valid reason why this liberal principle should not be applied generally to the validity of contracts, at least where only conceptual differences are involved. As to matters not involving the validity of contracts, the parties ought to be allowed to choose the law of any state, although it has no connection with the operative facts of the case.

For a while it seemed as if the Supreme Court of the United States would impose the Beale point of view as a matter of constitutional law in certain types of contracts, especially in matters of insurance,⁷⁵ but in the light of its latest pronouncements this is no longer clear. It seems that the law of the forum will be allowed to determine for itself where the contract is made and whether the law of some other state or country is applicable and, if it has a legitimate interest in the matter, it may decline to give effect to the foreign law on grounds of public policy.⁷⁶

Prior to 1906, the year in which the Carmack Amendment to the Interstate Commerce Act brought interstate shipments under federal control, conflicts questions regarding the validity of stipulations limiting the liability of carriers came frequently before our courts. Similar questions arose also with regard to contracts made by telegraph com-

⁷¹ See CONFLICT OF LAWS RESTATEMENT, § 332 (1934).

⁷² See *Scudder v. Union National Bank of Chicago*, 91 U. S. 406 (1875).

⁷³ *Hall v. Cordell*, 142 U. S. 116, 12 S. Ct. 154 (1891); *Pritchard v. Norton*, 106 U. S. 124, 1 S. Ct. 102 (1882).

⁷⁴ *Seeman v. Philadelphia Warehouse Co.*, 274 U. S. 403, 47 S. Ct. 626 (1927).

⁷⁵ See *New York Life Ins. Co. v. Dodge*, 246 U. S. 357, 38 S. Ct. 337 (1918); *Mutual Life Ins. Co. v. Liebing*, 259 U. S. 209, 42 S. Ct. 467 (1922); *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 45 S. Ct. 129 (1924); *Home Ins. Co. v. Dick*, 281 U. S. 397, 50 S. Ct. 338 (1930); *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143, 54 S. Ct. 634 (1934); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178, 57 S. Ct. 129 (1936).

⁷⁶ See *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023 (1941).

panies prior to 1910 when an amendment to the Interstate Commerce Act subjected such contracts to federal law if during the course of transmission a state line was crossed. Such stipulations against negligence were regarded as valid in some states and as invalid in others. If valid by the proper law, the courts of the forum might decline to give effect to such stipulations on grounds of public policy, at least where the contract was to be in part performed in the state of the forum or was breached there.⁷⁷

The Harter Act in 1893 eliminated such problems with regard to maritime contracts of carriage by subjecting them to uniform federal legislation. This act was held inapplicable to contracts of passengers and their baggage and consequently with respect to them the above conflicts questions still remain.⁷⁸

The political and economic upheavals following the First World War brought along in their train a multitude of novel questions in the conflict of laws, such as fluctuating exchange,⁷⁹ currency restrictions⁸⁰ and moratory⁸¹ or confiscatory legislation,⁸² some of which have been difficult to deal with on the basis of the traditional rules of the conflict of laws.

Rights in land have been subject in Anglo-American law since the earliest times to the law of the situs. As regards covenants in a deed and especially title covenants, there has existed considerable confusion which persists to the present day. From a realistic approach to the subject it would seem that title covenants, whether running with the land or not, should be governed by the law governing the title, that is the situs of the land.⁸³ Executory contracts relating to land are governed, of course, by the rules of the conflict of laws applicable to contracts, but

⁷⁷ See *Ocean Steam Navigation Co. v. Corcoran*, (C. C. A. 2d, 1925) 9 F. (2d) 724.

⁷⁸ *The Kensington*, 183 U. S. 263, 22 S. Ct. 102 (1901); *La Bourgogne*, (C. C. A. 2d, 1906) 144 F. 781, *affd.* 210 U. S. 95, 28 S. Ct. 664 (1908).

⁷⁹ See *Hicks v. Guinness*, 269 U. S. 71, 46 S. Ct. 46 (1925); *Deutsche Bank Filiale Nuremberg v. Humphrey*, 272 U. S. 517, 47 S. Ct. 166 (1926); LORENZEN, *CASES AND MATERIALS ON CONFLICT OF LAWS*, 4th ed., 499-500 and note (1937).

⁸⁰ *Central Hanover Bank & Trust Co. v. Siemens & Halske Aktiengesellschaft*, (D. C. N. Y. 1936) 15 F. Supp. 927.

⁸¹ *Bailey and Rice*, "The Extraterritorial Effect of the New York Mortgage Moratorium," 20 CORN. L. Q. 315 (1935); 36 COL. L. REV. 487 (1936); 40 COL. L. REV. 867 (1940).

⁸² *Dougherty v. Equitable Life Assurance Society*, 266 N. Y. 71, 193 N. E. 897 (1934); see LORENZEN, *CASES AND MATERIALS ON THE CONFLICT OF LAWS*, 4th ed., 583-584, note (1937).

⁸³ See 9 CAL. L. REV. 234 (1921).

the law governing such contracts is as much in doubt today as it was forty years ago.⁸⁴

The law governing rights of property in chattels has been expressed for centuries by the maxim *mobilia personam sequuntur*, according to which movable property is deemed to follow the person of the owner and governed by the law of his domicile. In modern times personal property is frequently located permanently in a state other than that of the domicile of the owner and for that reason the claims of the law of the situs have asserted themselves more and more. By the beginning of the century it was held that the rights of third parties in chattels should be determined on the basis of their actual situs at the time of the transaction.⁸⁵ Today it is felt that property rights in chattels should be controlled by the law of the situs even between the parties.⁸⁶ Where the chattel has been removed to another state without the owner's consent and the owner has not been negligent in not removing the same after knowledge of its presence there, the law is still unsettled as to whether the rights of the owner can be lawfully divested by the law of the situs.⁸⁷ As title will pass in Anglo-American law as the result of mere agreement, there is generally no occasion to draw a sharp distinction between the contract and property aspects of the subject, and in the conflict of laws our courts have sometimes applied contract rules when property rights were involved, which should have been referred to the law of the situs.⁸⁸ In the interest of greater simplicity, the law of domicile is still retained in determining rights in chattels in certain branches of the law, viz. in the matter of matrimonial property⁸⁹ and in the law of wills and intestate succession.⁹⁰

Questions involving the power of states to tax have come before the Supreme Court with ever-increasing frequency during the last forty years. In accordance with the maxim *mobilia personam sequuntur*, movable property was held to be taxable at the domicile of the owner. This rule was abandoned, however, by the Supreme Court with respect

⁸⁴ See *Polson v. Stewart*, 167 Mass. 211, 45 N. E. 737 (1897); *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 58 (1901); *Meylink v. Rhea*, 123 Iowa 310, 98 N. W. 779 (1904); *Tillotson v. Prichard*, 60 Vt. 94, 14 A. 302 (1888).

⁸⁵ See *MINOR, CONFLICT OF LAWS*, § 129 (1901).

⁸⁶ See *CONFLICT OF LAWS RESTATEMENT*, § 258 (1934).

⁸⁷ See *id.*, § 49, caveat.

⁸⁸ See *Jewett, Inc. v. Keystone Drilling Co.*, 282 Mass. 469, 185 N. E. 369 (1933).

⁸⁹ *CONFLICT OF LAWS RESTATEMENT*, § 289 (1934).

⁹⁰ *Id.*, § 306 (wills); § 303 (distribution).

to chattels in 1905,⁹¹ when it held that a property tax on chattels could be levied only by the state in which they had their actual situs. Twenty years later the same doctrine was applied by the Supreme Court to inheritance taxation.⁹² As regards intangibles, including notes, bonds and stock certificates, the Supreme Court for a time tended to support the view that only the state of the decedent's domicile could impose an inheritance tax,⁹³ but during the last few years the Supreme Court has receded from its former position.⁹⁴

Marriage, which is based upon contract, creates a status. As questions of status are said to be governed in Anglo-American law by the law of the domicile of the parties, it would follow that the law of the domicile of each party should determine whether the status has been created. In this country, however, it has been customary for persons who cannot get married under the law of their respective domiciles to go to a state where they can get married, and to return immediately after the marriage. Our courts have gone very far in sanctioning such evasions by looking at marriage from the contract point of view and therefore holding that the law of the place of celebration controls. In certain types of cases in which local feelings were involved the courts of the domicile of the parties whose law had been evaded have held such marriages to be invalid on grounds of public policy,⁹⁵ but they would be valid in all other states.⁹⁶ Attempts have been made to check such evasion by legislation, notably in the Uniform Marriage Evasion Act,⁹⁷ but these legislative efforts have met with little success. The *Restate-*

⁹¹ *Union Refrigeration Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

⁹² *Frick v. Pennsylvania*, 268 U. S. 473, 45 S. Ct. 603 (1925). See also *City Bank Farmers' Trust Co. v. Schnader*, 293 U. S. 112, 55 S. Ct. 29 (1934). The question whether a tax might be levied at the business situs was reserved.

⁹³ *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98 (1930); *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436 (1930); *First National Bank of Boston v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1932).

⁹⁴ See *Curry v. McCannless*, 307 U. S. 357, 59 S. Ct. 900 (1939); *Graves v. Elliott*, 307 U. S. 383, 59 S. Ct. 913 (1939); *Stewart v. Pennsylvania*, 312 U. S. 649, 61 S. Ct. 445 (1941).

⁹⁵ See *Johnson v. Johnson*, 57 Wash. 89, 106 P. 500 (1910); *In re Stull's Estate*, 183 Pa. 625, 39 A. 16 (1898).

⁹⁶ *Hall v. Industrial Commission*, 165 Wis. 364, 162 N. W. 312 (1917), held that a marriage contracted in evasion of the Illinois law and valid in the state in which it was celebrated was invalid in Wisconsin, on the specific ground that Wisconsin had similar legislation to that of Illinois against evasion and under such circumstances felt it to be its duty to support the policy of the sister state. The court recognized that it was going a step further than that of any case brought to its attention.

⁹⁷ The Uniform Marriage Evasion Act has been adopted in only five states (Illinois, Louisiana, Massachusetts, Vermont and Wisconsin).

ment of the Conflict of Laws has tried to fit our law into the status theory of marriage by providing that where a marriage will not be recognized by the law of the domicile of either party it shall be regarded as void everywhere.⁹⁸

Evasion of the law of the matrimonial domicile has reached vast proportions in recent years in matters of divorce. With the recognition of the wife's capacity to acquire a separate domicile for purposes of divorce, both spouses were enabled to establish their domicile in a state having the most liberal divorce laws and obtain a divorce there on grounds recognized by the law of the forum. Although vigorous attempts have been made to check the migratory divorce evil by legislation, nothing has been accomplished, the Uniform Annulment of Marriage and Divorce Act having been adopted in only three states.⁹⁹ Most of the courts¹⁰⁰ still maintain that for the recognition of a foreign divorce decree the court granting the same must have had jurisdiction over the subject matter, i.e., the status, which requires domicile. In recent years collateral attack upon foreign divorces, admittedly void because of the absence of domicile, has been unsuccessful in many cases because it was deemed inequitable for the attacking party to raise the issue.¹⁰¹ According to this doctrine, the party invoking the jurisdiction of the court may not later deny its jurisdiction, nor, according to some decisions, may the libellee appearing in the suit or who subsequently remarries.¹⁰²

When the parties have tried the issue of domicile, the finding is binding upon all courts as *res judicata*.¹⁰³ Divorces rendered by courts of sister states are entitled to full faith and credit if both spouses were domiciled in the state, or their last matrimonial domicile was in the state,¹⁰⁴ or if the libellant was domiciled in the state and the libellee was

⁹⁸ CONFLICT OF LAWS RESTATEMENT, § 132 (1934).

⁹⁹ In Delaware, New Jersey and Wisconsin.

¹⁰⁰ Howe, "The Recognition of Foreign Divorce Decrees in New York State," 40 COL. L. REV. 373 (1940), contends that the New York courts have never committed themselves to the status theory of divorce. This accounts for the fact that they have recognized foreign divorces although neither spouse had a domicile in the state where both parties were before the court. *Gould v. Gould*, 235 N. Y. 14, 138 N. E. 490 (1923); *Glaser v. Glaser*, 276 N. Y. 296, 12 N. E. (2d) 305 (1938).

¹⁰¹ See Harper, "The Validity of Void Divorces," 79 UNIV. PA. L. REV. 158 (1930); Harper, "The Myth of the Void Divorce," 2 LAW & CONTEMP. PROB. 335 (1935).

¹⁰² For a more detailed statement, see LORENZEN, CASES AND MATERIALS ON CONFLICT OF LAWS, 4th ed., 783-784 (1937).

¹⁰³ *Davis v. Davis*, 305 U. S. 32, 59 S. Ct. 3 (1938).

¹⁰⁴ *Atherton v. Atherton*, 181 U. S. 155, 21 S. Ct. 544 (1901).

personally before the court. In other cases the courts of the different states are free to recognize the foreign decree or not.¹⁰⁵ The *Restatement*,¹⁰⁶ following Beale,¹⁰⁷ attempts to give a new interpretation to the decision of the Supreme Court of the United States in the *Haddock* case and to restrict the voluntary recognition of the foreign decree by the individual states in the same manner. The apparent simplification of the law of divorce suggested by the new formulation would seem, however, to be an illusion, in view of the fact that it makes fault a jurisdictional issue which would lead to greater diversity of decisions than that existing at the present time.¹⁰⁸

The loosening of marriage ties during the last forty years, resulting in an ever-increasing number of divorces, has created new problems also regarding alimony and the custody of children. As regards alimony decrees, it is now settled that they are entitled to full faith and credit as final judgments, provided the amount accrued cannot be changed by the court rendering the decree.¹⁰⁹ In the past alimony has been associated with divorce proceedings. However, the fact that today a husband may obtain, without knowledge of the wife, a divorce which will be recognized in many states has compelled the courts to dissociate divorce and alimony and to allow the divorced wife under certain circumstances to bring an independent suit for alimony.¹¹⁰

The jurisdiction of courts to award the custody of children is still based upon two antagonistic principles. One is that jurisdiction to award the custody of children exists at their domicile¹¹¹ and the other, that a court having jurisdiction to award the custody of a child retains jurisdiction to modify its award although the domicile of a child has been changed in the meanwhile to another state.¹¹²

The rules governing legitimacy, legitimation and adoption as they

¹⁰⁵ See *Haddock v. Haddock*, 201 U. S. 562, 26 S. Ct. 525 (1906).

¹⁰⁶ *CONFLICT OF LAWS RESTATEMENT*, § 113 (1934), which reads in part, "A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled in the state and the other is domiciled outside the state, if (a) the spouse who is not domiciled in the state (i) has consented that the other spouse acquire a separate home; or (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home. . . ."

¹⁰⁷ Beale, "Haddock Revisited," 39 *HARV. L. REV.* 417 (1926).

¹⁰⁸ McClintock, "Fault as an Element of Divorce Jurisdiction," 37 *YALE L. J.* 564 (1928); Bingham, "The American Law Institute vs. the Supreme Court in the Matter of *Haddock v. Haddock*," 21 *CORN. L. Q.* 393 (1936).

¹⁰⁹ *Sistare v. Sistare*, 218 U. S. 1, 30 S. Ct. 682 (1910).

¹¹⁰ See *Toncray v. Toncray*, 123 *Tenn.* 476, 131 *S. W.* 977 (1910).

¹¹¹ *CONFLICT OF LAWS RESTATEMENT*, § 146 (1934).

¹¹² *Stetson v. Stetson*, 80 *Me.* 483, 15 *A.* 60 (1888); *Griffin v. Griffin*, 95 *Ore.* 78, 187 *P.* 598 (1920).

exist today were developed in the main prior to 1900. We have no decisions as yet determining what law governs legitimation from birth. As regards rights of inheritance by adopted children, the Supreme Court of Kansas held in 1909¹¹³ that they were derived from the status, and were governed, therefore, by the law of the state where the adoption took place. This holding was overruled in 1927,¹¹⁴ so that it is now established without dissent that rights of inheritance are governed by the law governing the succession to the particular property, movable or immovable. The adopted child has been held, however, to retain his rights of inheritance against his natural parents when the local law of the state of adoption had not cut off such rights but the local law governing the inheritance would do so.¹¹⁵

As regards intestate succession, wills and the administration of estates, no important developments have taken place during the last forty years. The construction and interpretation of wills is still said to be governed by the law of the testator's domicile at the time of the execution of the will.¹¹⁶ So far as the question relates to land, it is evident that the rule should have no application when the law of the situs attaches an absolute meaning to the words used by the testator. The law of the situs should govern also if it uses a presumption which is rebuttable only by admissible evidence showing an actual intention to the contrary on the part of the testator.¹¹⁷ This is also the position taken by the *Restatement of the Conflict of Laws*.¹¹⁸

Testamentary trusts in movable property are said to be governed by the law of the testator's domicile.¹¹⁹ The New York courts have sustained them, however, in certain instances where the trust was to be administered under the law of another state the law of which did not object to the administration of such trusts, although the trust was invalid under the local law of New York.¹²⁰ By statute it is provided also in New York that effect shall be given to a declaration by the testator that his will shall be construed in accordance with the law of New York.¹²¹

¹¹³ *Boaz v. Swinney*, 79 Kan. 332, 99 P. 621 (1909).

¹¹⁴ *In re Riemann's Estate*, 124 Kan. 539, 262 P. 16 (1927).

¹¹⁵ *Slattery v. Hartford-Connecticut Trust Co.*, 115 Conn. 163, 161 A. 79 (1932).

¹¹⁶ See *Higinbotham v. Manchester*, 113 Conn. 62, 154 A. 242 (1931).

¹¹⁷ Heilman, "Interpretation and Construction of Wills of Immovables in Conflict of Laws Cases Involving 'Election,'" 25 ILL. L. REV. 778 (1931).

¹¹⁸ *CONFLICT OF LAWS RESTATEMENT*, § 251 (1934).

¹¹⁹ *Id.* § 295.

¹²⁰ *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558 (1892).

¹²¹ 13 N. Y. Laws (McKinney 1939), "Decedent Estate Law," § 47.

In the administration of estates there still exist many difficulties which the *Restatement* has attempted to iron out.¹²² By adopting the mercantile theory regarding bills, notes and certificates of stock it has sought to place the law upon a basis harmonizing best with the status of these instruments in the business world. A less progressive spirit is shown on the other hand by the *Restatement* when it recognizes a distinction between executors and administrators, according to which no privity exists as between administrators, whereas such privity does exist between executors in different states where there is identity of person.¹²³

DEVELOPMENTS IN OTHER COUNTRIES

The above survey gives some idea of the development of the conflict of laws in the United States during the last forty years. Let us now consider briefly what has happened in the meanwhile in the rest of the world.

Forty years ago was the era of the Hague Conventions on the conflict of laws. It was felt that the time was ripe for an attempt to provide an international basis for the rules of the conflict of laws. The first effort in the direction of securing identity of rules in the different continental countries was in the matter of civil procedure (judicial assistance), status, matrimonial property rights and bankruptcy. The Conventions on Civil Procedure of 1899 and 1905 were ratified by many continental countries. Conventions relating to marriage, divorce, separation and guardianship were concluded in 1920 and were ratified by several states. Draft conventions on succession and wills, the effect of marriage upon the rights and duties of married persons in their personal relations and upon their property, interdiction and similar measures and bankruptcy were agreed upon at the Hague in 1905 but never reached the convention stage.¹²⁴ The above attempts at the unification of the conflict of laws did not, however, measure up to the expectations that had been entertained. They were elaborated by official delegates from the various governments represented who came under specific instructions. This meant that no agreement could be attained except upon the basis of many compromises, exceptions and reservations, which largely nullified the general objective—uniformity. This situation was aggravated by the fact that, following in the footsteps of the Italian and German legislators, the conventions adopted nationality

¹²² CONFLICT OF LAWS RESTATEMENT, §§ 506 (2), 510 (2) (1934).

¹²³ *Id.*, §§ 510, 511.

¹²⁴ For an English translation of these conventions and drafts, see LORENZEN, *CASES ON THE CONFLICT OF LAWS*, 1st ed., Appendix (1909).

as the governing principle in matters of status and the like, instead of domicile, the effect of which was so untoward in France that it felt compelled to denounce the conventions.

Disappointed by these efforts, no further attempts were made on the continent to promote general conventions on the subject of the conflict of laws. Interest in the unification of law thereupon shifted to the field of commercial law. In 1912 an international convention was signed at the Hague on the subject of bills of exchange. This was not ratified, however, by any of the signatory states, due in part at least to the outbreak of the First World War. This convention contained a few articles on the conflict of laws.¹²⁵ More recent developments in the direction of securing uniformity in the conflict of laws took place at Geneva, the seat of the League of Nations. In 1923 the Geneva Protocol on Arbitration Clauses was signed providing for the compulsory recognition of arbitration agreements by the contracting states.¹²⁶ It was supplemented by the Geneva Convention for the Enforcement of Foreign Arbitral Awards of 1927,¹²⁷ which has been ratified by many states and has been substantially put into effect in England by the Arbitration (Foreign Awards) Act of 1930.

In 1930 many continental countries entered into the Geneva Convention on Bills of Exchange and Promissory Notes, and in 1931 into a similar convention on the law of checks, in connection with each of which separate conventions were concluded for the settlement of certain conflict of laws problems.¹²⁸ Although the above conventions relating to the conflict of laws applicable to bills, notes and checks contained various compromises and reservations, they constitute a forward step in promoting uniformity in the conflict of laws of the different countries.

The movement for the unification of the conflict of laws among the Latin-American states antedated the continental efforts by many years. Nine of the Latin-American states agreed at Lima in 1878 upon a

¹²⁵ For an English translation of this Convention, see LORENZEN, *CONFLICT OF LAWS RELATING TO BILLS AND NOTES*, Appendix (1919).

¹²⁶ For the text of the conventions, see League of Nations Publications, 1928.II.5, (Economics & Finance). The text may be found also in RUSSELL, *ARBITRATION AND AWARD*, 12th ed. (Aronson) 336 (1931) and in NUSSBAUM, *INTERNATIONAL YEAR-BOOK ON CIVIL AND COMMERCIAL ARBITRATION* 239 (1928).

¹²⁷ For the text (in French) of the convention, see 2 NUSSBAUM, *INTERNATIONALES JAHRBUCH FÜR SCHIEDSGERICHTSWESSEN IN ZIVIL- UND HANDELSACHEN* 237 (1928).

¹²⁸ For the text of these conventions in English, as well as of conventions on stamp laws relating to bills, notes and checks entered into at the same time, see LORENZEN, *CASES AND MATERIALS ON CONFLICT OF LAWS*, 4th ed., 578 (1937).

general treaty on the conflict of laws, which was not ratified, however, by any of the states. Eleven years later (1889) another attempt was made at Montevideo. Various treaties were concluded at that time relating to international civil law, international commercial law, international criminal law and international procedural law, which were ratified by Argentina, Bolivia, Paraguay, Peru and Uruguay. Colombia adhered to the Treaty on International Procedural Law in 1920.

The work of unifying the conflict of laws, initiated at the Second Pan-American Conference in the city of Mexico in 1901, was interrupted by the First World War, but was resumed in 1924 when the American Institute of International Law, meeting at Lima, appointed a commission, including Dr. Antonio Sanchez de Bustamante of Havana, Cuba, to draw up a code of private international law. Dr. Bustamante's draft was adopted at the Sixth Pan-American Conference, held in Havana in 1928, with the official title of "Code Bustamante."¹²⁹ Like the Convention of Montevideo of 1889, the Code Bustamante consists of four parts, entitled respectively International Civil Law, International Commercial Law, International Criminal Law and International Law of Procedure. The code was ratified by and is now in force in the following Latin-American countries: Bolivia, Brazil, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Dominican Republic, and Venezuela. As neither Argentina nor Brazil were willing to yield with respect to the fundamental question whether the "personal law" should be determined by nationality or domicile, Brazil having embraced the doctrine of nationality and Argentina adhering to the traditional notion of domicile, the Code Bustamante provides simply that each state shall remain free to adopt either.¹³⁰

In commemoration of the Fiftieth Anniversary of the South American Congress of Private International Law, held at Montevideo in 1889, a Second South American Congress of Private International Law was held in Montevideo in 1939 and 1940 for the purpose of revising the earlier treaties. These new treaties were signed by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay. Brazil signed all except the one on International Civil Law.¹³¹

¹²⁹ See BUSTAMANTE, *LA COMMISSION DES JURISCONSULTES DE RIO DE JANEIRO ET LE DROIT INTERNATIONAL I* (1928); Lorenzen, "The Pan-American Code of Private International Law," 4 *TULANE L. REV.* 499 (1930).

¹³⁰ Code Bustamante, art. 7.

¹³¹ Segundo Congreso Sudamericano de Derecho Internacional Privado de Montevideo, 1939-1940 (1940).

Since the year 1881 the conflict of laws has been an obligatory subject of study at all French law schools. At that time a chair for that subject exclusively was established at the University of Paris. This step of the French Government stimulated interest in the conflict of laws in France and made the French writers leaders in this field. Important works on the conflict of laws have appeared during the last forty years in many countries, including Latin America.¹³² The growing interest in the conflict of laws during the same period and especially since the First World War is evidenced also by the increased number of reviews devoting themselves exclusively or in part to the conflict of laws and in the establishment of institutes specializing in the study of that subject. The Institute of Comparative Law at Berlin has published from 1928 to 1935 an annual volume containing the decisions of the German courts on the conflict of laws during the preceding year, and the Institute of Legislative Studies of Rome from 1937-1939, five volumes annotating current decisions of the conflict of laws of the leading countries of the world.

Attention may be called also to other activities in the field of the conflict of laws. With the aid of the Carnegie Endowment for International Peace the Hague Academy of International Law was established, under whose auspices lectures on different phases of the conflict of laws have been delivered during the months of July and August of each year, since 1923, by distinguished jurists from all parts of the world. These lectures have been published in the *Recueil des Cours*, of which sixty-six volumes have appeared to date. In France an *Encyclopedia of International Law*, both public and private, edited by Professors de Lapradelle and Niboyet, was published between 1929 and 1931 in ten volumes, including the conflict of laws of the different countries of the world. It was the intention of the publishers to bring the encyclopedia up to date by supplements of which the first appeared in 1934. In 1934 the Comité Français de Droit International Privé was organized in Paris for the purpose of re-examining the fundamental doctrines of the French conflict of laws. This committee has met regularly and published the results of its deliberations.

Professor Rabel, formerly director of the Institute of Comparative Law of Berlin, Germany, is engaged at the present time in the laborious task of ascertaining the extent to which the rules laid down in the *Restatement of the Conflict of Laws* by the American Law Institute

¹³² An exhaustive bibliography may be found in I BEALE, *CONFLICT OF LAWS*, xvii-cxii (1935).

find support in the positive law of the continental and Latin-American countries.

All this denotes progress. As a result a better understanding has been gained of the practical operation of the rules of the conflict of laws in the different countries. This is not to say, however, that the world is ready for the unification of these rules by international agreement. Complete uniformity is, of course, an ideal which in the realm of finite law will remain forever unattainable. The best to be hoped for is a greater degree of uniformity. Even this will require much effort, patience and good will. The work must begin, as it has, with countries having the same institutions and legal background. If at the conclusion of the present World War a United States of Europe should emerge, progressive steps for the unification of the rules of the conflict of laws may be expected. The experience derived from the Hague and Geneva Conventions should have taught the continental countries valuable lessons from which they may greatly profit when the further unification of their rules of the conflict of laws is to be undertaken. The Latin-American countries have already a code of private international law—the Code Bustamante. The provisions of this code require further amplification and revision to be an effective guide for the solution of the problems in the conflict of laws among the Latin-American states, but when these are made, the adoption of the Code Bustamante by all Latin-American countries may follow. As for the countries of the common law, there exists at the present moment considerable uniformity in the rules of the conflict of laws. It is not unlikely, therefore, that before many years there will exist three large groups of countries in which the rules of the conflict of laws have attained substantial uniformity—the Continental, the Latin-American and the Anglo-American.

Whether greater uniformity is attainable between these groups, especially between the Anglo-American and the others, remains to be seen.¹³³ Professor Rabel is of the opinion that the present rules of the conflict of laws, derived as they are from the internal law of the different countries, can never operate harmoniously in their application to countries with different legal institutions. He contends, therefore, that the traditional rules of the conflict of laws require restatement and must be framed in more general terms derived by the comparative method from the different legal systems of the world. This would

¹³³ We have seen that no agreement could be reached on the question whether the "personal law" should be determined with reference to domicile or nationality. Argentina, Colombia, Mexico, Paraguay and Uruguay have failed to ratify the Convention, and of the fifteen countries that have ratified, eight did so with reservations.

appear to be the scientific way of resolving the difficulties presented today in situations where the conflict of laws rules of the forum have as their background legal institutions of which there is no direct counterpart in the country whose law is to be applied. It would be well if scholars such as Professor Rabel would develop the comparative method in the field of the conflict of laws to a point where the results can be utilized by the courts. Until that time our courts will have to be content to use the traditional methods in dealing with the problems of the conflict of laws. There is some indication that our courts are prepared to adopt a somewhat more realistic approach in conflicts situations. The immediate hopes for the further development of the conflict of laws in this country would seem to lie in this direction.