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Conflict of Laws: The Choice of Law Lex Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One

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CONFLICT OF LAWS: THE CHOICE OF LAW LEX LOCI DOCTRINE, THE BEGUILING APPEAL OF A DEAD TRADITION, PART ONE*

JAMES AUDLEY McLAUGHLIN**

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I. INTRODUCTION

A number of states, including West Virginia, still adhere wholly
or partially to a doctrine for deciding conflict of laws cases that is

* Part two of Professor McLaughlin's article will appear in Volume Ninety-Four, Issue One,
of the West Virginia Law Review.
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rooted in nineteenth century legal conceptualism. This dated doctrine is still clung to because of its apparent certainty. This apparent certainty is especially attractive in light of what Justice Richard Neely of the West Virginia court calls the "fuzziness" of the modern alternatives.\(^1\) Prompted by Justice Neely's comments, I am writing an article to make clear (uncover, dig up?) the conceptual roots of what is generally thought to be an outdated doctrine (*lex loci*); to demonstrate the death of those roots and to demonstrate that the certainty thought to be generated by this dead tree of a doctrine is illusionary. In Part Two, I shall then attempt in a limited compass to describe the modern approach in its various guises, underline its common features and critique its principal weaknesses. I shall also propose that the approach of Second Restatement of the Conflict of Laws can be used to help solve choice of law problems if the general aim of choice of law rules is kept in mind. The general aim of choice of law is to apply the law that makes the most sense in settling the legal dispute before the court. 

The legal analysis attendant to choice of law decisions occasions a contrast between the old and the new ways of thinking about law that is nowhere else so vividly marked out. In judicial rhetoric, scholarly treatments and judicial practice, the contrast is stark, but often, strangely blurred. Indeed, although the old way of thinking (hereafter *lex loci*)\(^2\) has no scholarly defenders and few judicial adherents,\(^3\) one still often reads opinions in which the judge laments

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2. The phrase "*lex loci*" is often used and will be used here as shorthand for the whole doctrine rooted in vested rights-territorialism that came to final form in the First Restatement, *Re-Statement, Conflict of Laws* (1934) [hereafter referred to as the First Restatement]. "*Lex loci*" is also often used to denote any rule or interest that points to the law of the place where the cause of action arose and is contrasted with *lex fori*, the law of the forum hearing the lawsuit.

3. Cataloguing the states that still adhere to *lex loci* in some form is problematic. Not only might *lex loci* be adhered to in one area such as torts but not in another, such as contracts, (Compare Paul v. National Life, 352 S.E.2d 550 (W. Va. 1986) (torts-*lex loci* with Lee v. Saliga, 373 S.E.2d 345 (W. Va. 1988)) (contracts — no *lex loci*) but a state may not have faced the issue lately such that it is hard to guess the state's current position. See, e.g., Calhoun v. Blakely, 152 Vt. 113, 564 A.2d, 590 (1989) where although the "federal courts have predicted that we will abandon *lex loci* in favor of a more flexible approach" the court refused to endorse the prediction because such change was unnecessary to the result. *Id.* at 115, 564 A.2d at 592.) Or it may have faced the issue and waffled on it. Compare Paul v. National Life, 352 S.E.2d 550 (W. Va. 1986), with Oates v. Oxygen.
the loss of the certainty of the old system that would be entailed in embracing the new approach. Indeed, judges often seem unable to escape the beguiling rhetoric of the old system, even while formulating "tests" under the new. In an area of law where certainty seems most important to arriving at a satisfying doctrine (i.e., one that is intellectually comprehensible, coherent, and feels just), why has all this lamenting about certainty not led to a rejection of the new "fuzziness" for that old tried and true certainty? This little essay is an effort to explain why. I will show (not at all an original


"Lex loci delicti has long been the cornerstone of our conflict of laws doctrine. The consistency, predictability and ease of application provided by the traditional doctrine are not to be discarded lightly ...." See also Owen v. Owen, 444 N.W.2d 710 (S.D. 1989) (referring to "its built-in virtues of certainty, simplicity and ease of application") id. at 711; McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979) ("uniformity, predictability, and ease of application"). Id. at 1131, 253 S.E.2d at 664.

undertaking) that the old certainty was built on the simplicity and intuitive appeal of its basic concepts and the ease with which from these basic concepts one could spin out a few simple rules which supposedly solved all cases. However, the certainty supposed to attend the simplicity is an illusion bordering on delusion. Moreover, this illusion of certainty was paid for at the price of results that were simply arbitrary in terms of judicial policy, social policy, or justice. Finally, I will suggest that the new doctrine, for all its fuzziness of statement and multiplicity of forms, is more certain than the old doctrine and far less arbitrary. The new choice of law approach creates no illusions about simple solutions to complex and difficult problems. Lots of simple cases under the old rules become hard cases under the new because they are in fact hard cases: cases involving difficult choices. Only through painstaking analysis are the choices fully revealed and is their resolution confidently undertaken. The hard cases with their hard choices were always there, but their difficulty was simply swept under the carpet of lex loci, a carpet that, as will appear, was truly a magic carpet; it never touched any ground but that of reified abstract legal concepts.

II. THE ILLUSION OF CERTAINTY OF LEX LOCI DOCTRINE

A. Its Simple Concepts

The two simple concepts on which the lex loci gospel was built are the exclusivity of territorial sovereignty and the vested transitory

6. This, of course, is the main charge leveled at lex loci over the years. For an often cited and quite systematic demonstration of the arbitrariness of lex loci contractus (law of the place of making) see Currie, Married Women’s Contracts: A Study in Conflict-of-Laws Method, 25 U. Chi. L. Rev. 227 (1958) reprinted in Currie, SELECTED ESSAYS ON CONFLICT OF LAWS (1963). Walter Wheeler Cook (1873-1943) in THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) an anthology of articles written between 1919 and 1942 attacks the lex loci system root and branch: “root,” the logic of lex loci territorialism and vested rights makes no sense and “branch,” courts do not really “do” lex loci anyway, they may “talk” it but they do not do it. The late Professor Albert A. Ehrenweig, made it his life’s work to show that lex loci was not in fact “done” by courts. A. EHRENWEIG, CONFLICT OF LAWS (1962); A. EHRENWEIZ, CONFLICTS IN A NUTSHELL (3d ed. 1974). Indeed, most commentators in the heyday of the First Restatement, CONFLICT OF LAWS (1934 to 1963) assumed lex loci was mostly “talk” and not the “real” basis for decision. See E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS (1947) and D. CAVERS, A CRITIQUE OF THE CHOICE OF LAW PROBLEM, 47 Harv. L. Rev. 173 (1933).

Thus, the critique of lex loci doctrine went from it cannot be done because it makes no logical sense, to it has not been done as revealed by what courts have in fact decided and that it ought not be done because it reaches results that make no sense. My emphasis in this article is that, in addition to the above critique, it ought not be done because it also lacks predictability, its vaunted attribute.
cause of action. Is it not obvious that a sovereign has exclusive jurisdiction to create rights, duties, and all legal relationships within its physical boundaries and no power whatsoever outside its boundaries? And is it not obvious that a lawsuit must be predicated on a good cause of action; one which had a life prior to filing as a chose-in-action which "chose" came into existence at the time and place of the last event necessary to its existence? And is it not clear that at that place and moment this right to sue "vested" in the owner (i.e., became a vested right of the owner)? Finally, a third concept plays a role, the concept of a lawsuit as debt collection. After all, a lawsuit is, according to no less a light than Benjamin

7. See, J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 18, 20 (2d ed. 1841). (In 1924 Professor Ernest G. Lorenzen of Yale Law School, wrote a withering critique of Story's territorial premise, then citing the 8th Edition of 1883 of his commentaries, which publication record itself shows the influence of Story's ideas.) Lorenzen stated, "The only conclusion that can be reached from the foregoing discussion is that the rules of the Conflict of Laws are not based upon, nor are they derivable from, any uniform theory of territoriality." E. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 9 (1947) (reprinting the 1924 article, Territoriality, Public Policy and the Conflict of Laws, 33 YALE L.J. 736). "In view of the foregoing it is a little surprising to find among the American courts and writers of today a tendency to accept the doctrine of territoriality of law as the major premise for the solution of the problems of the Conflict of Laws." Id. Lorenzen then adds proof of his "major premise" thesis by quoting Beale, What Law Governs the Validity of a Contract, 23 HARV. L. REV. 79 (1909): "If the law of the place where the parties act refuses legal validity to their acts, it is impossible to see on what principle some other law may nevertheless give their acts validity . . . Any attempt to make the law of the place of performance govern the act of contracting is an attempt to give to that law extraterritorial effect." Id. at 267.

Hence it is that a vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.


But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found. Stout v. Wood, 1 Blackf. 71; Dennick v. Central R.R. Co., 103 U.S. 11, 18, 26 L. Ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that law determines not merely the existence of the obligation (Smith v. Condry, 1 How. 28, 11 L. 3d 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.

Id. at 128.
Cardozo, the enlistment of the coercive power of the state to help the plaintiff get what he "owns" from the defendant who is wrongfully withholding it. The Cardozoian concept of a lawsuit as debt collection is central to the old dogma, but is perhaps best seen as a natural by-product of conceiving of a "cause of action" as a "vested right." All lawsuits then are simply the conversion of a cause of action, a species of property, into a judgment so that the defendant, now a judgment debtor, can be strong-armed into paying (i.e., turning the plaintiff's property over to him).

B. Its Simple Rules

These simple concepts led to simple rules, rules that had an inevitability about them that gave them an aura of revealed truth. These rules needed to serve no social or political purpose because they were simply the true rules, the ineluctable outgrowth of true concepts. And there were only a few of these rules, at least so it seemed (or seems) at a quick glance and with such rules that was all the glance one needed (or needs).

For all torts there is a rule, summarized by the phrase *lex loci delictus* (in Latin, no less, to certify its "true-ruleness") which states that wherever the last event occurs that creates a cause of action for a civil wrong or "tort," that place, that sovereignty, creates that right in all its legal dimensions. Thus, if a car is negligently repaired

9. A foreign statute is not law in this state, but it gives rise to an obligation, which, if transitory, "follows the person and may be enforced wherever the person may be found" Cuba R.R. Co. v. Crosby, 222 U.S. 473, 478 . . . . No law can exist as such except the law of the land; but . . . it is a principle of every civilized law that vested rights shall be protected. Beale [Conflict of Laws], § 51. The plaintiff owns something, and we help him to get it.

If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. Loucks v. Standard Oil Co. of New York, 224 N.Y. 99, 110, 120 N.E. 198, 201 (1918) (emphasis added).


Whatever variations of opinion and practice there may have been, it is established as the law of this court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery.
in state A, but falls apart in state B injuring the driver, the liability of the negligent repairer will be determined by the law of state B because that is where the cause of action came into being and "vested" in the driver.

For all contracts there is a rule summarized by the phrase *lex loci contractus* which states that wherever the final act occurs that makes a promise binding it is that place whose law in all its fullness and nuance creates the binding obligations called contract duties and the correlative contract rights. As we shall shortly see, there are alternative contract formulations which as easily flow from our basic jural concepts, but the above formulation is the most appealing.\(^\text{11}\)

For all property in immovable things, a fixed star, *lex rei sitae*, controls. This rule states that the law of the place where the immovable estate is creates and controls all property rights in that estate. For all property in movable things, *lex rei sitae* also controls for most property right formation. That rule mandates that the law of the place where the movable object of property is at the time the property interest comes into existence determines the existence and contours of the right.

For decedent's estates and family law, follow the *lex loci domicilii*. For decedent's estates, the rule is that the law of the state in which the decedent had his domicile at the time of his death will control the succession and distribution of his personal estate. In family law, aside from the validity of the marriage contract (*lex loci contractus*), most issues of choice of law are determined by the domicile of the marriage which now is the domicile of each of the parties.

There, in four simple Latin phrases all choice of law problems are solved. True rules in ancient but timeless rhetoric. Why give that

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\(^{11}\) Most "appealing" at least to Professor Beale, the grand articulator of *lex loci* doctrine. The question whether a contract is valid . . . can on general principles be determined by no other law than that . . . of the place of contracting. If the law at that place annexes an obligation to the acts of the parties, the promisee has a legal right which no other law has power to take away . . . . If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is no other law which has power to do so. Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 260, 270-71 (1910).
up? Indeed, how can one (a polity?) give up the truth. We might just as soon give up the notion that water has two hydrogen and one oxygen atoms. In fact, it is more analogous to giving up the "truth" that the four elements are fire, earth, air, and water. Time has passed them by. The underlying concepts no longer have a ring of either importance or truth about them. The simple rules then have lost their conceptual and only predication. Rationalizing the retention of the lex loci rules on grounds of clarity, certainty and economy are just that, rationalization. They are merely simple to state. They do not bring clarity, certainty, or economy to the choice of law process. But more on that anon.

C. The Hollowness of the Basic Concepts

None of the three predicate concepts (territoriality, vested rights and lawsuit as debt collection) will stand modern scrutiny. The notion of exclusive territorial sovereignty is true, but trivial. In the complex events that give rise to most legal disputes, a single territorial locus is impossible to find. The seemingly single and simple event of (say) X driver of Y car on D day at H hour may seem to have a simple locus, but the car itself was made elsewhere (its component parts made many elsewhere) its fuel made elsewhere, sold still elsewhere; its exhaust and its sound will go elsewhere; the driver has been elsewhere and formed relationships in several "elsewheres" that shape his driving, his know-how, his purpose, and his right to drive. Many of these "elsewheres," these different places that shape and compose the events of life and, more pertinently, the events of disputation, are in different sovereignties than the seeming locus of the single event. The single locus of any event is an abstraction from the totality of the event; in the vernacular, it's a simplification of a complex fact; events have spacial and temporal depth, and in events that are the subject of disputation, the whole event in all its depth (actually depth of events is infinite so, more accurately, it is "the deeper event in its manageable depth") becomes relevant. Thus, the many layers of events makes trivial for choice of law purposes the notion of exclusivity of territorial sovereignty. Territoriality is of course true and relevant to the decisional process, but it has no talismanic significance. Where many territorial sovereigns are
touched, the territorial concept helps little in choosing among them.  

The concept of a "cause of action" as a "vested right" (with a correlative vested duty) is simply a way of talking about a law suit. Indeed, the idea of a cause of action comes from the need to remove obviously unmeritorious claims (i.e., obviously one-sided disputes) from the judicial arena in summary fashion. The general demurrer was the procedural vehicle for summary disposition, and whether one had in one's complaint stated enough that if true entitled one to judicial aid was a technique of summary decision.  

This looking to the tale told by the plaintiff in his initiating pleading to determine whether a cognizable legal dispute existed came to be talked about in terms of whether or not the plaintiff had stated a good cause for judicial action, quickly truncated to whether plaintiff had a cause of action. The verb "to have" (unlike "to state") suggests a physical type of possession and, voila, "a cause of action" is like a physical thing that attaches to oneself. It needs a name before it is sued on so the French word for thing, "chose," stands in (from Law French) for the subject of property rights; thus is born the chose-in-action (contrast with both the chose-in-possession and the cause of action). Thus, when the last event necessary to a good cause of action (one that will survive demurrer) happens, it springs into being as a chose-in-action and vests (think of velcro) in the future plaintiff. Moreover, everywhere this would-be plaintiff goes, his vested right to sue follows. And, more importantly, everywhere the would-be defendant goes, the right to be sued follows.  

However, a law suit is now viewed more realistically as the settlement of a dispute by law. The dispute involves past, present, and usually future events. The pleadings are now used to give notice of the dispute to the other disputant. They are no longer a ritualized procedures.

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12. For an early attack on territoriality as the basis for choice of law rules, see E. Lorenzen, supra note 7.  
13. The slide from "vested right" to "vested cause of action" depends on right and cause of action being synonymous or nearly so.  
14. The old writ system of pleading out of which grew the idea of a cause of action had its origins in ancient English practice.  
way of asserting a pre-existing claim and demanding, in ritualized form, its satisfaction. The facts and the law may entitle plaintiff to win a judgment, but the exact nature of the facts and the law can only be determined after the adversarial process has allowed each side to participate in their development. The law of each case is known only after trial. This is true, even where the dispute settling law is statutory. This difference in perspective as to what a lawsuit is and as to what legal rights are underlies the clash between the old and the new approaches to choice of law.

Recently Professor Perry Dane of Yale claimed that the notion of “vestedness” is essential to the rule of law.17 “Vested rights” of the Bealian variety (i.e. the kind Professor Joseph H. Beale the grand guru of lex loci described) are not at all the same as “vestedness” (i.e., Dane’s vestedness can be achieved far short of Bealian vested rights).18 My attack on “vested rights” and that part of “modern” doctrine which I defend are perfectly consistent with vestedness as defined by Dane. However, I disagree with his claim that vestedness is essential to the rule of law, and I disagree with the vision of a lawsuit that “vestedness” implies. Moreover, I don’t believe that “vestedness” as a word or concept is particularly useful in developing a satisfying choice of law approach.19 But more on that anon. First, let’s look at the supposed certainty of the ancien regime.

D. The Uncertainty of the Simple Rules

1. Their Inherent Indeterminacy

a. The Tort Rule (Lex Loci Delicti)

The paradigm case is Alabama Great Southern R.R. Co. v. Carroll.20 Most of the relevant events of the case (the employment con-

18. Id. at 1260-65.
19. Vestness ends up making lawsuits too backward-looking; the common law, a sort of positive law; and introduces a conceptualism that interferes with the kind of analysis that leads to sensible results.
20. 97 Ala. 126, 17 So. 803 (1892).
tract, domicile of both parties and the negligent conduct) took place in Alabama. Alabama had recently enacted a new labor law repealing the infamous triad of defenses against employee injury cases.\textsuperscript{21} Mississippi had no such "modern" labor law. The plaintiff was injured just inside the Mississippi border where the negligently maintained coupling broke. Simple case: \textit{Lex loci} said Mississippi is where the cause of action, if any, came into being. Mississippi law applies in determining what the nature of the cause of action is and what defenses there may be thereto. As we shall see in the next section, that is a consummation many would wish to escape.\textsuperscript{22} But for now, this case is an example of the simplicity and certainty of the rule. "Where did you get hurt?" "Mississippi." "Mississippi law controls your suit then wherever you bring it." No problem.

But wait. What if "getting hurt" is further analyzed and proves not so simple or "monolocal." Clearly some "hurts" will be hard to localize. For example, where is the hurt to one's reputation located? To one's privacy? To one's expectations because of fraud? To one's emotional well-being? To one's employment? To one's consortium? Courts sometimes say the domicile of the victim.\textsuperscript{23} Equally logically they also say every place a defamation has been published or where the victim was when she first learned of the defamation.\textsuperscript{24}

Moreover, even physical injury can be a problem if the injurious source is internal, such as poison, or takes a long time to take effect. It once was said that the cause of action for being poisoned (for instance by tainted meat) vests where the poison "takes effect."\textsuperscript{25} meaning, I presume, when it becomes symptomatic. But, of course, it starts to take effect immediately. So one poisoned by bad fish on the train in Maine may not feel queasy until New Hampshire, nauseous until Massachusetts, sweaty and vomiting until Connecticut

\textsuperscript{21} Contributory negligence, assumption of risk, and, the real suit killer, the fellow servant rule.

\textsuperscript{22} \textit{See infra}, note 86 and accompanying text.


and suffer death until New York. The poison started to take effect sans symptoms in Maine and continued to take more and more effect in each state until it had its ultimate effect in New York.

Wrongful death actions in general were a problem for lex loci delicti. Technically, the cause of action did not arise until death, but the death often comes a long way from where the mortal blow was struck. Which place was it to be? The First Restatement picked the place the blow was struck.\footnote{First Restatement, § 391.} Why? Supposedly the action arose there in some inchoate fashion. In reality, it just made more sense regardless of the conceptualization.

In this field of civil wrongs, lex loci delicti had much built in uncertainty. But torts was the area of greatest certainty. In other areas, actual certainty of result was never an honest claim for lex loci doctrine as we shall now see with contracts.

b. The Contract Rule

It is here, rather than with torts, that lex loci is clearly neither simple nor certain.\footnote{In 1920 Professor Ernest G. Lorenzen began his article Validity and Effect of Contracts in the Conflict of Laws, 30 Yale L.J. 565: “There is no topic in the conflict of laws in regard to which there is greater uncertainty than that of contracts. In this country there is no agreement even regarding the fundamental principles that should govern.”} A cause of action for breach of contract can be located in all faith to the vested rights/territorial concept in either of two places. That is because there are two ways of conceptualizing a cause of action for breach of contract. First is the idea that any contract law suit is based on the contract. Of course, it’s based on the contract, you rejoin. Yes, but it’s also quite plausibly based on the breach of the contract. If on the contract, then the law creating and controlling the cause of action based thereon is the law of the place the promise became a contract. Of course, that may itself not be so easy to find where offer and acceptance is interstate. But it makes sense, conceptually, to find that place. Thus, the law of the place of making is born. It sometimes had a special latin name, lex loci celebrationis.\footnote{Lex loci contractus is the usual name for the place of making but lex loci contractus could also be used for the place of performance rule. Lex loci celebrationis was sometimes used. It meant exclusively the place of making rule.}
However, if the cause of action in contract is actually based on the breach of the contract, and not merely the contract after all until the contract is breached, one has no cause of action, and the mere recital of a valid contract in a complaint will make it subject to demurrer (or as we now say dismissal for failure to state a claim for relief), then the place the promise is broken ought to control and the law of that place will determine whether a cause of action has vested in the promissee. And for this also there was sometimes a special Latin name, *lex loci solutionis.*

The pull of contradictory formulations of *lex loci contractus* is seen in the oft-cited case of *Poole v. Perkins* where the "familiar and well-settled" "general rule" is quoted:

> It is the general rule that every contract is as to its validity, nature, interpretation and effect, or, as they may be called, the right, in contradistinction to the remedy, is governed by the law of the place where it is made, unless it is to be performed in another place, and then it is governed by the law of the place where it is to be performed.

Although the quoted rule purports to state a place of making rule, it in fact states a place of performance rule. Since one only follows the law of the place of making when it is also the place of performance, it is obvious that one always follows the place of performance. Why is the rule stated in this elongated and unnecessarily bifurcated way? Most likely it is the power of the concept of contract "vestedness." The rights and duties created by contract vest as of the time of the last act necessary to create the contract (and, of course, somehow, the place); a moment located in space/time; the vesting moment. Thus, the court repeated in rule form that idea

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29. *Lex loci solutionis* was used originally for situations where the performance was a mere payment for another's performance, *i.e.*, the law of the place of payment of a note etc. It was used occasionally to distinguish between a place of making and place of performance rule. Usually, however, *lex loci contractus* was used to mean either place of making or place of performance as the two rules were often conflated into one illogical rule. See infra, note 30 and accompanying text.

30. 126 Va. 33, 101 S.E. 240 (1919).

31. Section 311, The First Restatement, states how the "place of contracting" determination is to be made (by the law of the forum using "the general law of contracts." Comment d.) and then gives a set of rules about finding that place. Sections 312, 314, 315, 316, 323 (Informal Unilateral Contract), 325 (Informal Bilateral Contract), and 326. Then, in other places, the issues controlled by the place of contracting are identified. E.g., §322 (validity), 334 (formalities).
and then perhaps unwittingly overrules it by saying unless the contract is to be performed elsewhere, then it's that "elsewhere" law that controls. Perhaps it is a way to resolve the cognitive dissonance created by the competing contract-vesting concepts. The court first wants both making and performance in the same place. The case with no dissonance. Then, as if an afterthought, if they do differ, go with performance.

The First Restatement combined the two ideas, making and performance, in a way that was more than mere rhetoric. For some purposes the place of making determined the rights of litigants (validity of contract), and for other purposes it was the place of performance (performance issues). A nice, neat dichotomy except when applied it is difficult to distinguish between "the nature and extent of the duty [to perform]" and "the sufficiency of performance." In other words, is a question about sufficiency of performance one about what exactly was required under the contract (a question of

32. Section 355 defines place of performance as simply the state where "the promise is to be performed." Section 358 then identifies five issues to be controlled by the place of performance including manner, time and locality, sufficiency and excuse.

33. Section 332 [the place of contracting controls] (f): "except as stated in § 358, the nature and extent of the duty for the performance of which a party becomes bound."

34. Section 358 [place of performance controls] (d) "the sufficiency of performance" and (e) "excuse for non-performance." The comment b to § 358 tries to draw a "practical line separating question of obligation from question of performances" as follows:

As stated in § 332, Comment c, there is no logical line which separates questions of the obligation of the contract, which is determined by the law of the place of contracting, from questions of performance, determined by the law of the place of performance. There is, however, a practical line which is drawn in every case by the particular circumstances thereof. When the application of law of the place of contracting would extend to the determination of the minute details of the manner, method, time and sufficiency of performance so that it would be an unreasonable regulation of acts in the place of performance, the law of the place of contracting will cease to control and the law of the place of performance will be applied. On the other hand, when the application of the law of the place of performance would extend to a regulation of the substance of the obligation to which the parties purposed to bind themselves so that it would unreasonably determine the effect of an agreement made in the place of contracting, the law of the place of performance will give way to the law of the place of contracting.

Section 358, comment b.

Well that surely clears things up! Beale, the reporter for the First Restatement, Conflict of Laws did not much believe in the place of performance rule, although it has ancient roots, see, J. Story, Commentaries on The Conflict of Laws §§ 242, 280 (8th Ed. 1883), and must have only begrudgingly made the concessions to the place of performance rule found in the First Restatement.
contract interpretations like a question of law) or what was in fact done by the promisor?

For example, A promises B to deliver ten tons of manure by Saturday, May 20. In fact, A delivers ten tons of manure on Sunday May 21. B refuses delivery saying manure meant cow manure and this is horse manure and besides the manure is a day late. A says manure is manure and besides B won’t spread it until Monday anyhow so this is substantial performance. Now, is it a question of what A was obligated to do under the contract or is it a question of whether what A did do satisfied what he was obligated to do? That is, was A’s delivery of some kind of manure on the right weekend a satisfaction of the promise to “deliver manure on Saturday?” It’s obviously both a question of giving more precise meaning to the words of the promise and of characterizing in words what happened. All applications of rules are like this. At the precise moment of application, a rule (including a contract obligation) “says” the same words as the facts “say.” The rule “says” “manure on the weekend,” the facts “say” “manure on the weekend.” Voila, contract obligation met, no cause of action. Or the rule “says” “cow manure on Saturday” and the facts “say” “manure on the weekend.” Alas, the two differ, a breach occurs, and a cause of action results. Or the rule “says” “manure on the weekend” and the facts say “horse manure on the weekend.” Again no match, etc. Always it’s a question of interpretation and characterizing the facts.

In any event, the Restatement compromise has not proved to be a precise tool for drawing lines. Moreover, two other ideas further roiled any claim to clarity: contractual choice of law and the law of the place of validation. Given that the vested rights/territorial concept leads to two different places with regard to contracts, why not allow the parties to choose a “reasonable” place? In an 1882 case, Pritchard v. Norton, the United States Supreme Court quoted former Chief Justice John Marshall’s “principle of universal law” that a contract is governed by the law with a view to which it was
made." 36 Although the precise basis for the Court's holding in *Pritchard* is not entirely clear, 37 the case is often cited for the proposition that the parties to a contract may make the choice of law. Thus, quite consistent with the *lex loci* view, courts have allowed parties to opt out of a rule imposed choice to a party chosen choice. 38 Moreover, *Pritchard* and other cases of that vintage have been said to contain a rule of validation, *lex validitatis*. 39

In sum then, the vested right/territorial dogma as applied to contracts yields three main rules and two supplemental rules. 40 The high inherent indeterminacy of *lex loci contractus* makes it a likely first casualty to the "new thinking." 41 In West Virginia, for example, the Supreme Court of Appeals steadfastly maintains that it is a *lex loci delicti* state, but has clearly abandoned *lex loci contractus* in favor of the "most significant contacts" approach of the second restatement. 42

c. The Property Rules

*Lex rei sitae* 43 appears to be a precise rule for the property area. After all, one usually has property "in" some physical thing, and physical things are located in some definite place. But, of course,

37. The language and holding of the case supports any of three rules: the rule of party choice, the rule of validation (sometimes called *lex validitatis*), and rule of the place of performance.
38. An excellent discussion of the "law of the parties' intention" is contained in Siegelman v. Cunard White Star Lines, Inc., 221 F.2d 189 (2nd Cir. 1955) (John Marshall Harlan (with Clark concurring) and Jerome Frank dissenting).
39. A. Ehrenzweig, Conflicts in a Nutshell § 52.54-59 (3rd ed. 1974) cited in Crampton, Currie, and Kay, Conflict of Laws, Cases-Comments-Questions, 4th Ed. (1987) at 162-163. The rule of validation states that if there is a conflict between the laws of the place of making and the place of performance then the law of the place that validates the contract terms at issue applies.
40. In brief, main rules: law of place of making (lex celebrationis), law of place of performance (lex solutionis), law of placing making/performance (First Restatement); supplemental rules: law of the parties choice (party autonomy), law of place validation (lex validitatis). The main rules each purport to be the whole of *lex contractus* and the supplemental rules each add to *lex contractus*.
42. Lee v. Saliga, supra note 3.
43. Sometimes written *lex loci rei sitae* and sometimes merely *lex sitae*. It means literally —
people do have property in "things" with no definite, physical location such as savings accounts and corporations, and, more importantly, the property is actually "in" some person in just as important a way as it is "in" some "thing." Thus, lex domicilli is a natural rival to lex rei sitae in the property area, and, indeed, domicile of the owner makes as much sense in terms of vested rights/territoriality as does site of the thing owned.

Nonetheless, for most of the property area, lex rei sitae prevailed. The reasons appear to be that some things, at least, are more fixed than the people with the property rights and that "property" is, in the vernacular, more strongly associated with the "things" in which persons have property than with those persons. Thus, we use the word property to mean both the bundle of interests in a "thing" and the "thing" itself. But, to the average person, the word "property" means the thing owned as in "my property," "she owns much property," "the property was in Ohio." As to the greater fixity of things over persons, the traditional view divided choice-of-law-property cases along "fixity" lines; instead of real and personal property, there were "movables" and "immovables." And the more fixed of these, the "immovables," gave rise to a stronger and much more persistent lex rei sitae rule. Some conflicts texts call it "the land taboo" so firmly entrenched and powerful is it. But even this clear

44. The correspondence is not one for one, but is nearly so. Leasehold interests in real property are personality but immovables. But for the most part real property interests are immovables, and personal property interests are movables.

45. The law governing rights of property in chattels has been expressed for centuries by the maxim mobilla 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. Today it is felt that property rights in chattels should be controlled by the law of the situs even between the parties.


rule as to real estate has one wrinkle, the doctrine of *renvoi*, that makes for some uncertainty that other *lex loci* rules do not share. *Renvoi* will be discussed in a later section. Moreover, the problem of characterization, which also will be discussed in the next section, is especially troublesome with regard to "immovables." Finally, the situs rule is so manifestly silly in some contexts, that judges will stretch language and doctrine to avoid it.\(^{47}\)

But, *lex rei sitae* in the area of "movables" is a rule of great inherent uncertainty. In the first place, there is the obvious fact that "movables" are movable. The rule attempts to avoid this problem by fixing the place the "tangible thing" is "at the time of the events which create the interests."\(^{48}\) But the litigated dispute will be about those "events" which create the interests which probably will have taken place over a sufficient period of time that the "movable" will have moved, such as a gift sent through the mails, the sale of a chattel (cars, mail order items, etc.) by mail or telephone or the pledge of a valuable chattel for a loan. Each of these transfers can obviously create problems of locating the chattel at "the moment of transfer." When the moment of transfer occurred, if it occurred at all, is likely part of the dispute.

Intangible "movables," such as stock, bonds, and bank accounts create an even greater problem of location. The reason for this problem with intangible movables is that there is both a transfer title document, which is tangible but is not "the" thing which is owned but merely firm evidence of ownership, and there is the actual interest which is a kind of debt often owed by a corporation which is a kind of person, an incorporeal or fictional person.\(^{49}\)

... that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. Most cases books use *In re Barrie's Estate*, 240 Iowa 431, 35 N.W.2d 658 (1949) to illustrate the stubborn persistence of *lex rei situs* as to land transfers in the face of good sense.

47. See Clark v. Clark, 178 U.S.186 (1900). Here the Supreme Court reinstated *lex rei sitae* over the heroic efforts of the lower courts to avoid it and do what made sense.

48. *Restatement of Conflict of Laws* § 211 (1934); *see also* §§ 255, 256, 257 and 258.

49. Even reifying a corporation into a kind of fictional person is thought to be a bad way of thinking about legal statements about corporations, viz. "General Motors is liable to its customers for faulty design of its cars," according to H.L.A. Hart, the English jurist. *See* Hart, Definition and Theory in Jurisprudence. (Inaugural Lecture at Oxford University, 1953), *reprinted in* COHEN AND COHEN'S, *Readings in Jurisprudence and Legal Philosophy* (Shuchman Ed. 1979).
Moreover, there are many complex ways of holding property or exercising property interests. The leading example is trusts where even trying to locate the usually intangible object of the property interest seems both futile and irrelevant, even to die-hard-vested-rights territorialists. For trusts, is the *lex rei sitae* the location of the trustee, the active decision maker regarding the care and distribution of the entrusted property, or where the entrusted property (usually intangible) is located, or where the trust instrument was written or signed, or where the settlor lives or where the beneficiary (*cestui que trust*) lives or is domiciled? Territoriality gives no clear answer; “vested rights” points in several directions. Even the rule itself, *lex rei sitae*, points several places.\(^{50}\)

Finally, *lex rei sitae* loses out to *lex domicilii* where the property holder’s domicile becomes fixed by death (not so fixed, of course, that substantial controversy can always be avoided as to where that one fixed location might be).\(^{51}\) Switching rules gives rise to another characterization decision; was a transfer *inter vivos* or testamentary? If *inter vivos*, then *lex rei sitae*; but if testamentary, then *lex domicilii*.\(^{52}\) But, more on “characterization” in the next section.

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51. Although the rule states that one always has one and only one domicile at any point in time, two jurisdictions making the determination may each conclude that it is the one and only domicile. *See in re Dorrance’s Estate*, 309 Pa. 151, 163 A. 303 (1932) (Pennsylvania says Pa. is the one domicile); *In re Dorrance’s Estate*, 115 N.J. Eq. 268, 170 A. 6011 (1934) (New Jersey says N.J., etc.).

52. For example, *compare* Cutts v. Najdrowski, 123 N.J. Eq. 481, 198 A.885 (1938) with *In re Weinstein’s Estate*, 176 Misc. 592, 28 N.Y.S.2d 137 (Sup. Ct. 1941) and *see supra*, note 50.
d. The Domicile Rule

*Lex Domicilii* figures in two areas of great concern in the practice of law: descendant's estates and family law. In these areas, *lex domicilii* seems a necessary legal concept. Both areas focus on an individual, or definite set of individuals, and seek to sort out a set of future relations between that individual(s), her property, and other people. At one time, a marriage itself (the *res*) was thought to have a single domicile. The single domicile is a concept more perfectly consonant with territoriality than the "modern" idea that a marriage "*res*" is located where either party to it is domiciled. But finding a simple separate marital domicile was difficult and required determining which party was at fault before jurisdiction of the divorce court attached. This seemed a bit like putting the cart before the horse.

Domicile itself is not a certain concept, although the rules about finding it are easily stated. As a choice of law rule, it is mildly predictable once it is determined that the domicile of someone is to determine the applicable law. Except for divorce and descendant's estate, however, domicile has not been an obvious basis for choice of law under the *lex loci* regime. Domicile plays a more important role under the modern regime which will be discussed in the next section. Nonetheless, several additional points about domicile as a determinate legal concept are appropriately mentioned at this point, even though they are somewhat tangential to my main thesis that the *lex loci* doctrine is not highly determinant.

55. White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888) is the case most often used as a principal case in conflict of laws case books no doubt because of its unusual facts as to residency and its wooden application of the rule. The rule is (more or less) "One's domicile is the place one resides with the intent to make that place one's home for the time being and with no definite plans to return to one's former home." It took thirty-three sections of the First Restatement to define domicile. See *Restatement of Conflict of Laws*, §§ 9-41 (1934). In *White*, residency was established by moving furniture into a Pennsylvania house and going to the house, from West Virginia, for several weeks, to feed the livestock. The present intent to live in Pennsylvania was clear. But death in West Virginia, his lifelong domicile, intervened. Ruled sufficient residency in Pennsylvania, its law as to descendant's estates applied in spite of descendant's lifelong association with West Virginia and almost no association with Pennsylvania.
Domicile is a pervasive theme in public and private law. It is relevant in many contexts that are only marginal to choice of law: judicial jurisdiction, voting rights, college fees, receipt of welfare benefits, and other governmental benefits and burdens. One of the major law school texts uses domicile as "the chosen point of entry" to the entire field of Conflict of Laws.

Although used in many contexts, domicile once was a unitary concept, its meaning the same no matter what its use. Its meaning now tends to vary with context. Of course, the realists say its meaning always varied with context (and within context). But then the realists thought that the exact meaning of any concept varied with context. Domicile acquired after the time period of the principal facts of a legal dispute (i.e., after the cause of action has "vested") gives pause. Traditional thinking had it that so-called "after ac-

56. A court's jurisdiction over the person of an individual can be predicated on either in-state domicile (Milliken v. Meyer, 311 U.S. 457 (1940) or presence at the moment of service (Burnham v. Superior Court of California, 110 S.Ct. 2105 (1990); Carr v. Carr, 375 S.E.2d 190, 192 (W. Va. 1988)) or past contacts (International Shoe Co. v. Washington, 326 U.S. 310 (1945)) and federal court subject matter jurisdiction in diversity of citizenship cases is, of course, based on domicile.

63. Restatement of Conflict of Laws (1934).
66. By "realists" is meant a movement in American law that has been labeled American Legal Realism which has been highly influential in legal academia from the 1920's until the present. Its major tenets are that the law is judicial decisions, not rules laid down, and that judicial decisions have been, and ought to be, guided, but not dictated by, past decisions with primary concern for the distinctive facts of each case and for the social consequences of any decisions read as a rule to guide future action. See Llewellyn, Some Realism about Realism, 44 Harv. L. Rev. 1222 (1931); Golding, Jurisprudence and Legal Philosophy in Twentieth Century America—Major Themes and Developments, 36 J. Legal Educ. 41 (1986).
quired domicile'" cuts no ice.\textsuperscript{67} To the vested rights theorists, of course, anything happening after the rights vest including a change of domicile of one of the parties is simply irrelevant, period.\textsuperscript{68} A modern rights based theory of litigation\textsuperscript{69} also views after-acquired domicile as irrelevant to choice of law.\textsuperscript{70} Modern rights based theories view litigation as the resolution of a dispute about past events and the liabilities created by those events, with liability being a direct function of rights and duties that existed at the time of the events according to some state's positive law. Such a theory is different from "vested rights" theory because it does not dictate which state's positive law it must accord with, while "vested rights" necessarily says it is the law of the state where the last event necessary to create the vested right (\textit{i.e.}, the cause of action) occurred. Justice Lewis Powell summarized the rights-based position in his dissenting opinion in \textit{Allstate Ins. Co. v. Hague};\textsuperscript{71} "a postaccrual residence has nothing to do with facts to which the forum state proposes to apply its rule . . . ."\textsuperscript{72}

On the other hand, Justice Brennan held for the Court in \textit{Allstate} that the "postoccurrence change of residence" was relevant to the

\textsuperscript{67} Reich v. Purcell, 67 Cal.2d 551, 432 P.2d 727, 730, 63 Cal. Rptr. 31 (1967) (Traynor J., a traditionalist at war with tradition, held that allowing after-acquired domicile to matter would encourage forum shopping.).

\textsuperscript{68} See, \textit{e.g.}, Justice Brandeis's opinion in John Hancock Mutual Life Insurance Co. v. Yates, 299 U.S. 178, 182 (1936).

\textsuperscript{69} See, Dane, \textit{Vested Rights, "Vestedness," and Choice of Law, 96 Yale L.J. 1191 (1987).}

\textsuperscript{70} Brilmayer, \textit{Rights, Fairness and Choice of Law, 98 Yale L.J. 1277, 1287 (1989)}.

\textsuperscript{71} 449 U.S. 303 (1981).

\textsuperscript{72} The full paragraph reads:

This rule is sound. If a plaintiff could choose the substantive rules to be applied to an action by moving to a hospitable forum, the invitation to forum shopping would be irresistible. Moreover, it would permit the defendant's reasonable expectations at the time the cause of action accrues to be frustrated, because it would permit the choice-of-law question to turn on a postaccrual circumstance. Finally, postaccrual residence has nothing to do with facts to which the forum State proposes to apply its rule; it is unrelated to the substantive legal issues presented by the litigation.

\textit{Id.} at 337.

For those keeping score, Chief Justice Burger and Justice Rehnquist joined in Powell's dissent with Justice Stevens concurring in the above-quoted statement. \textit{Id.} at 331.
choice-of-law issue.\textsuperscript{73} Other cases support the idea that after-acquired domicile is relevant to choice of law.\textsuperscript{74} Needless to say, allowing after-acquired domicile to count implies something quite fundamental about the nature of a law suit. It says that a law suit is the effort to resolve a present dispute about past, present and future events.\textsuperscript{75} This implied assumption is so fundamental as never to be mentioned by court or commentator. I will have more to say about this in Part Two.\textsuperscript{76}

The domicile of corporations is also of continuing concern. The simple question, "What is the domicile of a corporation?" leads to such further questions as, "Should 'domicile' be used regarding corporations or is some other concept more appropriate to locating a corporation?" and "Should corporations have more than one domicile, or official location (as they can have more than one state citizenship for diversity cases)?"\textsuperscript{77} The Restatement (Second) Conflict of Laws § 11, comment 1, says, "[N]o useful purpose is served by assigning a domicile to a corporation." Moreover, the traditional doctrine of \textit{lex incorporationis}\textsuperscript{78} assumed that the place of incorporation was how a corporation was legally located and domicile

\textsuperscript{73} \textit{Id.} at 319. Justices White, Marshall, and Blackmun concurred. Justice Stewart did not participate. See on relevance of "after acquired domicile" in Supreme Court: 4-4.


\textsuperscript{75} See \textit{supra} notes 18 & 19 and accompanying text.

\textsuperscript{76} For a discussion of many hypothetical cases involving after acquired domicile and when it should and should not count, see Hancock, \textit{The Effect in Choice of Law Cases of the Acquisition of a New Domicile After the Commission of a Tort or the Making of a Contract}, 2 \textit{Hastings Int'l & Comp. L. Rev.} 215 (1979).

\textsuperscript{77} 28 U.S.C. § 1332(c) (1988). A corporation is a citizen of the state of its incorporation and of the state of its principal place of business which has generally been read to mean either where most of its physical property and employees are located or, if no such state, where its "nerve center" is located.

\textsuperscript{78} In Kozyris, \textit{Corporate Wars and Choice of Law}, 1985 \textit{Duke L.J.} 1, 15, the author states: "An established rule of traditional Conflicts — developed by the courts in the absence of legislative intervention — is that the internal corporate relationship is governed by the law of the state of incorporation" (citing the \textit{First Restatement}). He adds "A review of cases decided over the last twenty-five years reveals that, despite the conflicts revolution, in all but a handful of these the law of the state of incorporation was applied without discussion." \textit{Id.} at 17-18. This is one traditional area that does indeed have certainty and has remained relatively free from intrusion by modern doctrine. \textit{But see} Western Airlines, Inc. v. Sobieski, 191 Cal. App. 2d 399, 12 Cal. Rptr. 719 (1961).
was simply not mentioned. Domicile is occasionally mentioned with regard to corporations out of necessity because of statutory language or out of habit.80

Domicile is, in important ways, a concept of both necessity and habit. We do need to have a single, fixed location for persons for some things, e.g., for "general jurisdiction" over persons,81 for voting, for many governmental burdens (licensing) and benefits. But the domiciliary concept was not central to choice of law under the lex loci regime and, where it was used, it was used seemingly out of necessity. Under some of the modern regimes, especially interest analysis à la Brainerd Currie82 and political rights analysis à la Lea Brilmayer,83 domicile of the parties is central to choice of law. Nonetheless, even those domicile-heavy-choice techniques do not require the single domicile notion, i.e., in a close case nothing should turn on where the single domicile lies. The fact that more than one state has substantial connection with a party must be taken into account in accessing each state's interests or any parties political rights. In any event, the residential affiliations of the parties is of great concern in all modern approaches, but the old idea of a singular domicile is, for the most part, unnecessary, and searching for a single home (where your heart is) will fade with time.84


81. "General jurisdiction" is the jurisdiction a court has over a person when it try any claim against her within the court's subject-matter jurisdiction. Domicile, consent, and presence give general jurisdiction. "Specific jurisdiction" is jurisdiction only over the specific law suit or suits related to the jurisdiction-giving activity of defendant in the state. It arises when the basis of jurisdiction is past contacts with the state. It makes sense to think that one and only one state ought to have general jurisdiction over a defendant, and, therefore, domicile ought to be used. But the Supreme Court's recent decision seemingly allowing general jurisdiction for mere transitory presence makes even this use of the single domicile concept nonsense. Burnham v. Superior Court of California, 110 S. Ct. 2105 (1990).


84. In Allstate Insurance Co. v. Hague, 449 U.S. 303 (1981), Justice Brennan noted: "Minnesota has three contacts with the parties .... First, and for our purposes a very important contact, Mr. Hague was a member of Minnesota's work force .... While employment status may implicate a state interest less substantial than does residence status, that interest is nonetheless important." Id.
2. Their Acquired Indeterminacy

In the course of actually applying the *lex loci* rules to cases, certain judgments must inevitably be made. These are mostly judgments about when to apply which rule, or whether to apply any rule, other than *lex fori*. In other words, in the course of actual application, the rules have acquired rules about the application of the rules. These acquired rules of application add substantially to the uncertainty of outcome of the traditional doctrine. These acquired rules are called "wrinkles" by some commentators and "escape devices" by others. "Wrinkles" implies little flaws or rough spots in an otherwise symmetrical and smooth conceptual scheme, but "escape devices" is obviously critical of the *lex loci* doctrine. Judges used certain "devices" to "escape" from the straight jacket of *lex loci*; the desire to escape being a function of the felt injustice or arbitrariness of the dictated result. My emphasis here has been on the lack of the vaunted certainty of *lex loci*, but the usual criticism has been that it is arbitrary in result. In any event, these "wrinkles" or "escape devices" were an almost inevitable part of the doctrine and further undermined its certainty.

Public policy was the original device that courts used self-consciously to escape from *lex loci*. If the foreign-created claim was

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at 313. In Foster v. Leggett, 484, S.W.2d 827, 829, the Court noted as practical justification for choosing Kentucky law: "While appellee was a resident of Ohio, he kept a rented room near his work in Kentucky, stayed in it on the average of two nights per week and all his employment and most of his social relationships were in Kentucky." In the Uniform Child Custody Jurisdiction Act adopted by every state, the concept of "home state" has been substituted for domicile or residency. Home state has precise time limits (at least six months) and is not the only way a court can obtain jurisdiction to make a child custody determination. "Significant connection" and "substantial evidence" may also give jurisdiction. In other words, real affiliation with a state is the basis of judicial action not a moments residence with a moments "homey" intent, as with domicile. CHILD CUSTODY JURISDICTION ACT §§ 2(5) and 3(a), 9 U.L.A. 133, 143 (1968); W. VA. CODE §§ 48-10-2&3 (1986).


really repugnant to the forum's sense of justice, then the forum would not lend its court's aid to the actualization of that claim. Indeed, most statements of the lex loci rules had a public-policy exception built into the formulation. But, the other "devices," while inevitable, were not self-consciously used to escape injustice, at least when first used.

Characterization of the kind of claim one had was necessary because there was a different rule for tort cases, contract cases, property cases, etc. Since the categories were very broad and seemingly obvious, in most cases the characterization was done intuitively, without controversy and often without comment, but not always. Property interests are created by contract; people commit torts while involved in contractual relationships; people transfer property by contract and so forth. Therefore, some deliberate substantive classification was inevitable.

Another kind of classification was also inevitable. In enforcing (actualizing) a foreign-created claim, a forum will want to, even need to, follow its own enforcement process with all its attendant rules for initiating and proving claims. Thus, it became necessary to determine whether a particular rule governed the substantive claim or the remedial process.

Inevitably, also, there were issues about what foreign law to use in establishing the claim; the whole law of the source-of-claim state including its choice-of-law rules, or merely its domestic substantive rules. Moreover, why should the claim be governed by the law of only one state when it seems to have two or more distinct facets each with different territorial tags? These two wrinkles are called "renvoi" and "depecage" respectively.

In the next sections, I will briefly discuss each of these "wrinkles." It will be well to keep in mind that each is a natural, indeed inevitable, outgrowth of the lex loci doctrine. However, each has been exploited by judges to avoid the results seemingly dictated by lex loci.

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87. The problems of substantive classification, public policy, renvoi, procedural-substantive classification and depecage do not go away with the advent of the modern approaches, but they are no longer (or should be no longer) devices with which to manipulate results but are now viewed in a functional view of the calculus of choice.
a. The Public-Policy Exception

The usual formulation of a *lex loci* rule contained the public-policy exception. Benjamin Cardozo's succinct formulation, "A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids. That is the generally accepted rule in the United States." He went on to give the classic definition of "public policy" in this context:

"The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

Notice two things about his formulations: first, the "public policy" that is spoken of is fundamental, prevalent, and deep-rooted, the foreign state's law triggers the gag reflex of the forum polity; second, the public policy disables a lawsuit; it disallows plaintiff from using the forum's court for actualizing its rights. It does not allow a plaintiff to create a right that did not exist or come into being in the locus state. These two facets of the public-policy exception are integral to the *lex loci* concept; the public-policy exception is door closing (not opening) and then, only when the foreign right outrages the forum.

The original exception, conceived as closing the door on outrageous foreign rights, was quite consistent with the vested rights/territorial basis of the *lex loci* doctrine. A right could only come into being at the time and place of the last event necessary thereto. If it did not come into being there, it could not conceivably come into being. Ohio could not create rights for an event taking place in Kentucky. So says territoriality. But, if Kentucky law created such a right, then Ohio had a duty to enforce it. So says vested-rights dogma. But, a most natural extension of the territorial sovereignty theory was that while a forum has a duty to enforce the foreign right, it has inherent power to refuse to participate in what it views as clearly immoral rights. "You, the suitor, may have the right, but

89. Id. at 202.
90. Id.
the right causes instant nausea in this polity and we refuse to help you." Thus Cardozo’s formulation quoted above. I reiterate in order to underline the fact that "public policy" is a natural, logically consistent, and very narrow exception to lex loci. Few doors would be closed by this exception; indeed, it would be a last desperate argument when all else failed. Moreover, the appeal of lex loci, its real beauty, is its logical consistency.

However, the public-policy exception has not worked that way. It has become an all-purpose exception for courts still bent on saying they are using lex loci when they do not like the results lex loci dictates. In doing so, the public-policy exception is "a crude tool to rough justice but not necessarily justice under law." A 1986 West Virginia case is a good example of the modern use of the public-policy exception. In Paul v. National Bank, a case indistinguishable from Babcock v. Jackson (West Virginia driver and guest on brief trip killed in Indiana due to the driver’s mere negligence; Indiana has a guest statute; West Virginia does not), the

91. See supra, notes 88 & 89 and accompanying text.
92. We must admit that extreme cases might be imagined in which the mere enforcement of a foreign right would be an offense against good morals. But such cases cannot arise among the several states of the United States. (emphasis added.)
95. 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). This case is generally considered the benchmark case of the new era. The author of the opinion, Judge Fuld, had declared that New York no longer relied upon “the generally accepted rules” (i.e. the First Restatement of 1934) in Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954), at least in contract cases, but the new “grouping of contracts” theory was not necessary to the result in Auten or in the later opinion by Judge Fuld in Haag v. Barnes, 9 N.Y.2d 554, 216 N.Y.S.2d 65, 175 N.E.2d 441 (1961). See Ehrenzweig, The "Most Significant Relationship" in the Conflicts Law of Torts, 28 Law & Contemp. Probs. 700, 703-05 (1963). Judge Fuld in both Auten and Babcock laments the loss of "certainty, ease of application and predictability" which the traditional rules provided, but that loss was necessary because of the "unjust and anomalous results" occasioned by the old rules. Id. 12 N.Y.2d at 478-79; 240 N.Y.S.2d at 746-47; 191 N.E.2d at 281, 282. My thesis is that such "certainty," etc. in fact never obtained.
West Virginia Supreme Court of Appeals refused to follow Babcock's famous lead in rejecting *lex loci delicti*, but reached the same result by using the public-policy exception while retaining *lex loci delicti*. Alas, conceptually, the *lex loci delicti* with public-policy exception does not fit the *Paul* case. As stated above, public policy closes the door on giving a remedy for some foreign created rights of action. But in *Paul*, because mere negligence was alleged, no foreign (Indiana) cause of action came into being. There was nothing for West Virginia public policy to close the door on. The West Virginia court has used the public-policy exception to create a cause of action that did not exist at the place of the *delectus*.96

Have other courts done the same thing? Of course.97 What does it mean? It means that *lex loci delicti* has slipped its conceptual moorings and is merely a simplistic way of talking about making choice-of-law decisions using one arbitrary factor as the sole designator of choice.

I say "talking about" because the public-policy exception allows the forum to do whatever it thinks best if the designated foreign law seems unjust. Remember, in a common-law system, whenever

96. Could one argue that the guest statute is a mere defense to a cause of action as contributory negligence was viewed as a "mere defense"? Such conceptualization would go as follows: host's negligence injures guest, a common-law cause of action pops into being in the guest against the host. But the legislature has intervened, giving the host a privilege (in Holfeldian language) to negligently inflict harm on guest passengers. Therefore, West Virginia recognizes the Indiana cause of action but closes its doors on the Indiana defense as against public policy.

There are several reasons why this argument fails to show that the *Paul* court's use of public policy is consistent with that doctrine as originally conceived. First, the Indiana legislature did not "intend" to create such a "privilege" but rather to destroy the common-law-negligence cause of action where the plaintiff was a guest of the defendant. In fact, the "defense" would be raised by motion to dismiss for failure to state a claim. Second, the original conception of vested rights was that the vested right included whatever defenses and limitations pertained thereto according to the creating sovereign. *See supra*, note 8. Moreover, courts applying the public-policy exception thought it more unjust to a defendant not to allow a foreign defense to a foreign cause of action, than to disallow a plaintiff's foreign cause of action. Closing the door to a cause of action was not a judgment on the merits and thus not *res judicata*. But not allowing a defense would mean the cause of action could go to judgment, which judgment would be *res judicata*. *See* Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160 (1932); Western Union Telegraph Co. v. Brown, 234 U.S. 542, 547 (1914).

The court in *Paul* merely used "public policy" as a rhetorical technique for choosing forum law. Such rhetorical technique avoids the articulation of choice generally considered essential to the validity of judicial practice. *See supra*, note 92; *infra*, note 99 and accompanying text.

a local judicial precedent seems unjust, it can be, and usually is, eventually overruled. Therefore, whatever common-law rule a polity follows will necessarily be the just rule by its lights.\textsuperscript{98} So whenever the \textit{lex loci delicti} designates a foreign law that is substantively different from the forum law (\textit{i.e.}, will make a difference in the outcome of the case), it will be trumped by the public-policy exception in favor of forum law.\textsuperscript{99} \textit{Lex loci delicti} becomes \textit{lex fori}.

What has just been said presupposes that the public-policy exception as it actually developed in the cases is stronger medicine than that prescribed by Judge Cardozo as quoted above. The \textit{Paul} case does not necessarily need such a stronger version of public policy because guest statutes have become so putrid to our compensation oriented sense of justice that the Cardozo version might reach guest statutes. And the court in \textit{Paul} emphasized the abuse guest statutes have had heaped on them in recent years.\textsuperscript{100} But, in other courts, the public-policy exception has been of a much stronger variety (\textit{i.e.}, a weaker public policy will suffice to trump the foreign law) such that its use, when coupled with forgetting the door-closing aspects, pushes \textit{lex loci} towards \textit{lex fori} in any case of real conflict.

This broadening of the exception makes \textit{lex loci} even more uncertain than it was as originally conceived. But, there is another aspect to the public-policy exception, as actually used by the courts, that further increases the conceptual arbitrariness of the results reached under \textit{lex loci}. The \textit{Paul} case is an excellent example of this other aspect. In \textit{Paul}, both plaintiff and defendant were West Vir-

\textsuperscript{98} Of course, such a statement is subject to qualifications. There must be an occasion for overruling the unjust precedent, which means that if the precedent is treated as \textit{"law"} it may be \textit{"bad law"} for some time. Moreover, the unjustness of the precedential rule must outweigh the value of a settled rule in promoting predictability, as in \textit{"it's better for some rules to be well-settled than settled well."} Nonetheless, \textit{"the common law works itself pure"} (in Lord Mansfield's famous phrase), and overruling unjust common-law precedent is how it works itself pure — \textit{"pure"} by the best lights of the current state high court judges.


\textsuperscript{100} \textit{Paul}, at 553.
Virginia domiciliaries; the relationship between the parties was formed in West Virginia; the motor trip was to start and end here; the insurance was bought here. In other words, any modern choice-of-law system would pick West Virginia law to determine the standard of liability growing out of the use of the car as between these two people.101 And the court pointed out in Paul that "[t]his State must have some connection with the controversy above and beyond mere service of process [within the state] before the rule we announce today will apply."102 In other words, it is against West Virginia public policy to use a guest statute when West Virginia has an interest in the outcome of the case; but, if we just happen to be the forum to arbitrate an essentially foreign dispute, we do not care how arbitrary the foreign law is. This attitude would doubtless violate the privileges and immunities clause of the constitution,103 but that's beside the point. What the little recital of the necessity of a connection with the forum shows is that a state's interest in having its own law apply is fueling the public-policy exception. And that is exactly what Professors Paulsen and Sovern found to be the case as far back as 1956.104

101. In other words, as posited in the second section of this article, it makes sense to settle this dispute between West Virginians occurring in a West Virginia court according to West Virginia law.
103. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States." U.S. Const. art IV, § 2. If modern analysis is used and the conclusion reached that it is reasonable, given the foreign setting of the dispute, to apply foreign law, no privilege and immunity problem arises. See Toomer v. Witsell, 334 U.S. 385, 396 (1948). Indeed, as Toomer suggests and a number of cases have held, not to apply foreign law when the setting is entirely foreign may violate either the Due Process Clause or the Full Faith and Credit Clause of the United States Constitution. See Home Insurance Co. v. Dick, 281 U.S. 397 (1930) (Due Process Clause); Order of Commercial Travelers v. Wolfe, 331 U.S. 386 (1947) (Full Faith and Credit); see also, Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981). But where a forum will ignore a foreign limitation on a cause of action or create a local cause of action in the name of public policy (and not because of the multistate nature of the case), but not apply that same public policy if the claimant is a nonresident, then a privilege and immunity granted state citizens is being denied to a citizen of another state merely because of the "other-state" citizenship. See Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281 n.10 (1985) (quoting Justice Bushrod Washington's list of "fundamental rights" protected by the P&I clause as including "to institute and maintain actions of any kind in the courts of the state" and noting "that those privileges on Justice Washington's list would still be protected by the clause.") But see, Ortregger v. State Board of Control, 99 Cal. App. 3d 1, 160 Cal. Rptr. 317 (1979), appeal dismissed, 449 U.S. 870 (1980). One suspects that should a nonresident be denied the public policy exception to a foreign guest statute claim à la Paul, the United States Supreme Court would ignore Paul's reasoning and simply assume it was a choice of law issue resolved by the greater contacts with the guest statute state.
They pointed out that

"[The] overwhelming number of cases which have rejected foreign law on public-policy grounds are cases with which the forum had some important connection . . . . The common invocation of the public policy argument to defeat a foreign claim is a denial that foreign law should govern at all and an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it." 105

And thirty-three years ago Paulsen and Sovern attacked this "crude tool" as having the principal vice of "providing a substitute for analysis." The concept "stands in the way of careful thought, of discriminating distinctions, and of true policy development in the conflict of law." 106

b. The Characterization Maneuver

There are two kinds of characterizing that a court must inevitably do given the lex loci dogma: it must determine, "characterize," the kind of substantive claim the plaintiff is asserting, i.e., tort, contract, or some other, and it must determine whether a particular rule governs the substantive claim or merely pertains to the process by which the claim is enforced or actualized.

i. Subject matter characterization

In order to use the lex loci rules, the court must first characterize the cause of action or right as to its substantive field, i.e., torts, contracts, or some other. Since the lex loci rules are very simple (and thus very broad), there are only a few large areas that are material to this task. Tort cases, i.e., all "civil wrongs," are one class; contracts, i.e., every kind of enforceable promise, is another single class. In many (even most) cases this task is simple and uncontroversial: a self-evident intuition. Indeed, Professor Beale thought it so self-evident that he did not discuss (or even mention) the problem in his lengthy and exhaustive treatise on the Conflict of Laws: the definitive statement of the vested rights/territorial thesis. 107 The

105. Id. at 981.
106. Id. at 1016.
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First Restatement made no mention of the problem at all.\textsuperscript{108} Beale and the First Restatement apparently followed the "just know" rule (e.g., "you just know that's a tort case," "that there's a property case," etc.).\textsuperscript{109}

However, it should be equally obvious upon a moments reflection that many cases are not so obvious. Is the foreclosure of a mortgage a property case or a contract case?\textsuperscript{110} Does an employment injury case sound in tort or contract?\textsuperscript{111} Any case involving vicarious liability for tortious conduct is a problem in classification; does liability grow out the contractual relationship between the defendant and tortfeasor, or does liability grow out of the tortious conduct?\textsuperscript{112}

Trusts, the devolution of property, real and personal, are also fraught with characterization problems.\textsuperscript{113} But even in the simplest case a characterization issue can be dredged up if one digs deep enough.

In fact, "characterization" has been aptly characterized as a device by which courts manipulate their way out of unpleasant results seemingly dictated by the "obvious" application of the lex loci norm. For example, in the oft-cited Levy v. Daniels' U-Drive Auto Renting Co.,\textsuperscript{114} a tort claim against the tortious renter driver and the owner

\textsuperscript{109} (2) The method of characterization most widely employed by the courts is a form of low-level labeling. The decider stands off from the problem for a moment, contemplates his navel, and concludes this specimen looks like a tadpole, or a minnow, or a chameleon. The conclusion reached is thought to be so obvious (can't you see that's a minnow?) that supporting reasoning is not necessary.
\textsuperscript{110} R. Crampton, D. Currie & H. Kay, supra note 105, at 90; see, e.g., Swank v. Hufnagle, 111 Ind. 453, 12 N.E. 303 (1887).
\textsuperscript{113} 112. R. Crampton, D. Currie & H. Kay, supra note 107, at 75-78.
\textsuperscript{114} 113. Caldwell v. Gore, 175 La. 501, 143 So. 387 (1932) (dam break flooding neighbor, property or tort case?); Cutts v. Najdowski, 123 N.J. Eq. 481, 198 A. 885 (1938) (savings book trust — inter vivos or testamentary); see R. Crampton, D. Currie & H. Kay, supra note 107, at 87-90 ("Savings Bank Trust — Gift, Trust, Will or What not?").
of a car was converted into a third party beneficiary contract suit in order to take advantage of a place of rental law that said rented cars created vicarious liability in the renter. The state of the accident, and thus of the "delectus," had no such law. In a 1974 case, the Fourth Circuit managed to distinguish Levy with some clever conceptualistic reasoning, demonstrating again the intricacy and hollowness of lex loci analysis, as well as the uncertainty of its results.\(^{115}\) Sometimes, part of a case, a separable issue, say, can be given a certain characteristic that changes the locus of that issue and thus of the choice of law in a crucial conflict of laws. For example, in Haumschild v. Continental Gas Co.,\(^{116}\) the Wisconsin Supreme Court characterized the issue of interspousal immunity from tort liability as a question of family law, not as a question of tort law, and therefore, applied the law of the parties domicile (Wisconsin) rather than that of the place of the accident (California). Thus, the court was able to reach a result it wanted (Wisconsin, the forum, had no interspousal immunity, the "modern" view) and which made more sense from a conflict-of-laws standpoint.\(^{117}\)

\(^{115}\) Kline v. Wheels by Kinney, Inc., 464 F.2d 184, 186 (4th Cir. 1972). Judge Field reasoned that the Connecticut law in Levy was focused on car rental and thus that law was part of any car rental agreement, but that the New York law was directed at all owners being liable for torts of permissive users and therefore did not become part of rental agreements but was merely an addition to New York tort law which had no application to a North Carolina accident under that state's lex loci delicti rule. Judge Butzner dissented, finding it reasonable to believe that North Carolina would have seen the case as ex contractu, and the New York law as part of the contract and allowed recovery. Judge Butzner's dissent in essence says that given the total facts and legal circumstances of this case it makes sense to allow recovery against the renter.

\(^{116}\) 7 Wis. 2d 130, 95 N.W.2d 814, 817-18 (1959).

\(^{117}\) In Haumschild, the court technically used characterization but the reasons given for the characterization were functional not conceptual:

We think that disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of the family domicile. That state has the primary responsibility for establishing and regulating the incidents of the family relationship and it is the only state in which the parties can, by participation in the legislative process, effect a change in those incidents. Moreover, it is undesirable that the rights, duties . . . conferred or imposed by the family relationship should constantly change . . . during temporary absences from . . . [the home state].

Id. at 817 (quoting Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218, 222-23 (1955) (Traynor, J.)).

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Clearly this policy reason for denying capacity to sue [preventing family discord] more properly lies within the sphere of family law, where domicile usually controls the law to be applied, than it does tort law where . . ." Id. at 817-18.

This is an early example (and much commented on) of a case where the court simply applied
Curiously, this characterization device is sometimes conspicuously overlooked by courts straining to reach sensible results while adhering to *lex loci*. In *Chase v. Greyhound Bus Lines*,\(^{118}\) for example, the court made no mention of the possibility of (and precedent for) characterizing the family immunity issue crucial to resolving that case as a question of family law. The court assumed that a Pennsylvania accident case was controlled by Pennsylvania law as to every substantive issue even though the family lived in West Virginia and the trip began and was to end in West Virginia.

In any event, characterization is inevitable if using *lex loci* doctrine,\(^{119}\) and it adds substantial uncertainty to *lex loci* choice of law even when used by judges who care nothing for the equities of the outcomes of their cases. Moreover, when used by judges who like equitable results, it is a ready means to the correct result. When it is used with *depecage* and other "escape devices," it makes for some clever conceptualistic reasoning in the service of results that make sense. Judge Roger Traynor of the California court was the master of such technique. He later obliquely apologized for having to use such technique:

"I do not regard it [*Grant v. McAuliffe*]\(^{120}\) as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet, I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law."\(^{121}\)

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the law that made the most sense to apply. The court also used a technique called "*depecage*" a French word for splitting the various legal issues in a case apart and making separate choice of law decisions as to each issue: the law of state A might control one issue, (say) whether defendant's conduct was negligent, and the law of state B another, (say) whether defendant's negligence results in liability where defendant's victim is his wife. *Depecage* is a technique ignored by the First Restatement, and assumed as routine practice by the Second. See Reese, *Depecage: A Common Phenomenon in Choice of Law*, 73 Colum. L. Rev. 58 (1973). Professor Willis L.M. Reese of Columbia University Law School was the reporter for the Second Restatement, Conflict of Laws.


119. Even in cases like *Chase*, 184 S.E.2d 810, see *supra* note 116 and accompanying text, characterization is done intuitively and unconsciously, but done it is; one cannot get to *lex loci delicti* without characterizing the case as a "*delectus*" or tort.

120. 41 Cal. 2d 859, 264 P.2d 944 (1953).

ii. Substantive-Procedure Characterization

Another distinction that must be made in every conflict case using the vested rights/territorial theory of *lex loci* is whether a particular rule claimed to apply to the case is part of the vested right itself (in which case the locus rule is used) or whether it is merely a rule governing the perfection of the right (in which case the forum rule is used). This distinction is usually expressed as substantive/procedural characterization. The reason for the distinction is conceptual, not functional, as is true of most of the *lex loci* distinctions. This conceptualistic reasoning goes as follows: if the rule is merely one about perfecting the right (rules about proof of facts, pleadings, and remedies), then the vested right itself is not changed by the rule although the kind of judgment the cause of action engenders may be changed. These procedural rules for perfecting rights, territoriality informs us, ought to come from the forum. So *lex loci* for substantive rules, *lex fori* for procedural rules.

Unfortunately, the distinction is more easily stated than made even if one sticks to the conceptual basis for the distinction. Rules about time limitations on actions, burdens of proof, statutes of fraud, survival of actions, and limitations on recovery are not unambiguously either substantive or procedural.

For example, a statute of limitations was (is?) thought to merely cut off the remedy, but not the right itself.\(^{122}\) By this conceptual mode of thought then, a statute of limitation was procedural and the forum applied its own limitation even if longer than that of the substantive law state. It thus might recognize a right now unenforceable (but not "dead") in the "vesting" state.\(^{123}\)

But wait, sometimes a time limitation on bringing a cause of action was contained in the very law creating the cause of action. Then it "felt" as if the limitation was part of the law creating the right, and, thus, the passing of the time limit cut off the right it-

\(^{122}\) J. Beale, *supra* note 107, at §§ 604, 605 (1935).

self. Therefore, the issue became whether the statute of limitation was a "general" statute applying to all of an area of, for instance, common-law claims for tortious bodily injury, or was a specific statute aimed at specific rights such that it would be reasonable to infer that it was intended to qualify or kill the right itself. Usually, but not always, the specific statute was part of the same enactment creating the right. Usually, but not always, when a limitation was contained in the same enactment it was held to cut off the right.

Legislatures have long since entered the statute of limitation choice-of-law arena with borrowing statutes. We now have an old uniform borrowing statute and a new uniform borrowing statute, meaning that neither is uniform. When stacked on top of tolling statutes, they make for some interesting cases.

Burdens of proof create another kind of conceptual dilemma. When state A said the burden was on plaintiff to disprove contributory negligence, "absence of contributory negligence" became part of the plaintiff's cause of action and must have been pleaded. It appeared thus to be substantive. When state B said the burden is on the defendant to prove that the plaintiff was contributorily negligent, then, plaintiff need not plead the absence of contributory

126. Id.
127. Id.
128. Uniform Statute of Limitations on Foreign Claims Act (1957) (withdrawn 1978) (as between the foreign and the forum time limit, the shorter controls). Only three states adopted the Uniform Act. West Virginia was one of them. W. Va. Code §§ 55-2A-1 to -5. In 1982 a new Uniform Conflict of Laws-Limitations Act, 12 U.L.A. 59 (1982) was promulgated, making statutes of limitations substantive. It too has been adopted by few states. See 12 Uniform Laws Annotated 59 (Supp. 1991) for a current list of the states adopting it. Many states have adopted a law "borrowing" the limitation of the state where the "cause of action" or "claim" "arose" or "accrued." But according to L. Brilmayer & J. Martin, supra note 108, at 149: "Such statutes are remarkably varied and cover or fail to cover a wide variety of questions." For an interesting (actually wild) case see Duke v. Housen, 589 P.2d 334 (Wyo.), cert. denied, 444 U.S. 863 (1979). For a case where the substantive law choice was different from the place where the cause of action arose, see George v. Douglas Aircraft, 332 F.2d 73 (1964).
negligence and it is not part of the plaintiff's cause of action. If a vested right is viewed as a vested cause of action (or chose in action), and a cause of action is the material facts one must plead (to state a cause of action), and contributory negligence is a material fact, then the absence of contributory negligence is part of the statement of one's cause of action in states that require plaintiff to prove its absence, and not part of the statement of the cause of action when defendant must prove its existence. And, since the statement in a formal pleading of the cause of action appears to be synonomous with having a cause of action, then the rule about the burden of proof of contributory negligence appears to be a rule about the vested right (cause of action) itself, and, thus, dictated by lex leci delicti.130

But wait, if a vested right is a construct of the law creating it and that law (be it statutory or common law) names all the factual elements that must be established in order to have a right (and a cause of action), then it matters not who has the burden of actually establishing the facts at trial (a mere matter of proof); that burden does not alter the substantive law creating the right of action. Thus, a rule about who has the burden of proof is a mere matter of procedure and the forum should use its own rule. Most of the time this second conceptualization of the burden of proof problem prevailed and burdens of proof were considered a procedural rule of the forum.131

Statutes of fraud may be procedural or substantive depending on interpretation of the statute as to whether it is worded so as to bar the contract or merely bar suit on the contract. The conceptual game is played out in deep earnest with ludicrous results if the statute of frauds of the place of contracting only bars the remedy and that of the forum bars the contract but not the remedy. In that case,

131. See Levy v. Steiger, 233 Mass. 600, 124 N.E. 477 (1919); see also Sampson v. Channell, 110 F.2d 754 (1st Cir.) cert. denied, 310 U.S. 650 (1940) (holding the burden of proof was "substantive" for purposes of applying state law but "procedural" under the state law then applied).
an oral contract will be enforced though it does not satisfy the statute of frauds of either the place of making or the forum of enforcement. Survival and revival of actions had a similar history as did limitations on the amount recoverable. They can be conceptualized either way.

The distinction between substantive and procedural law is still used even in "modern" choice-of-law schemes, but the distinction is now likely to be marked out by a functional test. The question will be, is any particular rule, whether abstractly substantive or procedural, one that it "makes sense" to import from another state or not. The fact that the other state's law is in some way "adjective" or "procedural" will figure in the "makes sense" calculus pushing generally against using out-of-state law. The more it tends to be purely procedural, the more likely will it be thought inappropriate to use foreign state law. Indeed, in the last thirty years of lex loci dominance, a more functional definition of "procedural" was increasingly used, as reflected in the 1934 Restatement itself.

c. Renvoi

Yet another source of uncertainty inherent in any system of conflict of laws, but to which lex loci conceptualism is especially prone, is determining what exactly one means by "the law of another state." The vested cause of action would seem to point to whatever law determines the contours of a like cause of action in that other state's

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132. See Marie v. Garrison, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883). Restatement (Second) of Conflict of Laws, § 598 comment a (1934) concludes: "If the statute of frauds of the place of contracting is procedural only and that of the forum goes to substance only, an oral contract will be enforced though it does not conform to either statute."


134. Restatement (Second) of Conflict of Laws § 122 comments a, b (1969); see also 1988 Revisions to Restatement (Second) of Conflict of Laws § 142 comment e (Proposed Revision 1988):

[Subsequent cases] no longer characterize the issue of limitations as ipso facto procedural and hence governed by the law of the forum. Instead, the courts select the state whose law will be applied to the issue of limitations by a process essentially similar to that used in the case of other issues of choice of law. These cases represent the emerging trend. See also Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482 (9th Cir. 1987); Good v. Elotex Corp., 831 F.2d 508 (4th Cir. 1987) cert. denied, 487 U.S.1218 (1988).

135. Restatement (Second) of Conflict of Laws ch. 12 introductory note (1934), quoted in R. Crampton, D. Currie & H. Kay, supra note 107, at 95-96.
courts. But, if the other state takes into account the interstate nature of the facts creating the cause of action in determining its contours (or its existence), then ought not the forum state do likewise in determining the foreign cause of action? In other words, is not the law of state A, the law that the courts of state A would apply in this very case if it were before them, and should not a court of state B apply as the law of state A the very law state A's courts would apply to this case now before state B?

Stated this way the answer seemed obvious. Of course, the law of state A is the law its courts would apply in this case. For example, a West Virginia domiciled family goes to Pennsylvania on a brief auto trip and has an accident in Pennsylvania while the wife/mother is driving. Pennsylvania has no family immunity doctrine for auto torts, but Pennsylvania also follows the law of the state of the domicile of the family in determining which state's law applies. A Pennsylvania court, therefore, would apply West Virginia's doctrine of intrafamily immunity and disallow all the intrafamily claims against the wife/mother. Thus, even though West Virginia, following lex loci delicti, would apply Pennsylvania law, it finds that Pennsylvania law for this very case to be West Virginia law. So the lex fori would apply after all.

Or would it? There's a wrinkle in this wrinkle. What if the putative Pennsylvania court in applying West Virginia law takes the same tack of looking at what a West Virginia court would do and finds that West Virginia would apply Pennsylvania law? Infinite oscillation! What looks at first like a perfectly sensible rule turns out to be unworkable. This doctrine of looking at the "whole law," including the choice-of-law rules of the state, is called renvoi.

136. These are the facts of Chase v. Greyhounds Lines Inc., 156 W. Va. 397, 184 S.E.2d 810 (1973); see supra note 116.

137. The term "renvoi" is obviously French; the word meaning "to look back." According to Lorenzen: "It was not until the adoption of the renvoi doctrine by the French Court of Cassation in the Forgo Case, decided in 1882, that the problem attracted the serious attention of the jurists." Lorenzen, The Renvoi Theory and the Application of Foreign Law, 10 Colum. L. Rev. 190 (1910), reprinted in E. Lorenzen, Selected Articles on the Conflict of Laws 19, 20 (1947).
Professor Beale and the First Restatement objected to *renvoi*, or "the renvoi," except in certain very limited circumstances. 138 But the doctrine had its champions, most notably the late Dean Irwin Griswold of Harvard. 139 Although it does seem anomalous to get a different result in the forum applying foreign law than would be gotten in the foreign state whose law is being applied, few courts have used *renvoi*. The reason for non-use is not primarily the dissonance of the potential for eternal oscillation, but something more fundamental; the rules for choice of law are conceived (or designed) to pick the domestic rule of the chosen state — not the "whole law." 140

Under *lex loci*, it is enforcement of a vested right created by the *domestic* law of the locus state that is the basis of choice. Under modern interest analysis approaches, the interest is analyzed in terms of state *domestic* law policies. Moreover, the forum uses the choice-of-law rule it deems best by its lights, so why allow the other state to negate it by using some "lesser" rule?

Nonetheless, *renvoi* has been used some by courts both to "escape" results dictated by *lex loci* and because it sometimes seems to make sense in terms of determining the other state's law. 141 It

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138. According to R. CRAMPTON, D. CURRIE & H. KAY, supra note 107: "American legal writers have been generally hostile to the renvoi doctrine. Professors Cook and Lorenzen, the great enemies of the territorialist dogma promulgated by Professor Beale, agreed with Beale and his disciple, Judge Goodrich, that renvoi had no place in common-law jurisprudence. See 1 Beale, Conflict of Laws 55-58 (1935); Goodrich, Conflict of Laws § 10 (1st ed. 1927); Cook, The Logical and Legal Bases of Conflict of Laws ch. IX (1942); Lorenzen, Selected Articles on the Conflict of Laws 19-79 (1947)."

R. CRAMPTON, D. CURRIE, & H. KAY, supra note 107 at 66.

RESTATEMENT OF CONFLICT OF LAWS § 7 (1934) stated that "since the only Conflict of Laws used in the determination of [a] case is the Conflict of Laws of the forum . . . the foreign law to be applied is the law applicable to the matter in hand [read: internal or domestic law] and not the Conflict of Laws of the foreign state." Section 8 contained two long-recognized exceptions: "title to land" cases, and cases involving "the validity of a decree of divorce." Id. at § 8.


140. "Whole law" is a term frequently used in discussions of renvoi; it refers, of course, to domestic rules plus choice of law rules, as apposed to "domestic rules" only, which are referred to as "internal law."

141. It almost always "makes sense" to apply renvoi when renvoi points back to the forum — "if the other state would apply the forum state's law why shouldn't the forum?" See, e.g., Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 263-64 (2d Cir. 1984); Griggs v. Riley, 489 S.W.2nd 469 (Mo. App. 1972); see also Richards v. United States, 369 U.S. 1 (1962) (where the court in interpreting the Federal Tort Claims Act's choice of law provision (28 U.S.C. § 1346) held that "the whole law" of the place where the act or omission occurred should be applied). In none of these cases is the word "renvoi" used. As a rule, the word "renvoi" is used only where the renvoi doctrine is rejected.
adds to the indeterminacy of *lex loci* more than with modern approaches to choice of law because modern approaches remove the incentive to escape from senseless results. Moreover, modern approaches take into account the indeterminacy of foreign law such that determining what the pertinent foreign law is, and what it means for the specific case under analysis, is integral to the choice-of-law analysis. *Lex loci* in general assumes a determinacy of foreign law (or of domestic law) that simply does not obtain.

*Lex loci* assumes, and must assume for its vested-right premise, that common-law-judicial precedent is law in a positive sense.\(^{142}\) Courts using *lex loci* assume foreign courts will follow precedent even though they know that courts often modify, ignore, overrule, and choose among precedent.\(^{143}\) Moreover, common-law precedent must at least be interpreted, and that process is surely less certain than statutory interpretation. Even in cases seemingly controlled by statutes, there is an indeterminacy not usually recognized by a foreign court. In any event, *renvoi* allow courts occasionally to escape the false determinacy of foreign law by escaping back to the *lex fori* and, thus, adding to the indeterminacy of *lex loci*.\(^{144}\)

3. In Sum

*Lex loci* doctrine has not determined choice of law in conflicts situations in a simple, clear, and decisive way and it cannot. Even the conceptually purest form of *lex loci, lex loci delecti*, is inherently indeterminate, although it does far better than any other form except perhaps for *lex loci rei situs* for immovables. Moreover, even the easiest case for *lex loci delecti* (and the one judges must have in mind when talking about its certainty, predictability, and ease of application), the ubiquitous auto negligence tort, lacks certainty because of the propensity of judges to escape results they dislike through devices that are perfectly consistent with the vested right/territorial

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142. The assumption is that courts lay down rules in common law cases and that the rules thus laid down are binding law. It is indeed the assumption of *Erie v. Tomkins*, 304 U.S. 64 (1938). But we all know two things: (a) courts can, and regularly do, overrule common law rules (see *Morning Star v. Black & Decker*, Inc., 253 S.E.2d 666 (W. Va. 1979)); and (b) courts usually don't lay down rules that can be (1) easily identified as the rule laid down, and (2) easily understood outside of the facts situation in which they laid down. See generally K. Llewellyn, THE COMMON LAW TRADITION: DEMOCRACY APPRAISED (1960).

143. *Id.*

foundation of *lex loci*. They declare the locus law to be against forum public policy, or declare the cause of action to be one of implied or express contract, or of family law and not tort, or declare the issue to be procedural not substantive, or use a covert form of *renvoi* and declare the law of the locus to be different for multistate torts than for single state torts. All of these "escapes" are done more or less in the form of a declaration: a bald and bland statement declaring the decisive fact. Little or no analysis precedes or follows the declaration.

Hopefully, it is clear by now that *lex loci* lacks the one virtue its adherents claim for it: certainty. *Lex loci* has been abandoned, for the most part, even by states that pay lip service to its continued survival.

What of the modern supplanters? Are they as fuzzy as those who look back with nostalgia to the lost certainty of the *lex loci* era seem to believe? For the most part, the supplanters substitute analysis for rules, and where "rules" are used they are more akin to flexible guides than dogmatic, result-dictating rules. Analysis requires thought and some tolerance of controversy. In Part II of this article,145 I will look at that thought and controversy to show that predictable results can be and are being obtained under the modern approaches which, with one notable exception, all add up to the same thing which I call THE Modern Approach. This new approach obtains results that are as predictable as most common law dispute resolution ever is and, more importantly, obtains results that make sense. The results "make sense" because that is precisely the aim of modern choice-of-law. In Part II, I hope to demonstrate that if the Second Restatement of Conflict of Laws is used with a "make sense" attitude and thorough analysis, then fuzzy modern choice-of-law can be brought into clear focus.