April 1930

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THE MODERN INFLUENCE IN THE
CONFLICT OF LAWS

ROBERT T. DONLEY*

"Much acute intellectual ability, energy, and expository skill has been ... uneconomically spent in an attempt to distill from knowledge of a phase of governmental business a rarefied and sublimated science to be labeled 'jurisprudence'.

"The law is essentially a practical matter. No theory or effort concerning it can command much attention and respect unless it is directed by an intelligent recognition of this fact."1

It may well be doubted whether legal thought in the seventeen years which have elapsed since Wharton's dictum has not noticeably shaken such a conclusion. For legal scholars continue to "distill" theories and seem not at all troubled about whether they are commanding any particular attention or respect for anyone. And to those for whom realism is a sine qua non there is the ever-disconcerting and fascinating field of legal science conveniently but inaccurately called the "conflicts of law".

It shall therefore be the purpose of this paper to present

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the opposing theories of jurisprudence which relate to the conflict of laws and to discuss the extent to which they present an accurate analysis of the material with which legal science is concerned.

Some English Cases.

In the celebrated cast of Phillips v. Eyre\(^2\) it was stated that:

"As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

Rigby, L. J., in delivering a concurring opinion in Machado v. Fontes,\(^3\) spoke of this rule and said, "I cannot doubt that the change from 'actionable' in the first branch of the rule to 'justifiable' in the second branch of it was deliberate." In the Machado case the defendant had published an alleged libel concerning the plaintiff, in Brazil. Defendant filed a plea setting up that by Brazilian law no civil action for such a libel could be maintained, but that only criminal proceedings could be instituted. Lopes, L. J., after doubting whether the plea went more than to the remedy rather than to the substantive cause of action, assumed that it did go to the latter and larger question and said:

"The act was committed abroad, and was actionable here, and not justifiable by the law of the place where it was committed . . . . therefore the publication in Brazil is actionable here."

Thus were Lord Manfield's doubts in Mostyn v. Fabrigas\(^4\) resolved when he said:

\(^2\) L. R. (1870) 6 Q. B. 1.
\(^3\) L. R. (1897) 2 Q. B. 231.
"... if two persons fight in France, and both happen casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here. ... Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects."

And so, also, was the language of Selwyn, L. J., in The "Halley" extended. In these cases the court is not troubled to explain the theory underlying the creation of rights and correlative duties. In 1870 it was evidently thought sufficient to say that:

"A right of action, whether it arise from contract governed by the law of the place or wrong, is equally the creature of the law of the place and subordinate thereto. ... And in like manner the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law."

Dicey says that "the nature of a right acquired under the law of any civilized country must be determined in accordance with the law under which the right is acquired."

The American View.

The Supreme Court of the United States in Huntington v. Atrill stated that:

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5 "... in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of the collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as one of the facts upon which the existence of the tort, or the right to damages, may depend, but it is, in their lordship's opinion, contrary to principle and to authority to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

6 L. R. 2 P. C. 193, (1868).
7 Phillips v. Eyre, supra, n. 2.
9 146 U. S. 657 (1892).
"... a private action may be maintained in one State, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought."

In actions involving torts it is well established in this country that the law of the place where the injury occurred determines whether a right of action exists. "It is a general principle, that, in order to maintain an action of tort founded upon an injury to person and property, the act which is the cause of the injury and the foundation of the action must at least be actionable by the law of the place where it is done, if not also by that of the place in which redress is sought."

Thus, in England the investive facts must (1) be actionable by the law of England, had they occurred there; and (2) need not be such as would lay the basis for a civil action by the law of the place where they occurred.

Contrarily, in the United States the investive facts must (1) not necessarily be actionable by the law of the forum had the acts occurred there; and (2) must be such as would found a civil action under the lex loci delicti.

The opposite results which these courts might reach on a case involving identical situations of fact do not necessarily involve any difference in fundamental legal theory as to the creation of rights and duties; but may be reconciled on differ-

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20 Davis v. N. Y. etc. R. R., 143 Mass. 301, 9 N. E. 815 (1887).

The court proceeds to say: "It must certainly be the right of each State to determine by its laws under what circumstances an injury to the person will afford a cause of action. If this is not so, a person who is not a citizen of the State, or who resorts to another State for his remedy, if jurisdiction can be obtained, may subject the defendant in an action of tort to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred; and, as by the law of Massachusetts it is required that a person injured while traveling upon a railroad must prove, not only the negligence of the defendant, but also that he himself was in the exercise of due care * * * the plaintiff might relieve himself of the necessity of proving his own due care if, by the law of the State to which he may resort, such proof is not required, and thus put upon the railroad company a higher responsibility than is imposed by the State in which it was performing its business."
ent views as to the vague concept shrouded in the word "policy". Thus, the English court states that:

"... it is, in their lordships' opinion, alike contrary to principle and to authority to hold, that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

But such a position of impeccable wisdom as to its own methods of dealing with legal relations is not generally held in this country. Less provincially the Supreme Court of the United States indicated that so long as an action would lie under the law of the place where the acts occurred, it need not be actionable by the law of the forum. Thus a plaintiff may recover if by the lew loci he would not be barred by contributory negligence, although by the law of the forum such negligence would have been a defense, had the acts occurred there.

The Obligatio Theory.

Whatever may be the differences of policy in England and in the United States as to whether the investitive facts must be such as would have given rise to an action had they occurred in the forum, yet the courts of both countries adopt, apparently, the obligatio theory as substantially set forth in Slater v. Mexican National Railway Company:

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11 Cf. Walsh v. N. Y. & New Engl. R. R., 160 Mass. 571, 36 N. E. 584 (1894) opinion by Holmes, J., wherein the statement is made that: "...as between the States of this Union, when a transitory cause of action had vested in one of them under the common law as there understood and administered, the mere existence of a slight variance of view in the forum resorted to, not amounting to a fundamental difference of policy, should not prevent an enforcement of the obligation admitted to have arisen by the law which governed the conduct of the parties." The theory of law implied in this excerpt will be the subject of comment subsequently, infra.
13 Goodrich, "Tort Obligations and The Conflict of Laws," 73 U. of Pa. L. Rev. 19. It is stated that the law of the place where the injury was received determines whether a right of action exists, and that such is "the rule prevailing in this country upon the subject and is sound upon principle and authority."
14 194 U. S. 120 (1904).
“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. (Citing cases). But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, . . . but equally determines its extent.”

This view is generally accepted as the correct one in this country, and apparently also in England. The fundamental premise of this theory may be illustrated as follows: If A injures B negligently or wilfully in New York, then at that time and place a right is created in B to recover damages from A, and a correlative duty imposed upon A to pay these damages, ipso facto by virtue of the laws of New York. It further conceives that this right-duty relationship has some of the attributes of personal property; that it can be carried about from place to place by B and presented to a court wherever A may be found, in much the same way that a chattel might be offered for the inspection of a jury. The court, viewing this obligation, recognizes it as a possession of B which he acquired\(^{15}\) at some prior time and in some foreign place and proceeds to give executive aid accordingly. In addition, there is the further concept that the forum must measure the existence and extent of the obligation by the lex loci.

\(^{15}\) Thus: “If P brings his action against D in New York for this Massachusetts battery he is not asking New York to give an extra-territorial effect to the Massachusetts law. He asks that New York recognize and enforce his claim against D, acquired in Massachusetts and given by Massachusetts law.” Supra, n. 13.

It is submitted that if “acquiring” means anything it means that P has something, tangible or intangible, with attributes which make ownership or possession possible. Rules of law are hypotheses, having an abstract existence distinguished from the written evidence thereof. For legal purposes they have little, if any, significance apart from the minds of the judges who formulate the concept. Likewise “claim” is simply the concept of a jural relation. The result of the theory and terminology above-quoted is to state that prophecies as to the jural character of a given relation existing between P and D can be brought from Massachusetts to New York.
"If the acts of the parties impose no obligations on the one hand and confer no rights upon the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would have resulted. An act should be judged by the law of the jurisdiction where it was committed; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience; if his conduct according to that law violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights."

The justness of the result sought to be obtained by the application of this rule may be circumvented by the rules of procedure obtaining in the forum, as illustrated by the following example:

P is driving his automobile on a highway in State X. D approaches from the rear and attempts to pass P. D attempts to sound a warning signal but the connection breaks at the moment of attempting to pass and the cars collide, P not knowing of D's presence and applying his brakes suddenly. It is a rule of law in State X that the violation of a statute enacted for the protection of individuals driving on the highway is \textit{prima facie} negligence. The statute likewise makes it the duty of D to sound a warning signal and imposes a fine for failure so to do.

D moves to State Y where P brings suit. It is a rule of law in State Y that the violation of such a statute is evidence of negligence \textit{per se}.

D's failure to sound the required signal at the time and place of the collision was not in fact negligent, being due to the unforseeable breaking of the electrical connection. He has therefore not breached a duty owing to P. Did P acquire a "right" in State X?

\footnote{Alexander \textit{v.} Pennsylvania Co., 48 Oh. St. 623 (1891).}
However, when P sues in State Y, D will not be permitted to show that his conduct was not in fact negligent. And, granting that the failure to sound the signal was the proximate and direct cause of the injury, P will recover. Theoretically, State Y is not imposing an obligation upon D which did not exist in State X, but is simply determining the facts of the case in accordance with its own rules of proof. The effect therefore, is to alter the facts (negligence being a question of fact); or, to create a right-duty concept different from that which presumably would have been created under the lex loci.

"In other words, a party is entitled to have the forum attach the same legal effect to the ultimate fact proved as would the lex loci; but he must convince the forum as to what these ultimate facts are in the manner provided by the rules of the forum itself." 17

Although cases may be found to the contrary, and although there is little uniformity of agreement upon what are matters of "substance" and what are matters of "procedure", it is generally laid down that the rules of the forum control the admissibility of evidence, the competency of witnesses, the probative value of evidence, the quantum thereof necessary to require submission of the facts to a jury, and the burden of proof. Thus it frequently occurs that although the forum clings to the obligatio theory of the creation of rights and duties, yet it may create those which the lex loci presumably would not have created and refuses to create others which the latter might have evolved; and all this without the influence of a supposed public policy.

The Local Law Theory.

The local law theory of the bases of conflict of laws is stated by Cook as follows: 18

17 See note in 12 MINN. L. REV. 263 at p. 266.
"... the forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which same or all of the foreign elements are connected, the rule so selected being in normal cases, and subject to the exceptions to be noted later, the rule of the decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a similar but purely domestic group of facts involving for the foreign court no foreign elements. ... . The forum thus enforces not a foreign right but a right created by its own law."

As to the concept that the law of the place creates an obligation at the time of the occurrence of the investitive facts, the answer is made that:

"So, a statement that by the law of New York A has under given circumstances, 'a right' and that B is under a correlative 'duty' is a conventional way of asserting that, on the basis of certain past behavior of certain New York officials, we now predict that New York officials will behave in a certain way if specified events happen and the officials are set in motion in the appropriate way by the injured party. 'Right', 'duty' and other names for legal relations are therefore not names of objects or entities which have an existence apart from the behavior of the officials in question, but merely terms by means of which we describe to each other what prophecies we make as to the probable occurrence of a certain sequence of events—the behavior of the officials."

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10 Ibid., p. 469. The exceptions referred to are:

(1) Where all facts occur in State A and suit is in State B. The rule applied by State B is the rule which it would have to apply to the very same case, (not a similar case); and

(2) Where State B applies the rule which State A would have applied, not to a purely domestic case, but to the very same case. This involves the application by State B of the rules of conflict of laws of State A.

20 Ibid., p. 746. The view is also taken that if P assaults D that act creates a plurality of jural relations, in effect, as many as there are courts which will recognize and sanction D's right.
However it must be made clear that the difference in the two theories is not one of mere language; one is not merely a conventional way of phrasing the other. The difference is fundamentally one which goes to the very foundation of legal theory as to the nature of rights, powers, privileges and immunities and their correlatives, duties, liabilities, inabilities and disabilities; and further as to their origin, creation and sanction.

Legal Phenomena.

Each science has its own aggregate of phenomena, and as in physics and chemistry it is the function of theories to describe and explain the nature of the physical world from particular points of view, so is it the function of legal philosophy and jurisprudence to give an accurate analysis of the mental and factual data which constitute legal phenomena. And any theory which must resort to fictions as substitutes for facts is pro tanto faulty, being somewhat comparable to the ancient physical doctrine that "nature abhors a vacuum." What are the elements of legal phenomena with which the legal scientist must deal as the chemist deals with the elements of matter? Kocourek reduces them to three:

1. A given rule of law, potentially existing in the abstract, susceptible of application to
2. A situation of fact created by acts of two jural persons, or/and the occurrence of events.
3. A jural relation, which operates as a connecting link between the legal rule and the situation of fact.

21 The correlative terms used are those adopted by KOCOUREK in "JURAL RELATIONS" p. 97. It is not within the scope of this article to debate the correctness of terminology or the fundamental difference in theory involved therein. Suffice it to say that the writer is convinced that the Hohfeldian correlatives of no-right-no-duty do not express the concept of a jural relation. The following articles are deserving of close inspection, HOFZELLER, "FUNDAMENTAL LEGAL CONCEPTIONS", (1919); CLARKE, "Relations, Legal and Otherwise", 5 ILL QUAR. 26 (1922); GOBLE, "Negative Legal Relations", 5 ILL L. QUAR 36 (1922); COBBIN, "What Is a Legal Relation?", 5 ILL L. QUAR. 50 (1922); KOCOUREK, "Non-Legal-Content Relations," 4 ILL L. QUAR. 233 (1922); GREEN, "The Relativity of Legal Relations", 5 ILL L. QUAR. 187 (1923).

If X negligently injures Y in Pennsylvania, and it is a rule of law in that State that "if one person negligently injures another with resulting damage he shall be liable to respond to the person so injured by the payment of monetary compensation", we have elements (1) and (2). But those elements standing alone give Y no compensation, for he must first institute an action, presenting the facts to a judicial body (a court of law), which will then afford him executive sanction by directing the sheriff to levy upon the property of X and realize therefrom the amount of money which has been determined as compensating Y for the injury.

Relations between persons are of two sorts, jural or non-jural. The matter of definition is important and varies as widely as these:

"... anything that can be expressed in the form of a statement of law is a legal relation. Any statement of law that can be made about A and B expresses a legal relation to which A and B are parties."

"A legal relation is the concept abstracted from a situation of legal and material fact by virtue of which one person presently or contingently, and either directly or indirectly, may control the range of natural physical freedom of movement of a human being in favor of another person."

For present purposes it will be sufficient to treat "legal relations" and "jural relations" as synonymous. If A lends B $100.00 and B promises to pay A $100.00 in one month.

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24 N. 22, p. 75.
25 Jural relation "is used interchangeably with 'legal relation'; the proper distinction is that a 'legal relation' is a concrete relation while a 'jural relation' is a legal relation considered abstractly. Courts deal with legal relations; while jurists and theorists deal with jural relations." Supra, n. 22, p. 435.

While this distinction is made by Professor Kocourek, the present writer uses the terms synonymously, in the sense that in reality the relation, whether denominated "legal" or "jural" is purely conceptual in nature. It is doubtful whether the idea of concreteness adds clarity to discussion of the questions discussed herein.
A has a claim to the payment of that sum and B owes a correlative duty to tender it as the expiration of one month. The relation between the parties is described as "primary." If B fails to comply with his promise, A's claim and B's duty are destroyed simply by the mere passage of time, and a new claim is created in A to have damages in the sum of $100.00 and a new duty created in B to pay those damages.\(^2\)

The new relation is "secondary." If the statute of limitations under the law of the forum is five years and A does not institute an action until six years, he cannot recover; not because his claim is destroyed, but because the statute introduces a new element in the legal phenomenon which impels the court to create a new power in B superior in legal effect to A's claim.

In such a situation the obligatio theory assumes that the primary relation between A and B was a legal relation at the time and place where the promise was made. We may say that from a survey of the rules of the law of the lex loci the prediction is that such a relation would be a legal relation if a court adjudicated the matter. However, until the forum is called upon so to determine the legal quality of the relation, it is still only a matter of prediction, although such prediction may amount to a certainty. The case is plain where the facts are not complicated and the rule of law is well-settled. But if B promised to pay A $100.00 because of the personal esteem which B held for A and because A was his brother who had rendered medical services to B while they were living in the same household, do those investive facts create a legal relation between A and B? That is to say, until the case is presented to a court for adjudication, how can it be determined whether A may

“presently or contingently, directly or indirectly, control the natural physical freedom” of B? If a recovery is allowed it is usual to say that a primary legal relation had once existed between the parties, followed by an obligation which A carried about with him (the secondary relation). If recovery is denied, then it is plain that no legal relation ever existed, or that it has been superseded by a superior relation which defeats the action, or it has been destroyed.

Therefore, it is clear that in allowing a recovery in any case the court creates the right and the correlative duty and directs the executive sanction necessary to its existence. We shall not debate here whether sanction is essential to the existence of a legal relation. Suffice it to say that since legal relations are based on legal rules, and that by very definition a legal rule is one supported by the power of the State to compel obedience to it, if a sanction be lacking the rule is not a rule of law, it is simply advice; and the relation is not a jural one, but indistinguishable from any other, moral, social, or otherwise.

The sole function of a court is to create jural relations. If it promulgates new rules of law (or mystically discovers those which have been potentially existent) it is not acting

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27 At this point the necessity of accurate definition is manifest. For example, the argument made is of no weight if a legal relation is merely a statement of law which can be made about A and B. It is also of primary importance to determine which legal person is the dominus and which the servus of the relation. If, under the facts, a recovery is refused and judgment rendered against A for costs, were the parties ever in legal relationship?

The definition of a legal relation here adopted will not, of course, be understood as implying an actual physical restriction of freedom, e.g., as by incarceration.

28 "The activities of courts, as courts, in a strict sense, are reducible to the creation of duties and the creation of powers. Courts never act in an adjudicative capacity except where a legal relation has been violated. More specifically, a court never acts as a court unless a duty has been infringed." Supra, 22, p. 350.

29 "A sanction as applied to a legal rule is 'any conditional evil annexed to a law, to produce obedience and conformity to it.'" Supra n. 22, p. 343. The point is also clear that sanctions may be applied to legal relations, which are the products of legal rules.
as a court, but as a legislature. And since legal relations exist only as prophecies until a court finally creates them as such, as distinguished from all other types of relations to which the investitive facts may give rise the fallacy of the obligatio theory is at once apparent. When A assaulted B in New York there was only the prediction that if suit were brought the court would declare the relation to be a legal one. Obviously it was not ipso facto created as such at the time and place of the occurrence of the investitive facts, for no court had been called upon to create it; and as we have seen there is no other way for a legal relation to be created. True, the acts themselves, and the events (such as the passage of time) are the only source of the relation, and those acts do have a specific reference to time and place. But the legal or non-legal character of that relation has no reference to dates and boundary lines other than those of the forum. Prior thereto all probable consequences and results were simply speculation.

We therefore have all the elements of legal phenomena in the court of the forum. The plaintiff cannot bring to it an "obligatio", but only his witnesses. The forum thus determines the true investitive facts, applies its own law (for it can apply no other) and creates the jural relation. The fact that the court may, through consideration of policy or concepts of justice, apply as its own rule, a rule identical with that obtaining under the lex loci, gives no more than persuasive force to the latter. The forum is constrained by no law except its own. It is therefore somewhat surprising that Beale should state:

"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."

30 "Courts in all countries have legislated (i. e., made legal rules) and continue to do so. The common law is almost entirely a product of the courts..." Supra, n. 22, p. 350.
31 Cf. Dodd "Jurisdiction in Personal Actions", 23 Ill. L. Rev. 427-431 (1929); "The idea of a right as something created by the law of a particular place which, once created, becomes a possession of the plaintiff, is, however, merely a mental concept and not an objective reality."
Rather one should see that if the forum affords no executive sanction, if it refuses to create the jural relation by applying the only law which it has any power to apply, its own, there is no principle upon which a recovery may be had. For it is apparent that "each state has the right by virtue of this sovereignty to apply to private international relations: (a) either the rules applying within the State to purely national business; (b) or some foreign law, in some way connected with the business in hand; (c) or independent rules." This view requires modification to the extent that (b) should state that the local rule applied is identical with or highly similar to, such foreign law.

What are the implications of the local law theory? In *McDonald v. Mallory* the plaintiff sued to recover under the wrongful death statute of New York. The deceased was a New York citizen, and the injury causing the death had occurred on the high seas on board of a vessel owned by New York parties, and New York was likewise the home port of the vessel. The court permitted a recovery on the theory that New York law extended to the vessel and that the injury therefore should be treated as though it had occurred in that State. The court, in promulgating this fiction, stated:

"The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one State or country for a personal injury may be enforced in another to which the parties may remove or where they may be found, yet the right or liability must exist under the laws of the place where the act was done. Actions for injuries to the person committed abroad are sustained without proof in the first instance of the loci, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries."

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34 77 N. Y. 546 (1879).
And proceeded to demonstrate the necessity of the fiction thus:

"... at the place where the injury was consummated there was no law by which to determine whether or not it rendered the defendants liable to an action, unless the law of the State to which the vessel belonged followed her."

The implication of this and similar decisions is that there is some inherent limitation in the power of courts which disables them from applying to such a situation their own rules of law governing the relative rights and duties of the parties in the absence of any rule of law shown to have been in existence at the time and place of the occurrence. That it may think it unjust, or unconscionable, or impolitic, is another matter; but that it does not have the absolute power so to do is impossible to demonstrate. 

Let us suppose that A and B are citizens of Massachusetts and New York, respectively. They become members of Commander Byrd's exploring party in the Antarctic. While upon some hitherto undiscovered territory A becomes ill and promises that if B will nurse him back to health, he will pay B $1000.00. B agrees, but due to his negligent inattention, it becomes necessary to amputate A's feet. Upon their return to America, B moves to New Jersey, and A sues him there to recover damages for the loss of his feet, alleging B's negligent omissions. A files a plea setting up that at the time and place of the occurrence there was no law in force in the Antarctic; that A's allegations that it was B's duty not to injure him negligently are untrue for the reason that there was no law that imposed such a legal duty upon B; that having violated no legal duty, there is no cause of action; and that B's duty cannot be measured by the laws of

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35 Cf. Dicey, n. 8, supra, p. 827: "When an act which damages A or his property is done by X in a barbarous country, the character of the act cannot depend on the law of the country where it was done. If both X and A are domiciled in England, the act is probably wrongful and actionable in England. If the two parties are domiciled, the one in England and the other, e. g., in Germany, then the act is probably actionable in England and according to the law of Germany."
New Jersey, New York, or Massachusetts because those laws can have no operation beyond the territorial limits of the respective states.\(^3\)

Under the obligation theory it is difficult to discover upon what principle a recovery could be allowed, for surely A acquired no obligation which he could carry from the frozen South Seas to New Jersey and there enforce against B. Were B's omissions other than immoral, inhuman, or antisocial? There could be no such obligation because there was no law in force at the time and place which would create it. "The only source of this obligation is the law of the place of the act ... that law determines not merely the existence of the obligation, ... but equally its extent."

Yet it will not be disputed that here is a situation which demands that A be afforded a remedy against B. If the New Jersey court proceeded under the local law theory it is believed that it might well say, "We are not concerned with the creation of obligations by foreign laws, but with the creation of rights and duties by this court. In determining whether we shall create a jural relation in this instance, or in any instance, we can apply no other rules of law except our own, for we have no power to apply the rules of other jurisdictions, which are not in force in this state. In choosing what our own rule of law shall be, we may adopt any which seems to us to be sound in principle and in consonance with the tenets of justice. Since B is now a citizen of New Jersey, we might apply the New Jersey rules of law applicable to similar cases involving no foreign element. However, we choose to take as the proper rule one identical with

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\(^3\) See Frederick J. De Sloovere, "The Local Law Theory and its Implications", 41 Harv. L. Rev. 421 (1928): "In a word, in no case is the power of the forum to re-create rights and enforce decrees any greater than that of the foreign jurisdiction where the acts occurred. Thus we get nowhere by glorifying the power of the forum and disregarding the power of the locus."

The writer submits that the foregoing statement is subject to the following criticisms: (1) the forum does not re-create rights, but creates them in the first instance; (2) it is flatly disapproved by such cases as Machado v. Fontes, in which the English court did create a civil right of action (and therefore had the power to do so), while in Brazil no civil right was capable of creation, under the facts of the case.
the law of New York, applicable to a purely domestic situation, for the reason that at the time of the occurrence of the injury, B was a citizen of that state, and we think it wise in policy to do so for the reason that as such a citizen, B’s conduct should be measured according to principles of tort liability with which he is, or ought to have been, most familiar, and as imposing the least hardship thereby.\(^\text{37}\)

That is, of course, on the assumption that New Jersey has no binding precedent governing cases of this character. Reverting to \textit{Machado v. Fontes},\(^\text{38}\) we are struck by the fact that a recovery was permitted although the law of the place of the injury gave no right of action for civil damages, and therefore in a strict sense is not in consonance with the obligatio theory. However we find Dicey saying:

"Thus, X and A are Englishmen, living in England. X, out of gratitude to A, but for no consideration whatever, promises A to pay him £100. The promise gives A no legal right whatever, under English law, to the payment of the £100 by X. Both parties being in France, A sues X in a French Court for the £100 as a debt owing to him. If A’s claim be measured, as it ought to be, by English law, then A will recover nothing; having acquired no right to payment under English law, he possesses no right which he can enforce in France. If, on the other hand, the nature

\(^{37}\) Apparently Professor Cook does not conclude that the theory can be extended to cover cases of this character. See n. 17, supra, p. 484: "My conclusion then is, that while, so long as we have the territorial organization of modern political society, the law of a given state or country can be enforced only within its territorial limits, this does not mean that the law of that state or country cannot, except in certain exceptional cases, affect the legal relations of persons outside its limits.... Whatever be the legal limitations upon the power of a state or country to affect the legal relations of persons anywhere in the world, they must be found in positive law of some kind—be the same international law or constitutional law, and do not inhere in the constitution of the legal universe."

If not already apparent, the writer's view not only that the theory is capable of such extension, but that it must be so extended, is the result of the following reasoning: The rules of law of the \textit{lex loci}, being simply conceptual, cannot attach to the acts of the parties (unless made a part of the investitive facts as hereinafter explained); they have no force in the forum greater than persuasive. Thus, the forum has the power to attach whatever jural consequences to the acts of the parties that it may choose, since in so doing, it will always apply its own law.

In so adjudicating, the forum is not constrained, in the absence of precedent, by considerations other than those of "policy".

\(^{38}\) \textit{Supra}, n. 3.
of A's claim be not measured by English law, then he may very possibly recover £100; with the result that he enforces not a right duly acquired under English law, but a non-existent right which the French Courts erroneously thought he had acquired under English law.\(^{39}\)

To state that a recovery may be had on the basis of a non-existent right erroneously conceived to be a jural claim is to confound logic and reduce the science of the law to the point of absurdity. If a remedy is afforded by the French Court it is because that court has by the application of the only legal rules which it can apply (its own) to a situation of fact presented to it, evolved the concept of a jural relation existing between A and X, a right-duty relation. That right and correlative duty come into existence, as jural, only when and if the concept is formed in the minds of the judges and executive sanction is imposed. Therefore, by permitting a recovery the court adjudicates that A did have a legal right. The statement that a right was non-existent, and in the next phrase admitting that a remedy may be had, will hardly be understood by anyone; especially X, who must pay the damages.\(^{40}\)

Much of the confusion arising out of the obligatio theory seems traceable to the idea that rules of law themselves create or impose rights and duties. As we have seen these rules are but one element in the complete legal phenomenon. Like jural relations they are but concepts having no existence apart from the minds of the officials of the sovereign nation or State who are called upon to apply them, acting

\(^{39}\) Supra, n. 8, p. 50.

\(^{40}\) See Jacobus v. Colgate, 217 N. Y. 235, 111 N. E. 837 (1916), CARDOZO, J.: "...the normal exercise of the State's power is through the agency of the courts, and hence a right which, when violated, does not create a right of action, is shorn of most of the incidents that make a legal right of value." In the opinion the Slater Case is quoted with approval.

Seabury, J., dissenting: "To argue that there can be no right because there is no remedy is to invert the maxim that there is no wrong without a remedy...."

\textit{Quaere:} Whether this decision, in its emphasis upon the importance of remedy, lends any support to the local law theory. Apparently not: "It is not accurate, therefore, to say even today that the primary right is one established by the law of New York."
under authority therefrom. If all the written evidence contained in constitutions, statutes and reported decisions were simultaneously destroyed the law itself would not be destroyed so long as the State agents continued to perform their official tasks. Upon the other hand, if a revolution overthrows the power of those officials, there is no law though there be ten thousand statutes and reported decisions in existence. Plainly only one element of a legal phenomenon has objective reality—the investitive facts, and they may have no present existence. That such a theory is uncomfortably nebulous is demonstrated by the language of the reported decisions in clinging to such terminology as "vested rights" and "acquired claims". One feels more secure in saying that he owns the home in which he lives than in saying that if anyone attempts to interfere with his possession and control over it the prophecy is that a court of law would afford him protection or compensate him in damages. It is a language of escape—escape from the mental to the physical world, from rights as concepts to rights as chattels which somehow may be grasped and held against all invasion.

Criticism of the Local Law Theory.

In the hypothetical case of A and B in the Antarctic is seen the limitless extent to which the local law theory may be logically extended. The practical difficulties in applying it to such a situation of fact are perhaps immaterial but present themselves to any lawyer familiar with the requirements of pleading. For that reason they may be briefly mentioned. A's lawyer immediately finds himself under the necessity of alleging facts showing the existence of a legal right and the breach of a legal duty, with resulting damage. Assuredly he cannot allege that it was the legal duty of B to exercise due care not to injure A's person for the reason that the facts incontrovertibly are that B was beyond the pale of any law whatever which could define that duty, or command, through any State agency, obedience to it. What sovereign had any power to control B's actions? Suppose that under the laws of Abyssinia it is illegal to give aid to
any person physically disabled, on the theory that the processes of nature and the will of whatever gods may be should not be frustrated. Why should Abyssinian definitions of legal duty be any less applicable to B than those of New York or New Jersey, if he be beyond the pale of both? Thus, A's lawyer will be constrained to plead the breach of a legal duty. B may properly reply that he has complied with his legal duty as defined under Abyssinian laws. If A rejoins that those laws are irrelevant and inapplicable, B may answer that they have exactly as much relevance as those of any one of the United States.

The requirements of pleading are themselves the result of the concept that remedies exist for the redress of violated "rights"; rights that are defined as primary: the right of integrity of the person, and the like. By very terminology, "primary" precedes "secondary" in point of time. It is therefore not difficult to perceive that the idea of time with reference to the occurrence of the investitive facts has been carried over into the idea of time with reference to the creation of rights and duties. And the concept is thus that a primary right does have an existence at some date prior to the creation of a secondary right. The hypothetical case, for example, assumes that on January 1st A had a right of integrity of the person; that on February 1st B, by his omissions to attend A, infringed or destroyed that right; and that therefore a new right is created in A to have damages from B.

It is not necessary to labor for the obvious. At the risk of doing so it may be stated that the local law theory adequately dissipates the fallacies of primary and secondary rights in relation to the calendar. But it is said that:

"Historically, rights grew out of remedies, but analytically rights are always precedent. . . . Yet Bartolus saw the necessity of regarding the analytical view in the conflict of laws. This view is clearly necessary today."

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42 See n. 16, supra.
43 N. 36, supra, p. 431.
This observation is offered in derogation of the local law theory, but it is submitted that its ultimate soundness is demonstrated thereby. The very point of emphasis is that rights (primary) are precedent, but analytically; which is to say as conceived by the minds of those who analyze; not in actual point of time intervening between the creation of those rights. It is clear that a right is simply the concept of the dominant side of a jural relation. As such it has no existence except in the minds of the judges who are called upon to deal with its creation. The forum, in affording a remedy, is necessarily called upon to define or at least to formulate its concept of any given relation as jural or non-jural. The fact that in so doing it is guided by the persuasive force of rules of law promulgated by another sovereign nation or State (mental data to assist in reaching a conclusion) in no wise alters the facts: (1) that the court is the sole body which formulates with any legal effect, the concept of the jural relations, and (2) imposes the sanction which is essential to its legal character.

And the further consideration that before conceiving of the remedial or secondary relation it was logically necessary to conceive that there had been another and primary relation between the parties, in no wise proves that that primary relation in reality existed at the time when and place where the investigative facts occurred.

The quoted criticism does, however, afford indicia to what is believed to be a valid objection to the local law theory. It is submitted that too great emphasis is placed upon the word “policy.” The selection of that term is possibly unfortunate for the reason that its connotations carry with it the implication that social or moral considerations are to be given legal efficacy. For example, a court may deny a
remedy upon a gambling contract as being against the "public policy" of the State. But as employed in the local law theory the term has a wider significance: the power of the forum to exercise a freedom of choice as to the particular rule of law which it will apply by way of analogy from the rule existing in some other jurisdiction, and having some connection with the occurrence of the facts. The absolute power of the forum is restricted *in fact* by (1) the binding force of its own precedents, and (2) the nature and character of the investitive facts. These two elements of the legal phenomenon are as essential to its existence as the third: the concept of the jural relation. The influence of those elements as a limitation upon the unrestricted power of the court will be mentioned briefly.

The precedents of the forum dealing with conflicts of law cases must be considered. If those precedents announce that the forum will, for example, "apply the law of the place where the acts of the parties occurred" to cases involving foreign elements, then the court, in 1929, must in effect do likewise. This is in no degree altered if the court says that it will apply its own law, which shall be a rule identical with that existing at the place where the acts occurred. Whatever may be the theory, the fact is that the court is bound by precedent to decide the case in a certain way; which, again is to say that it is bound to create certain jural relations, or to refuse to create certain others.

Secondly, is a rule of law a fact which, by express or implied intendment of the parties, may become part of the factual data composing the second element of the legal phenomenon? At the most, it is a conceptual fact, but the courts treat it as a physical fact, thus:

"When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony . . . . and when the evidence admitted consists entirely of a written document, statute or
judicial opinion, the question of its construction and effect is for the court alone." 44

A and B enter into a written contract in Michigan for the sale of 1000 pairs of shoes to be delivered in Canada. Suppose that the parties consult lawyers, and upon their advice insert a clause that "if any defects are found to exist in said shoes upon delivery to and inspection by the buyer, then the liability of the seller, if any, shall be determined under the rules of law now enacted in the State of Michigan with reference to implied warranties of quality in cases of like character." Half of the shoes prove to be faulty, and B enters suit in Illinois, where A has gone to reside.

The Illinois court will have no power, in the absence of a public policy to the contrary, to adopt as its own rule any save one identical with that enacted in the State of Michigan. That clause of the contract is as much the expressed intent of the parties as any other. Suppose that the rule of law enacted in Michigan and as construed by that court is such as to impose liability upon A, (or the prophecy of a liability). This is tantamount to B's saying to A, "If these shoes are faulty, then I will pay all damages you may suffer by reason of those defects." Such a promise is an investititive fact. If it is expressed in terms of a rule of law, is it any the less such a fact? 45

45 In Forepaugh v. D. L. & W. R. R. Co., 128 Pa. St. 217 (1890), the defendant entered into a contract to carry the plaintiff's circus; the contract contained a clause releasing the defendant from all damages, even though caused by its own negligence; the other relevant facts sufficiently appear from the following:

"The contract was made, was to be performed, and the alleged breach occurred, in New York. No possible element was wanting, therefore, to make it a New York contract. It is admitted that in New York the stipulation is valid, and this action could not be maintained, (citing cases). Why, then, should plaintiff, by stepping across the boundary into Pennsylvania, acquire rights which he has not paid for, and his contract does not give him?"

It is submitted that this decision does not proceed upon the theory that the New York rule of law became, by implication, a part of the contract,
The conclusion is the same if the intent of the parties be not expressed in writing, unless the instrument be regarded as more than mere evidence of that intent. If the parties have said nothing, with reference thereto, the inference of fact is conjectural, but the forum may presume that the parties acted (1) with reference to the law of the place where the contract was entered into; or (2) the law of the place of performance, i.e., by delivery. The presumption takes the place of actual proof, but whatever the manner or degree of proof requires it is still a fact which is established, viz., the intent of the parties.

Thus, wherever the parties by actual expression or necessary implication, have agreed that the legal relations, if any, thereafter to be created by any court between them, shall be determined by the application of a rule of the forum identical with that potentially existing in a foreign jurisdiction, then the absolute power of the forum, (in the absence of precedent and a contrary "public policy") is limited to that extent.48

but on the view that "the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality," a consideration of policy.

However, the implied clauses of a contract are as much a part thereof as those actually in writing, under familiar principles of construction. Of course, a rule of law, being conceptual in nature, cannot be incorporated into a contract. But a clause identical with the written evidence expressing that concept has precisely the same effect. It is in this sense that a rule of law can be said to become part of a contract, and the writer admits that this view is open to the criticism above indicated.

48 The arguments hereinafter advanced with reference to contracts do not apply to injuries to the person or property for the reason that a presumption that the parties acted with knowledge of, and intending to rely upon, the rules of law of the place of the act could not be considered as a fact, but simply as a motive force acting upon the parties, at the most. In addition, by very definition all cases involving negligence are predicated upon the failure of the negligent party to act or to omit to act in accordance with the rules of law defining his duty toward the person so injured. Thus no presumption could be emptier and more contrary to fact than this: that D, in negligently injuring P, is presumed to have had in mind a concept of any rule of law imposing a duty upon him; or that P, in suffering the injury conceives of a duty owing to him.
This is a limitation imposed not by extra-territorial effect of the foreign law, but by the nature of the investitive facts; and since it is not claimed that under the local law theory the court may disregard those facts, a great deal of argument may have been advanced to knock down a straw man. However since the local law theory purports to be an analysis of what the courts do, as distinguished from what they say, the emphasis is placed upon results. And the result indicated in the foregoing discussion is exactly the same as if the forum were constrained not by the facts, but by the extra-territorial operation of the foreign law.

The foregoing limitations upon the unrestricted power of the forum are left by the local law theory to "policy". In a word, that term infers a freedom of choice which does not have existence in fact. It is submitted that the theory should take these limitations into account. Of course, it is within the power of a court to disregard precedent and to refuse recognition of the facts of a case, and to render any sort of decision which it may choose.

Logically, the local law theory is sounder than the obligatio theory for the reason that it more nearly describes the processes involved in the actual decision of cases. It is true that a rule of law is a concept; that a jural relation is a concept; that they have no existence for legal purposes with reference to space or time; and that therefore they cannot be carried from place to place.

But it may well be doubted whether any theory which relies upon logic alone can be sufficient. Prejudice, emotion, superstition, and varied occult influences are quite as important in determining what legal relations shall be created. A complete legal theory should account for the imponderable elements. Further, theory should comport with the varying stages of the maturity of the legal science of which
it is a part. The local law theory, it is believed, is more nearly an analysis of that immature stage of the law wherein remedy is a dispensation somewhat within the arbitrary power of the sovereign to make. It would admirably fit the material of legal science in a newly-inhabited country where precedent is of little or no importance. But in the maturity of the law the very idea of stability and predictability is an interest to be secured, and is of the highest importance.

Doubtless courts will continue to follow the language of the precedents, reiterating their fictions, with some limited exceptions. And doubtless we cannot here debate the utility of pure theory. The suggestion has been made that whatever the pretensions of the law to the appellation "science" may be, they will be aided by conformity of theory to fact. Otherwise, new factual data may become increasingly unintelligible. The conclusion has also been advanced that we can no longer regard the law from the nineteenth century viewpoint as a force, an entity, distinct from the personalities of those who administer it. The influence of modernity has been felt. The law must be regarded not as the invisible, intangible protector of "rights" of person and property but as an analysis of what a small group of individuals have done with reference to the daily affairs of the remaining individuals whereby we may speculate as to the future disposition of similar affairs. Thus "rights" and "duties", "powers" and "liabilities", and the like may come to be regarded simply as convenient nouns employed in the discussion of what shall be the outcome of A versus B.

47 Of. Guiness, et al. v. Miller, 291 Fed. 769 (1923). Learned Hand, D. J.: "However, no court can enforce any law but that of its own sovereign, and when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign."
As indicated, this view is not particularly comfortable. The same sense of insecurity underlies criticism of modernity in religion, in ethics. But the essence of that spirit is truly scientific in searching for facts without reference to the effect thereof upon the discoverer. Therefore, legal writers will, it is presumed, continue to restate and revive legal theories in accordance with observed factual data. Otherwise, all pretensions to science must be faintly humorous.