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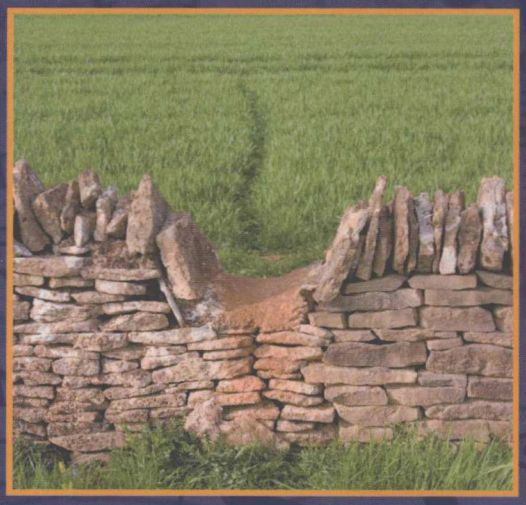
Conflict of Laws



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CONFLICT OF LAWS

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Introduction

Conflict of laws, described most generally, is the field of law that deals with the situation that arises when the regulatory powers of different authorities overlap. So phrased, this description fits a wide range of circumstances. Indeed, one of the attractions of conflicts is that its insights can be applied to so many other areas—administrative law, for instance, or constitutional law, or many puzzles in federal-state relations not usually thought to present a conflicts issue.

As taught in law school, however, conflicts usually comprises the core area of choice of law and some subsidiary related fields, primarily judicial jurisdiction and recognition of judgments. This book focuses on those topics, though it will at times suggest some of the broader applications. It is in the nature of an opinionated guide to the conflict of laws. That is, it is designed primarily to be a useful aid for the student who is taking conflicts, or a reference for the student or attorney who has not, but it seeks also to evaluate different approaches and to demonstrate the value of looking at conflicts from a particular perspective.

Most centrally, the book presents the choice-of-law problem through the analytic lens of what I call the two-step model. A choice-of-law problem arises when a court must decide which of multiple candidate laws will supply the rule of decision for a case. In its most common form, this requires a court to choose between the laws of one or more states. Suppose, for example, that the parties are two residents of State A involved in a one-car accident in State B. Whose law should control whether the passenger can sue the driver, State A's or State B's?

The book suggests that the proper way to analyze this problem consists of two stages, which it calls **scope** and **priority**. First, the court must determine the scope of State A and State B law. It must determine, that is, whether State A and/or State B law reach these facts, whether they grant rights (claims or defenses) to the parties. Sometimes the problem can be resolved at this first stage, through scope analysis alone. If it turns out that only one state's law reaches the case, the case should obviously be decided under that law. If each state's law about passenger-driver suits stated that it applied "only to car accidents occurring in this state" then the accident would fall within the scope of State B's law and not State

A's.[1] If, however, the first stage analysis reveals that the case falls within the scope of both State A and State B law, and those laws conflict, the court must decide which of the two laws is to be given priority. It then decides the case under that law.

This description should not sound controversial. Indeed, I hope it sounds both fairly simple and fairly obvious. The choice-of-law theories that courts and scholars have developed over the years are neither simple nor obvious, but I believe that they will be easier to understand and evaluate if we consider them as attempts to answer the two questions of scope and priority.

Choice of law, unlike most other areas of law, has been very strongly influenced by the work of law professors. Perhaps not coincidentally, it is generally considered excessively complicated in theory and unsuccessful in practice. It is my hope that this book will show that things are not in fact so dire. The complexities are not as fearsome as they might seem at first blush, and the prospects for a successful choice-of-law system are greater than naysayers maintain.

The structure of the book is designed to follow that typically used in conflicts courses and in most of the leading casebooks. Its first part addresses the core topic of choice of law, starting with the traditional approach and moving on to more modern proposals. Having looked at choice of law from the internal perspective of a state wrestling with the problem, it then considers the external constraints that federal law and the Constitution place on the choice-of-law enterprise. Part Two deals with the topics of judicial jurisdiction and recognition of judgments, which are frequently covered in conflicts courses. It also offers an analysis of conflicts issues as presented in the specific substantive area of family law, and in the international setting.

1. Alert readers may wonder what happens if the accident falls within the scope of neither state's law. This problem will receive substantial discussion later.

Part I
CHOICE OF LAW
Chapter 1
THE TRADITIONAL APPROACH
I. Introduction

Choice of law has a long and rich history, about which volumes can and have been written. A quest for its origins could go back as far as ancient Egypt.[1] For our purposes, though, we can pick up the story in the United States in the early twentieth century with the work of Joseph Beale.

Beale was a Harvard law professor who went on to become the American Law Institute's Reporter for the First Restatement of Conflicts.[2] The choice-of-law approach that he championed has been called variously the "vested rights," "traditional," or "territorial" theory. (This book will use each name at times.) It was codified in the First Restatement (published in 1934) and dominant in the academy and the courts during the first half of the twentieth century.

Beale's approach can be presented as a set of rules governing particular kinds of cases, and the bulk of this chapter will be devoted to exposition and discussion of those rules. But for the most part, the rules follow logically from a few central principles, and so it is worth starting with those principles and the vision of choice of law that they reveal.

The master principle of Beale's system is that all laws are territorially bounded in their operation. (It is because of the centrality of the territorial principle that the vested rights system is also sometimes called territorialism.) What this means is that a state's law applies to all events that occur within a state, and to no events occurring outside it. As Beale put it, "[b]y its very nature law must apply to everything and must exclusively apply to every-

1. See Hessel E. Yntema, The Historic Bases of Private International Law, 2 Am. J. Comp. L. 297, 300–01 (1953).

2. The ALI is a group of judges, practitioners, and scholars which publishes Restatements of the Law, designed to clarify, modernize, and otherwise improve the law. See www.ali.org.

thing within the boundary of its jurisdiction."[3] (The reliance on the nature of law is a characteristic Beale move, and readers should note its use in place of argument or explanation.)

On Beale's account, when some event occurs, the legal system of the place where it occurs attaches consequences. In his terms, rights vest. A tort victim acquires a right to damages, a contract signatory acquires the rights granted by the contract, and so on. Once vested, these rights can be considered much like personal property. In particular, they are **transitory**: they can be taken into other states and sued upon. A party who suffers a tort in State A and thereby acquires rights under State A law, for instance, can take those State A rights into a State B court and ask for the remedy to which they entitle him.[4]

The idea of vested rights is easy to mock as metaphysical hogwash, and Beale's critics did not hold back.[5] But in fact the idea of vested rights still plays a fairly significant role in our legal system—for one thing, what Beale described is essentially the way we still treat judgments, which can be obtained in one state and enforced in another (as discussed in Chapter 7). The precise details of the vested rights theory are in any case less important than the master principle of territorialism.

One of the basic challenges for the traditional system is explaining where this territorial principle comes from. Beale tended to assert that it inhered in the nature of law, or sometimes in the Due Process Clause of the federal Constitution. Courts of the early twentieth century accepted both these assertions, to some extent, but eventually their persuasiveness declined. If the territorial principle is not a given, something imposed on states by nature or the Constitution, then it must be defended as a sensible choice that tends to achieve the goals for which a choice-of-law system aims.

Of course, people differ about what these goals are, and also their relative importance. (Standard desiderata include uniformity of result across forums, predictability, ease of application, fairness,

3. 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935) § 4.12 at 46.

4. According to Beale, the remedy would actually be granted under State B law, and the State B court would consider the existence of the State A rights as a fact entitling the plaintiff to a State B remedy. See 1 BEALE, supra note 3, § 5.4, at 53. Most modern states have dropped this distinction and consider remedy to come from foreign law. So did the First Restatement, as far as the measure of damages is concerned. See Restatement of Conflict of Laws (1934) § 412.

5. See, e.g., David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 175–76 (1933) ("Indeed, one may now wonder how any juristic construct such as 'right' could have been accepted as fundamental in the explanation of any important aspect of judicial activity.")

and furtherance of state policies.) We will discuss this issue in more detail later, when it comes time to evaluate the traditional approach. The more immediate problem has to do not with the justification for the territorial principle but with its application. The vested rights model requires that every legal occurrence have a unique location, the place in which the rights vest. Identifying this location turns out to be harder than one might think.

The easy case for the vested rights theory is one in which all relevant events occur in a single state. If one party commits a tort against another in State A, or if the two parties make and perform a contract in State A, it is relatively clear on Beale's model that the rights should vest in State A and hence under State A law. This result does not change even if, for some reason, suit is later brought in State B. The plaintiff simply takes the rights that have vested in State A and presents them to the State B court, asking for a remedy based on rights created by the law of State A.

But matters can be considerably more complicated. Indeed, in a case that presents a choice-of-law question, they typically are. Such cases frequently involve cross-border events. A party may act negligently in State A and cause an injury in State B, or he may form a contract in A and breach it in B. How do we decide where the tort or the contract is located, as Beale's system requires?

There is no fully satisfactory answer to this question, but the one that Beale chose (the "last act rule") is at least plausible. He reasoned that since rights vested *when* some last necessary act or event occurred, they also vested *where* that event occurred. A tort, for instance, is not complete until an injury is inflicted. (You may remember from torts that "negligence in the air" is not actionable.) The injury is thus the crucial last act, and the tort occurs where the injury does. Similar rules apply for other causes of action.

Before we move to a discussion of these particular rules, it is worth pausing to ask how Beale's system looks from the perspective of the two-step model discussed in the introduction. The answer is that it is a scope-based system. The territorial principle is a rule of scope, which sets the reach of state laws equal to their geographical boundaries. (Importantly, it does so not only for the law of the forum, but for all laws. That is, a State A court applying Beale's approach will view not just State A law as territorially bounded, but the laws of States B and C as well.) It is an extremely powerful rule of scope because it also takes care of the problem of priority. Because state laws are territorially bounded, they can never overlap.

Within Beale's system, then, conflicts between state laws can never arise. This simplifies the analysis in some ways, because the question of how to resolve conflicts (the question of priority) need not be addressed. It also complicates it in some ways, because of the need to assign a unique location to each legal event. Whether the approach is appealing on the whole is a question that must be deferred for a bit. We will weigh its merits and demerits later. We turn now to the specific rules that implement Beale's system.

II. Traditional Theory: Jurisdiction-Selecting Rules

The traditional approach is what is sometimes called a jurisdiction-selecting approach. What this means is that it selects not a particular law but a particular jurisdiction, a state with the authority to regulate. It does so based on the territorial principle: the state with authority to regulate is the one in which the legal event occurred. Its law controls. One needn't ask, as we will see some modern approaches do, what purposes that law is intended to serve, or whom it is intended to benefit. One need only decide where the rights vested.

A. Torts

The rule that governs tort cases under the traditional approach is called *lex loci delicti*, Latin for "the law of the place of the wrong." It directs courts to decide tort cases according to the law of the place where the tort occurred—which, given the last act rule, is the place where the injury occurred. As Section 377 of the First Restatement puts it, "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."

Once the place of injury is identified, the *lex loci delicti* rule controls the vast majority of issues. Some exceptions exist. The First Restatement contains a large number of specific rules detailing which issues are governed by the law of the place of injury and which are not.[6] Some of the former include whether a cognizable injury has been sustained (§ 378); whether liability is strict or governed by a negligence or intentional harm standard (§ 379); the applicability of the fellow servant rule (§ 386); and the existence of

6. A practitioner handling a tort case in a jurisdiction that follows *lex loci delicti* should consult the Restatement but should also be aware that local courts are unlikely to be familiar with its more specific rules and may disregard them if they seem to contradict common sense.

vicarious liability (§ 387). The most notable exceptions are the following.

First, Section 380(2) provides that if the issue is the "application of a standard of care," the application should be performed based on the law of the place of action, not that of injury. This is a very narrow exception, dealing with not the choice between different standards of care (which Section 379 commits to the law of the place of injury) but rather with the application of a single standard. As illustration, the Restatement advises that if both states X and Y impose liability on railroads for negligently causing fires, but only the law of Y makes failure to use a spark arrester negligence per se, a railroad acting in X without a spark arrester but with due care is not liable for a fire caused in Y. Second, Section 382 provides that acts taken pursuant to a legal privilege or duty in State X cannot be the basis for liability under State Y law even if they cause injury in Y. Last, Section 387 provides that the law of the state of injury controls the issue of vicarious liability only if the defendant authorized the individual who caused the injury to act for him in that state.

These exceptions aside, the *lex loci delicti* rule seems simple enough. As tends to be the case in law, it is possible to complicate matters. A victim of poisoning, for instance, might ingest poison in one state, feel queasy in another, realize he was seriously ill in a third, and die in a fourth. This course of events may strike you as unlikely, but the First Restatement took the possibility seriously enough to address it explicitly. For cases of poisoning, comment a to Section 377 provided, the controlling law is that of the place where "the deleterious substance takes effect upon the body," i.e., the location of the first illness. Somewhat oddly, this rule applies as well for wrongful death actions—the controlling law is the law of the place where the injury was inflicted, not where death occurred.[7] (This is somewhat odd since one might think that death is necessary for a wrongful death cause of action, and hence death would be the crucial last event.)

Still, in the vast majority of cases, applying the law of the place of injury will be a relatively straightforward process. Indeed, in the vast majority of cases act and injury will occur in the same state. The main criticism of *lex loci delicti* is not that it is unpredictable or difficult to apply but rather that its rigidity produces arbitrary and unfair results. *Alabama Great Southern Railroad v. Carroll*[8] is a classic example.

7. See Restatement § 377, note 1.

8. 97 Ala. 126, 11 So. 803 (1892).